No. 25-0001

IN THE

Supreme Court of the United States

CINDY LIEBERMAN,

IN HER CAPACITY AS THE ATTORNEY GENERAL OF NEW COLUMBIA,

Petitioner,

v.

SOCIALAI, INC.,

Respondent.

On Writ of Certiorari to the
Supreme Court of The United States

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether Section 230 of the Communications Decency Act, 47 U.S.C. § 230, preempts New Columbia's Commonsense Artificial Intelligence Review Act as applied to Respondent SocialAI, Inc. in this case.
2. Whether New Columbia's Commonsense Artificial Intelligence Review Act violates the First Amendment to the United States Constitution as applied to Respondent SocialAI, Inc. in this case.

<u>TABLE OF CONTENTS</u>

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF JURISDICTION

The Supreme Court of New Columbia entered its judgment on May 1, 2025. Petitioner's timely petition for certiorari was granted on September 30, 2025. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment's Free Speech Clause providing that "Congress shall make no law . . . abridging the freedom of speech" and the Fourteenth Amendment's Due Process Clause that a State cannot "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. I, XIV.

The text of 47 U.S.C. § 230 is reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. Statement of the Facts

SocialAI is a popular social media company providing a platform for its 100,000,000 global users to connect and engage in free speech. *See* Compl. ¶ 11–13. SocialAI's team of 100 employees serve its userbase by utilizing an innovative technology called the "Behavioral Recognition Artificial Intelligence Network" ("BRaiN"). Compl. ¶ 11–14. The BRaiN is central to the successful operation of SocialAI, with it "autonomously making all decisions regarding content on the site" and curating "the overall type of content seen by users as well as to determine when users are fed specific postings." Compl. ¶¶ 13–18. SocialAI trained the BRaiN to effectuate its editorial philosophy that "a robust and unregulated 'marketplace of ideas' is essential for advancing human civilization." Compl. ¶¶ 13–17. During quarterly audits of the BRaiN, SocialAI can and occasionally does alter the BRaiN's coding to ensure it continues effectuating that philosophy. *See* Compl. ¶ 19.

SocialAI learned that the BRaiN was promoting content about "possibly unproven medical treatments" to medical support groups because of their likeliness to engage with that content. *Lieberman v. SocialAI, Inc.*, No. 25-cv-0001, 2 (N. Col. May 1, 2025) [hereinafter *Sup. Ct. Op.*]. SocialAI did not alter the BRaiN's coding because this trend was consistent with its editorial philosophy. *See* Compl. ¶ 20. Soon after, the BRaiN promoted an advertisement for "the zapper" ("the Advertisement"), an allegedly unproven treatment for diabetes, to members of a diabetic support group. *See Sup. Ct. Op.* at 2. More than fifty users reported the Advertisement as inaccurate or unsafe, and at least one requested that SocialAI explain "its decision not to remove the content." Compl. ¶ 22. SocialAI took no further action because "the AI was working as expected." Compl. ¶ 24. SocialAI did not implement human review of the Advertisement or provide a human response to the user's request for an explanation. *Sup. Ct. Op.* at 3–4.

II. Procedural History

New Columbia's Attorney General ("Petitioner") sued SocialAI, Inc. ("SocialAI") for violating the Commonsense Artificial Intelligence Review ("CAIR") Act on September 1, 2024. *See* Compl. SocialAI sought a dismissal of Petitioner's complaint asserting (1) that the CAIR Act is preempted by the Communications Decency Act ("CDA"), 47 U.S.C. § 230, and (2) the CAIR Act violated the First Amendment by forcing SocialAI to change its editorial decision-making process. *Lieberman v. SocialAI, Inc.*, No. 25-cv-0001, 1–3 (N. Col. Super. Ct. Nov. 29, 2024) [hereinafter *Super. Ct. Op.*]. The Superior Court agreed that the CDA preempted the CAIR Act and that the CAIR Act violated SocialAI's First Amendment right to exercise its editorial discretion. *Id.* at 4–7. On appeal, the Supreme Court of New Columbia affirmed the lower court's ruling, and, additionally, held that the CAIR Act's compelled explanation provision is "a direct intrusion into SocialAI's expressive autonomy." *Sup. Ct. Op*. at 4–7.

SUMMARY OF THE ARGUMENT

The Supreme Court of New Columbia's decision should be affirmed for two reasons. First, that court was correct in holding that Section 230 preempts the CAIR Act. *See Sup. Ct. Op.* at 4–5. Second, that court was also correct in holding that the CAIR Act violates the First Amendment. *Id.* at 5–6.

I. Section 230(e)(3) provides that "no liability may be imposed under any State . . . law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Section 230(c)(1) immunizes interactive computer service ("ICS") providers, like SocialAI, from claims that "treat" them as a "publisher or speaker" of "information provided by another information content provider." 47 U.S.C. § 230(c)(1); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). A claim "treats" an ICS provider as a "publisher" of third-party information when it imposes liability for how an ICS provider exercises traditional publisher functions. *See Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997).

Reviewing third-party content is a quintessential traditional publisher function. *See Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 744 (9th Cir. 2024). As such, Section 230(c)(1) immunizes ICS providers from liability for how they review third-party information. *See* 47 U.S.C. § 230(c)(1). Information is third-party information if the ICS provider is not "responsible, in whole or in part, for the creation or development of [that] information." 47 U.S.C. § 230(f)(3); *see also Jones v. Dirty World Ent. Recordings LLC*, 775 F.3d 398, 408 (6th Cir. 2014). Neither displaying nor recommending content is "developing" that content. *See Jones*, 775 F.3d at 410; *see also Dryoff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019).

Section 230 preempts the CAIR Act as applied to SocialAI for two reasons. First, the CAIR Act imposes liability on SocialAI for its review processes. *See* Compl. Specifically, it imposes a fine on SocialAI for using the BRaiN, an algorithmic enabling tool, to review the Advertisement, rather than having a human conduct that review. *Id.* This conflicts with Congress's command that state statutes cannot "treat" ICS providers as the "publisher" of information provided by another. 47 U.S.C. § 230(c)(1). Second, CAIR Act liability stems from SocialAI's review of third-party information. *See* Compl. A third party developed the Advertisement, and SocialAI merely displayed it and recommended it to users. *See* Compl. ¶ 21. SocialAI retains Section 230 immunity because neither displaying nor recommending third-party content "develops" that content. *Jones*, 775 F.3d at 408 (6th Cir. 2014).

II. The First Amendment rigorously protects the free marketplace of ideas by subjecting government regulations that control the content of speech to strict scrutiny, with narrow and well-defined exceptions. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (*Turner I*). The CAIR Act is content-based in two ways. First, Section 3(b) requires SocialAI to provide a human generated, "reasoned, responsive, and good faith" explanation of its content moderation decisions. CAIR Act § 3(b). A regulation that compels speech is necessarily content-based. *See Riley v. Nat'l Fed'n of the Blind of N.C, Inc.*, 487 U.S. 781, 795–98 (1988). By compelling SocialAI to engage in fully protected, noncommercial speech, the CAIR Act is subject to strict scrutiny. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983).

Second, Section 3(a) requires SocialAI to provide "independent [human] review" of "Flagged Information," *i.e.* content reported by at least fifty users as being "inaccurate, unsafe, or unlawful." CAIR Act §§ 2(b), 3(a). This controls SocialAI's constitutionally protected editorial discretion over Flagged Information. *See Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). A regulation that applies to speech because of its substantive message is content-based.

See Reed v. Town of Gilbert, 576 U.S. 155 (2015). The CAIR Act's interference with SocialAI's editorial discretion turns on the content of Flagged Information and is subject to strict scrutiny.

Neither provision of the CAIR Act can survive strict scrutiny because there are conceivable, less restrictive methods that New Columbia could employ to achieve its interests. *See Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2310 (2025). Even if the CAIR Act is subject to intermediate scrutiny, it would fail because it is overly broad and it does not directly advance New Columbia's asserted interest.

ARGUMENT

I. Section 230(c)(1) preempts the CAIR Act because it treats SocialAI as the publisher of third-party content.

The Supreme Court of New Columbia correctly held that Section 230 preempts the CAIR Act because it treats SocialAI as the publisher of third-party content. *See Sup. Ct. Op.* at 4. Section 230(e)(3) provides that "no cause of action may be brought and no liability may be imposed under any State . . . law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Section 230(c)(1) states that "no [ICS provider] shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Therefore, Section 230(c)(1) preempts any state law that treats an ICS provider as a publisher or speaker of information provided by a third party because such state laws are inconsistent with Section 230(c)(1). *See Barnes*, 570 F.3d at 1100–01.

The CAIR Act is inconsistent with Section 230(c)(1) as applied to SocialAI for two reasons. First, the CAIR Act imposes liability on SocialAI because it did not implement human review of a flagged advertisement on its platform. Compl. ¶ 7. However, Section 230 shields ICS providers from liability for exercising "traditional publisher functions," and reviewing third party content is such a function. *See Barnes*, 570 F.3d at 1102. By holding SocialAI liable for how it reviews content, the CAIR Act "treats" SocialAI as the publisher of that content, which opposes Congress's commands in Section 230(c)(1). Second, a third party created the Advertisement, and SocialAI played no role in its development. Compl. ¶ 7. The text of Section 230(c)(1) shields ICS providers from liability for "information provided by another content provider." 47 U.S.C. § 230(c)(1). By imposing liability on SocialAI for displaying such information, the CAIR Act is inconsistent with, and preempted by, Section 230(c)(1).

A. *The CAIR Act treats SocialAI as a publisher by imposing liability on SocialAI for how it reviews third-party content.*

Section 230(c)(1) immunizes ICS providers against claims that "treat" them as "the publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1). A claim treats an ICS provider as the publisher of third-party content if the claim alleges a violation of a duty that derives from the ICS provider's status or conduct as a "publisher or speaker." *Barnes*, 570 F.3d at 1102.

A claim alleges a violation of a duty that derives from an ICS provider's conduct as a "publisher" if it imposes liability on an ICS provider for exercising a publisher's traditional editorial functions. *See Zeran,* 129 F.3d at 330; *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (collecting circuit court cases holding that Section 230 provides immunity against claims that challenge "the exercise of a publisher's traditional editorial functions"). Traditional editorial functions include reviewing and editing third-party content, as well as making decisions about whether to publish, withdraw, postpone, or alter that content. *See Zeran,* 129 F.3d at 330; *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under Section 230."). An ICS provider's choice of how to present content is also protected. *See*

Marshall's Locksmith Serv. v. Google, LLC, 925 F. 3d 1263, 1269 (D.C. Cir. 2019) (holding that the "decision to present third party data in a particular format" is protected publisher activity). Section 230(c)(1) thus bars liability for how an ICS provider reviews and decides whether to allow certain third-party content because those are traditional publisher functions. *See Barnes*, 570 F.3d at 1106, 1109 (holding that Section 230 barred the plaintiff's claim when their theory of liability stemmed from the defendant's failure to remove content because removing content is a traditional publisher function); *see also Calise*, 103 F. 4th at 744 (holding that Section 230 barred a claim that sought to require an ICS provider to actively vet and evaluate third-party advertisements because reviewing third-party content is quintessential publisher conduct).

Since the CDA's passage in 1996, Congress has amended or incorporated Section 230 twelve times but has left the circuit courts' unanimous interpretation of "publisher" intact, functionally ratifying this interpretation. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project*, 576 U.S. 519, 537 (2015); *see also Jones*, 755 F.3d at 408. Additionally, interpreting "publisher" in Section 230 to include these traditional editorial functions aligns with the pre-Internet understanding of what functions publishers perform. 47 U.S.C. § 230(c)(1). This Court has consistently held that publishers review and disseminate third-party speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) ("[T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages which . . . fall squarely within the core of First Amendment security, . . . as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper[.]"); *see also Mia. Herald Publ'g Co. v. Tornillo*, 418 US 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues . . . constitute the exercise of editorial control and judgment."). Congress was writing against this background when it chose to include the term "publisher" in Section 230(c)(1).

Additionally, Congress chose to protect ICS providers when they use "enabling tools," like algorithms, to perform traditional editorial functions. *See* 47 U.S.C. § 230(f)(2)–(4) ("The term 'interactive computer service' means any access software provider . . . The term 'access software provider' means . . . enabling tools that . . . filter, screen, allow . . . disallow . . . display . . . [or] organize . . . content."). A platform can use an algorithmic machine to perform traditional publisher functions without losing Section 230 immunity. *See Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) ("[W]e find no basis in the ordinary meaning of 'publisher,' the other text of Section 230, or decisions interpreting Section 230, for concluding that an [ICS] is not the 'publisher' of third-party information when it uses enabling tools that are designed to match that information with a consumer's interests.").

Given that the circuit courts have unanimously interpreted Section 230(c)(1) to protect ICS providers exercising traditional editorial functions, and that Congress has functionally ratified this interpretation, the CAIR Act is inconsistent with Section 230(c)(1). *See Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 537; *see also Jones*, 755 F.3d at 408. The CAIR Act requires that a natural human being at SocialAI must provide an independent review of content that fifty users report as "inaccurate, unsafe, or unlawful." CAIR Act §§ 2(b), 3(a). Failure to review content in the manner that New Columbia dictates results in a civil fine of $10,000 per violation. *See* CAIR Act § 4(b). In other words, the CAIR Act imposes liability on SocialAI for how it exercises its traditional publisher function of reviewing content. Because this is incompatible with Congress' express dictates in Section 230(c)(1), the CAIR Act is necessarily preempted.

In *Calise*, the Ninth Circuit faced a nearly identical set of facts, when Meta faced a claim that would require it to actively vet and evaluate third-party advertisements. *See* 103 F.4th at 744. The Ninth Circuit held that Section 230 shielded Meta from that claim because reviewing third-party content is a traditional editorial function. *See id*. Here, the CAIR Act requires SocialAI, under threat of civil liability, to review and evaluate any advertisement that 50 users flag as inappropriate. Compl. ¶ 7. Reviewing content, however, is a traditional publisher function, and is shielded under Section 230(c)(1), as the Ninth Circuit held in *Calise*. *See* 103 F.4th at 744. To prevent the CAIR Act's invasion of SocialAI's "quintessential publishing conduct," and to protect Section 230(c)(1) from becoming a "dead letter," this Court should similarly hold that Section 230 protects SocialAI and preempts the CAIR Act. *Id.*

Additionally, the CAIR Act is inconsistent with Section 230 because it prohibits ICS providers from using advanced algorithms in making traditional publisher decisions regarding flagged content. *See* CAIR Act § 3(a). This directly conflicts with Congress's decision to protect ICS providers when using "enabling tools" like advanced algorithms to "filter, screen, allow . . . pick, choose, analyze, or digest content." 47 U.S.C. § 230(f)(2)–(4). SocialAI retains publisher immunity for Section 230(c)(1) purposes when it uses the BRaiN to review third-party content. *See Force*, 934 F.3d at 66. New Columbia has no legitimate authority to attach liability to conduct that Congress chose to protect.

Section 230(c)(1) immunity is not without limits, but the CAIR Act targets conduct that is squarely within those limits. The Ninth Circuit's decision in *Barnes* illustrates this point. In *Barnes*, the plaintiff pursued multiple claims against the defendant. *See* 570 F.3d at 1099. One of these claims sought to hold the defendant liable for failing to remove false profiles of the plaintiff from their site. *See id.* The Ninth Circuit held that Section 230(c)(1) barred this claim because deciding whether to remove content is a traditional publisher function. *See id.* at 1103. The plaintiff made a separate promissory estoppel claim, arguing that the defendant owed him a contractual obligation. *See id.* at 1106. The Ninth Circuit held that Section 230(c)(1) did not bar this claim because the duty sprung from the defendant's contractual promise to do something, not from its capacity as a publisher. *See id.* at 1107. Here, however, the CAIR Act solely targets publisher conduct; specifically, how SocialAI reviews content. Nothing resembling the *Barnes* promissory estoppel exception exists here. New Columbia's claim cannot stand, and neither can the CAIR Act.

Section 230(c)(1) preempts state laws that treat ICS providers as the publisher of third-party content. 47 U.S.C. § 230(c)(1). The CAIR Act treats SocialAI, an ICS provider, as a publisher by imposing liability for SocialAI's exercise of traditional editorial functions. *See Barnes*, 570 F.3d at 1102. Because that liability is for publishing third-party content, Section 230(c)(1) preempts the CAIR Act.

B. *The CAIR Act holds SocialAI liable for publishing third-party content that SocialAI did not create or develop.*

Section 230(c)(1) bars liability when an ICS provider is publishing content "provided by another information content provider." 47 U.S.C. § 230(c)(1). An "information content provider" is "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." 47 U.S.C. § 230(f)(3). Section 230(c)(1) immunity therefore applies if an ICS provider is not also the information content provider of the content at issue. *See Jones*, 775 F.3d at 408.

An ICS provider is only an information content provider if the ICS provider (1) helped develop the content and (2) the content is unlawful. *See Roommates.com*, 521 F.3d at 1167–68. An ICS provider "helps to develop unlawful conduct" when it "contributes materially to the alleged illegality of the conduct." *Id.* To "contribute materially," one must be responsible for what makes the displayed content allegedly unlawful. *Id.* at 1166 (denying Section 230 immunity when a website required users to respond to discriminatory questions because that requirement developed content that was unlawful under the Fair Housing Act).

Displaying third-party content is not "developing" content. *Jones*, 755 F. 3d at 410 ("[T]he proper interpretation of 'development of information' . . . means something more involved than merely displaying or allowing access to content created by a third party; otherwise § 230(c)(1) would be meaningless."). Section 230(c)(1) precludes liability when an ICS provider publishes content on its site if a third party provided that content and the third party is responsible for its unlawful or harmful nature. *See id.* at 415 (holding that an ICS provider did not develop defamatory statements made by third parties, despite the ICS provider publishing and commenting on the defamatory statements, because the defamatory content came entirely from third parties); *see also Marshall's Locksmith Serv.*, 925 F.3d at 1269 (holding that Google did not develop content when displaying false locations provided by scam locksmiths because a third party created the content, and the choice of presentation of that content fell within Google's prerogative as a publisher).

Similarly, recommending third-party content does not "develop" that content. *See Dryoff*, 934 F.3d at 1098 ("[R]ecommendations and notifications . . . are tools meant to facilitate the communication and content of others. They are not content in and of themselves."). Interpreting "develop" to include recommending and displaying content, as well as other traditional editorial functions, would swallow the core immunity that § 230(c) provides. *See Jones*, 755 F.3d at 409; *see also Roommates.com*, 521 F.3d at 1167 ("It's true that the broadest sense of the term 'develop' could include the functions of an ordinary search engine . . . But to read the term so broadly would defeat the purposes of Section 230 by swallowing up every bit of the immunity that the section otherwise provides.").

As explained above, Congress chose to protect ICS providers that use enabling tools to perform traditional editorial functions. *See* 47 U.S.C. § 230(f)(2)–(4); *see also Force*, 934 F.3d at 66. Therefore, when an ICS provider uses an enabling tool to display and recommend content, it does not develop that content. *See Force*, 934 F.3d at 70 (holding that Section 230(c)(1) immunity applied when Facebook used an algorithm to match and recommend, without materially altering, third party information to other Facebook users because using an algorithm to arrange and display third party content does not "develop" that content).

Only one circuit has held that using an algorithmic enabling tool to recommend third-party content "develops" that content and does not qualify for Section 230(c)(1) immunity. *See Anderson v. Tiktok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024). This interpretation of Section 230 contradicts the decisions of nearly every other circuit that has interpreted Section 230, which the court acknowledges. See *id.* at 184 (stating that "our holding may depart from the . . . views of other circuits," and then citing rulings from seven other Circuits). The *Anderson* court misapplies, misunderstands, and negates Section 230(c)(1). If Section 230(c)(1) does not protect the traditional editorial functions of curating third-party content that the ICS provider did not develop, then the plain text of Section 230(c)(1) lacks force and is swallowed by a judicially created standard that contradicts that text, decades of sister circuit precedent, and Congress's purpose in enacting Section 230. *See Roommates.com*, 521 F.3d at 1167.

Congress enacted Section 230(c)(1) to immunize ICS providers from liability for third-party content because tort-based lawsuits for that content would otherwise result in immense liability and incentivize ICS providers to forego permitting any third-party content on their sites, thereby significantly chilling speech on the Internet. *See Zeran*, 129 F.3d at 331 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."). To effectuate Congress's intent, courts should resolve close cases in favor of immunity to avoid "cut[ting] the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." *Rommates.com*, 521 F. 3d at 1174. The *Anderson* decision contradicts Congress's intent because if ICS providers are liable for third-party speech that they curate through enabling tools, then ICS providers are forced to choose between permitting third-party speech on their platforms or risking significant liability for that content. Congress enacted Section 230 so that ICS providers would not have to make such a choice. *See Zeran*, 129 F.3d at 330 ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech.").

The CAIR Act would hold SocialAI liable for how SocialAI exercised its editorial discretion regarding a flagged third-party advertisement that SocialAI did not create or develop. *See* Compl. Section 230(c)(1) forbids liability here. SocialAI uses the BRaiN, an enabling tool, to sort, recommend, review, remove, and display third-party content. Compl. ¶¶ 16, 18. In other words, SocialAI uses the BRaiN to assist in the exercise of its traditional publisher functions. *See Zeran*, F.3d at 330. Here, SocialAI used the BRaiN to review a flagged third-party advertisement. *See* Compl. ¶ 21. A third-party created the Advertisement, and neither SocialAI nor the BRaiN played a role in developing the Advertisement. *See Id.* SocialAI, through the BRaiN, exercised its editorial discretion when it chose not to remove that content. *See Zeran*, F.3d at 330. Similarly, SocialAI exercised editorial discretion when deciding how and where to sort that content on its site. *See Force*, F.3d at 66. None of SocialAI's actions in using the BRaiN developed the Advertisement.

SocialAI did not materially contribute to any alleged unlawfulness of the Advertisement. The Sixth Circuit's decision in *Jones* illustrates this point. In *Jones*, users had posted defamatory messages on the defendant's website, and the defendant displayed those messages and added non-defamatory commentary. *See Jones*, 775 F.3d at 398. The Sixth Circuit held that Section 230 immunity applied because the defamatory nature of the content came entirely from third parties and the defendant's choice to display that content did not develop it. *Id*. The facts here are a close parallel. The allegedly unlawful nature of the Advertisement came entirely from a third party, not from SocialAI. SocialAI merely displayed the Advertisement on users' feeds. Given that SocialAI was considerably less involved with the content than the defendant in *Jones* was, this Court should hold that SocialAI did not develop the Advertisement.

That SocialAI used the BRaiN to sort the Advertisement to appear on certain users' pages does not mean that SocialAI developed the Advertisement. In *Force*, the Second Circuit held that Facebook did not develop third-party content when it used an algorithm to match and recommend third-party content to other users. *Force*, 934 F.3d at 70. Rather, the Second Circuit granted Facebook Section 230(c)(1) immunity. *Id.* Here, the facts and circumstances are similar in that SocialAI also used an algorithm to match third-party content to users. Compl. ¶¶ 13–18. This Court should hold that Section 230(c)(1) immunity also applies here.

A contrary holding would contradict Congress's intent in enacting Section 230(c)(1) because it would pigeonhole SocialAI into choosing between permitting third-party speech or risking significant liability. *See Zeran*, 129 F.3d at 330. Given that SocialAI has 100,000,000 worldwide users, and that the CAIR Act requires only fifty users to report content to trigger the CAIR Act, the potential liability is immense. *See* Compl. ¶ 11; *see also* CAIR Act §§ 2, 3. Additionally, the cost of compliance with the CAIR Act is significant; SocialAI would need to hire thousands of new employees and radically alter its editorial philosophy. Compl. ¶ 28. To effectuate Congress's intent in enacting Section 230, and to prevent the death of SocialAI by "ten thousand duck-bites, fighting off claims that they promoted or encouraged . . . the illegality of third parties," this Court should grant SocialAI 230(c)(1) immunity, and hold that Section 230(c)(1) preempts the CAIR Act. *See Roommates.com*, 521 F.3d at 1174.

II. New Columbia's CAIR Act violates the First Amendment as applied to SocialAI because it compels speech and interferes with its editorial discretion.

The Supreme Court of New Columbia correctly held that the CAIR Act violates SocialAI's First Amendment rights by mandating explanations of its content moderation decisions and regulating SocialAI's editorial judgments. The First Amendment prevents New Columbia from "abridging the freedom of speech." U.S. CONST. amend. I, XIV; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (incorporating the First Amendment against the States through the Due Process Clause of the Fourteenth Amendment); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n. of Cal.*, 475 U.S. 1 (1986) (applying First Amendment protections to corporations).

The purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). To do so, "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner I*, 512 U.S. 622, 641 (1994). Outside of those exceptions, content-based regulations are subject to strict scrutiny, a standard of review "designed to enforce 'the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 470 (2025). The First Amendment's protections extend even to those narrow and well-understood exceptions, subjecting content-neutral regulations to an "intermediate level of scrutiny." *Turner I*, 512 U.S. at 641–43. While the CAIR Act should be subject to strict scrutiny, it cannot satisfy intermediate scrutiny either.

A. *The CAIR Act violates the First Amendment by compelling SocialAI to explain its content moderation decisions when requested by a user.*

The Supreme Court of New Columbia correctly held that the CAIR Act violated the First Amendment's prohibition against compelling speech by requiring SocialAI to "provide a reasoned, responsive, and good faith explanation" for its content moderation decisions when requested by a user. CAIR Act § 3. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and such regulations are classified as content-based regulations. *Riley v. Nat'l. Fed'n. of the Blind of N.C, Inc.*, 487 U.S. 781, 795–98 (1988). "As a general matter, such [content-based regulations] 'are presumptively unconstitutional and may be justified only if the government" satisfies strict scrutiny. *Nat'l. Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (citations omitted).

Satisfying strict scrutiny requires "the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). A regulation is only narrowly tailored if it is "the least restrictive means of achieving a compelling governmental interest." *Paxton*, 606 U.S. at 471 ("In the First

Amendment context, we have held only once that a law triggered but satisfied strict scrutiny[.]”). Regulations compelling commercial speech are an exception to this general rule. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y.*, 447 U.S. 557, 561–66 (1980).

Commercial speech is ordinarily “defined as speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Though in *Bolger*, this Court recognized speech not directly proposing a commercial transaction may nevertheless be “properly characterized as commercial speech” given certain factors. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983) (identifying three factors—being an advertisement, referencing a product, and possessing economic motives—that are indicative of commercial speech while explaining that no single factor is determinative). If some commercial speech is “inextricably intertwined with otherwise fully protected speech,” then courts will not “parcel out the speech,” but will “apply [the] test for fully protected expression.” *Riley*, 487 U.S. at 796; *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474–75 (1989) (“No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”).

Regulations compelling commercial speech are subject to two tiers of scrutiny depending on their mandates. *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637–38 (1985). First, regulations of lawful, non-misleading commercial speech are subjected to intermediate scrutiny. *See Cent. Hudson*, 447 U.S. at 566. A regulation satisfies intermediate scrutiny if it “directly advances” a substantial interest and it “is not more extensive than is necessary to serve that interest.” *Id.*; *see also Fox*, 492 U.S. at 478–80 (explaining that the government “must affirmatively establish [a] reasonable fit,” which is “not necessarily the least restrictive means,” to satisfy intermediate scrutiny). Second, regulations requiring the disclosure of “purely factual and uncontroversial information” to “dissipate the possibility of consumer confusion or deception” are subject to a more deferential standard of scrutiny. *Zauderer*, 471 U.S. at 650–52. Such regulations are sustained if the “disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers” and the disclosures are not “unjustified or unduly burdensome.” *Id.* at 651. These lower tiers of scrutiny are inapplicable because the CAIR Act compels SocialAI’s fully protected, noncommercial speech and should therefore be subject to strict scrutiny.

1. *The CAIR Act is a content-based regulation that compels noncommercial speech and cannot survive strict scrutiny.*

The CAIR Act compels SocialAI to “provide a reasoned, responsive, and good faith explanation by a natural human being of the grounds for the decision that the Flagged Information should be allowed or removed” if requested by a user who reported the content. CAIR Act § 3(b). By compelling speech that SocialAI would not otherwise make, the CAIR Act “necessarily alters the content of [SocialAI’s] speech” and is indisputably content-based. *Riley*, 487 U.S. at 795. Additionally, the CAIR Act is compelling fully protected, noncommercial speech and strict scrutiny applies in this case.

An explanation of SocialAI’s content moderation decisions fails to meet this Court’s commonsense commercial speech definition of “speech that does no more than propose a commercial transaction.” *United Foods*, 533 U.S. at 409. Additionally, the speech being compelled lacks the three factors identified in *Bolger*. *See* 463 U.S. at 66–68. First, such an explanation is not an advertisement. *See id.* at 66. Second, any reference to a product is purely incidental. In this instance, SocialAI must refer to the Advertisement’s product, but this is not analogous to the situation in *Bolger*. In *Bolger*, the manufacturer referred to its product and described its benefits in an indirect attempt to promote sales. 533 U.S. at 77 n.13. Here, by contrast, the reference would be about another's product and made only to provide a responsive explanation. Third, SocialAI has no economic incentive to respond to such requests, though SocialAI derives revenue from advertisements placed on users' feeds. *See* Compl. ¶ 12. *Bolger* recognized that economic motives are commonly involved in fully protected speech. *See* 463 U.S. at 67. An interpretation of *Bolger* that transfigures SocialAI's content moderation explanations into commercial speech for simply *referencing* commercial speech would work absurd consequences. Even the *Bolger* Court's opinion could be commercial speech under that view because it discusses an advertisement, references specific products, and those advertisements were made with economic motives.

Both common sense and the *Bolger* factors demonstrate that the compelled explanation is noncommercial speech. However, even if the explanation contains a commercial component, it is inextricably intertwined with SocialAI's noncommercial speech, and the CAIR Act would still be subject to strict scrutiny. *See Riley*, 487 U.S. at 796. Unlike in *Fox*, when "[n]o law of man or of nature [made] it impossible to sell housewares without teaching home economics," 492 U.S. at 474, here, the CAIR Act forces SocialAI to discuss the Advertisement to provide a "reasoned, responsive, and good faith explanation" of its decision. CAIR Act § 3(b).

The CAIR Act is "presumptively unconstitutional" because it compels noncommercial speech and can be sustained only if it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Becerra*, 585 U.S. at 766; *Reed*, 576 U.S. at 171. Even granting that New Columbia has a compelling interest in protecting its citizens from the dissemination of "potentially inaccurate, unsafe, or unlawful information" by AI, CAIR Act § 1, the regulation is not "narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. Requiring SocialAI to explain its decisions will not protect public safety because such explanations will not stem—or even slow—the dissemination of potentially inaccurate, unsafe, or unlawful information. The dissemination of dangerous content could continue with only requesting users being aware of SocialAI's justification for retaining the post. Because the CAIR Act does not employ "the least restrictive means of *achieving* [New Columbia's] interest," it cannot survive strict scrutiny. *Paxton*, 606 U.S. at 471 (emphasis added).

2. *Even if the compelled speech is purely commercial, the CAIR Act cannot survive intermediate scrutiny and* Zauderer *is inapplicable.*

Even assuming the CAIR Act compels purely commercial speech, it cannot survive intermediate scrutiny because it does not "directly advance" a substantial government interest. *Cent. Hudson*, 447 U.S. at 566. Assuming again that New Columbia's interest in protecting its citizens from AI disseminating "potentially inaccurate, unsafe, or unlawful information" is substantial, requiring SocialAI to explain its content moderation decisions does not directly advance that interest. CAIR Act § 1. As mentioned, providing an explanation to requesting users is disconnected from even slowing the dissemination of potentially dangerous content. Because of this fatal flaw, the CAIR Act cannot survive even intermediate scrutiny.

The deferential standard articulated in *Zauderer* is inapplicable because the CAIR Act is not compelling the disclosure of "purely factual and uncontroversial information about the terms under which [SocialAI's] services will be available." 471 U.S. at 651. First, content moderation decisions are not purely factual because they involve value judgements about what posts should be promoted or removed. Second, as this Court has recently seen, the subject of social media content moderation is incredibly controversial. *See generally Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

B. *The CAIR Act violates the First Amendment because it infringes upon SocialAI's editorial discretion by limiting its use of the BRaiN to moderate content.*

The Supreme Court of New Columbia correctly held that the CAIR Act violates the First Amendment's protection of editorial discretion by requiring SocialAI to provide human review of Flagged Information. Editorial judgments about what content "will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity" protected by the First Amendment. *E.g.*, *NetChoice*, 603 U.S. at 731 (2024); *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.").

Protections for editorial judgments are "enjoyed by business corporations" that express themselves through various mediums. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *see also NetChoice*, 603 U.S. 707 (2024) ("The principle does not change because the curated compilation has gone from the physical to the virtual world."). Even if such judgments "involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts" that are protected by the First Amendment. *Ark. Educ. Television Comm'n. v. Forbes*, 523 U.S. 666, 674 (1998).

"When the government interferes with such editorial choices . . . it alters the content of the compilation" and "in so doing . . . the government confronts the First Amendment." *NetChoice*, 603 U.S. at 731–32. Regulations of editorial discretion that turn "on the basis of the content" are subject to strict scrutiny. *Tornillo*, 418 U.S. at 258 ("It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment."). However, "content-neutral restrictions that impose an incidental burden" on editorial discretion will be sustained if the government can meet the demands of intermediate scrutiny. *Turner I*, 512 U.S. at 662. A content-neutral regulation of speech will be upheld if it is "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791; *McCullen*, 573 U.S. 490–96 ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.").

A content-based regulation "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163; *see also City of Aus. v. Reagan Nat'l. Advert. of Aus., LLC*, 596 U.S. 61, 71 (2022) (explaining a regulation is content-neutral if the "substantive message itself is irrelevant to the application"). A regulation is facially content-based if "the very basis for the regulation" turns on the content of the regulated speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993); s*ee also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 619–20 (2020) (plurality opinion) ("A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets."). Even if a regulation "contains no explicit content-based limitation," it is still content-based if its purpose or justification is "related to the suppression of free expression." *United States v. Eichman*, 496 U.S. 310, 315 (1990); *but see Ward*, 491 U.S. at 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'").

1. *The CAIR Act interferes with SocialAI's fully protected, expressive editorial decisions by restricting its use of the BRaiN to moderate content.*

SocialAI engages in fully protected, expressive activity when making content moderation decisions about what to allow or promote, even if the BRaiN enables these decisions. SocialAI exercises editorial discretion when deciding what content "will be included in or excluded from" its platform and then "organizing and presenting the included items." *NetChoice*, 603 U.S. at 731. Like the newspaper in *Tornillo*, SocialAI is not a "passive receptacle or conduit for news, comment, and advertising," but engages in curating and presenting content to its users. 418 U.S. at 258. Through SocialAI's considerable efforts training the BRaiN to function "in accordance with SocialAI's basic editorial philosophy" and quarterly audits to ensure the BRaiN continues effectuating SocialAI's belief in "a robust and unregulated 'marketplace of ideas,'" SocialAI takes an active editorial role to provide users a tailored experience. Compl. ¶¶ 15–18.

SocialAI's expressive activity is no less protected because it is a corporation, *see Hurley*, 515 U.S. at 574, that is exercising editorial judgments that have "gone from the physical to the virtual world." *NetChoice*, 603 U.S. at 717. Nor are those protections lost because SocialAI's curation "involve[s] the compilation of the speech of third parties," *Forbes*, 523 U.S. at 674, because such presentations "fall squarely within the core of First Amendment security." *Hurley*, 515 U.S. at 570. Regardless of the BRaiN's role in effectuating SocialAI's editorial judgments, SocialAI was aware of the content being promoted and continued promoting the Advertisement "because the AI was working as expected," *i.e.*, consistently with SocialAI's editorial philosophy. Compl. ¶¶ 19–24.

SocialAI relies on the BRaiN to enable its editorial philosophy and curate the overall content presented to its users. By restricting SocialAI's use of the BRaiN, New Columbia "interferes with [SocialAI's] editorial choices" thereby altering the content of SocialAI's compilation. *NetChoice*, 603 U.S. at 731–32. "And in so doing—in overriding [SocialAI's] expressive choices—[New Columbia] confronts the First Amendment." *Id.*

2. *The CAIR Act is a content-based regulation that interferes with SocialAI's editorial decisions and cannot survive strict scrutiny.*

The CAIR Act interferes with SocialAI's editorial discretion in a content-based manner because it requires SocialAI to "provide independent review by at least one natural human being of all Flagged Information" and make a final content moderation decision without relying on the

BRaiN except for background information. CAIR Act § 3(a). The CAIR Act "applies to [Flagged Information] because of the topic discussed or the idea or message expressed" has been reported as inaccurate, unsafe, or unlawful by fifty users. *Reed*, 576 U.S. at 163 (2015). Far from irrelevant, the CAIR Act's application turns on the perceived "substantive message" of Flagged Information. *City of Aus.*, 596 U.S. at 71.

On its face, "the very basis for the [CAIR Act] is the difference in content" between Flagged Information and everything else on SocialAI's platform. *Discovery Network*, 507 U.S. at 429. In *American Ass'n of Political Consultants*, this Court held that the regulation at issue was "about as content-based as it gets" when it made legal robocalls requesting the repayment of government debts, but prohibited robocalls asking for campaign donations, 591 U.S. at 619. Here, the situation is remarkably similar. It is illegal for SocialAI to use BRaiN to make final content moderation decisions for Flagged Information, but it is legal to use BRaiN to make final content moderation decisions for all other content. By requiring SocialAI to provide human review and explanations for Flagged Information but no other content, the CAIR Act "singles out [Flagged Information] for differential treatment." *Id.* Further, New Columbia's justification of protecting users from the dissemination of "potentially inaccurate, unsafe, or unlawful information" by AI, CAIR Act § 1, is "related to the suppression of free expression of Flagged Information." *Eichman*, 496 U.S. at 315. The CAIR Act cannot properly be considered a content-neutral regulation, despite its savings clause. *See* CAIR Act § 5.

Because the CAIR Act does not regulate SocialAI's editorial discretion in a content-neutral manner, it must be subjected to strict scrutiny. The CAIR Act is unable to meet this rigorous standard. If New Columbia is concerned about the dissemination of "inaccurate, unsafe, or unlawful information," then it could target the speakers of Flagged Information, without burdening SocialAI's speech at all. Because the CAIR Act does not employ the "least restrictive means," it cannot survive strict scrutiny. *Paxton*, 606 U.S. at 471.

3. *Even if it is content-neutral, the CAIR Act cannot survive intermediate scrutiny.*

Even assuming the CAIR Act interferes with SocialAI's editorial discretion in a content-neutral manner, it cannot survive intermediate scrutiny because it burdens substantially more speech than is necessary to further New Columbia's interest. The CAIR Act triggers after fifty unique users *report* content "as inaccurate, unsafe, or unlawful." CAIR § 2(b). This creates a low threshold on a platform with "100,000,000 users worldwide" and ensures that a substantial amount of innocuous content will become Flagged Information, so much so that SocialAI estimates it will "have to hire thousands of new employees" to comply. Compl. ¶¶ 11, 27.

Utilizing the number of reporting users may make administering the CAIR Act easier; however, it will burden substantially more speech than is necessary to achieve New Columbia's interests. Like in *McCullen*, when this Court noted that "a painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency," 573 U.S. at 495, here, ease of enforcement cannot justify an overburdensome regulation. Because the CAIR Act is not narrowly tailored to serve New Columbia's interest, it cannot survive intermediate scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Columbia should be affirmed.

Respectfully submitted,

Cameron Menendez (Issue I)
Kyle Donohue (Issue II)

CERTIFICATION

This brief contains 7,825 words, with 3,267 words in Issue I and 3,231 words in Issue II. The brief uses 12-point, Times New Roman font, and is doubled spaced. This brief has 1” margins and is left justified.

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.

Respectfully,

Cameron Menendez (Issue I)
Kyle Donohue (Issue II)