No. 15-60205

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Google Inc.,
Plaintiff-Appellee,

v.

Jim Hood, Attorney General of the State of Mississippi, in his official capacity,
Defendant-Appellant.

Interlocutory Appeal from the United States District Court for the Southern District of Mississippi, Northern Division (Dkt. No. 14-981 (HTW))

BRIEF *AMICI CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ENGINE, AND THE CONSUMER ELECTRONICS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE GOOGLE INC., URGING AFFIRMANCE

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August 3, 2015

STATEMENT OF INTERESTED PARTIES

(1) No. 15-60205, *Google Inc. v. Jim Hood*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- The Hon. Henry T. Wingate, United States District Court for the Southern District of Mississippi
- Google Inc., Plaintiff-Appellee
- Fred H. Krutz and Daniel J. Mulholland, with the firm Forman Watkins Krutz & Tardy LLP, Counsel for Plaintiff-Appellee
- Jamie S. Gorelick, Patrick J. Carome, Blake C. Roberts, Peter G. Neiman, Violetta G. Watson, Christopher Bouchoux, and Christopher W. Johnstone, with the firm Wilmer Cutler Pickering Hale & Dorr LLP, Counsel for Plaintiff-Appellee
- James M. Hood, III, Attorney General of the State of Mississippi, Defendant-Appellant
- Douglas T. Miracle, Bridgette Williams Wiggins, Alison O'Neal McMinn, and Krissy Casey Nobile, with the Office of the Mississippi Attorney General, Counsel for Defendant-Appellant
- F. Jerome Tapley and Hirlye Ryan Lutz, with the firm Cory Watson, PC, Counsel for Defendant-Appellant
- James Clark Wyly and Sean F. Rommel, with the firm Wyly-Rommell, PLLC, Counsel for Defendant-Appellant
- John Wimberly Kitchens, with the firm Kitchens Law Firm, PA, Counsel for Defendant-Appellant
- Carolyn Glass Anderson and Patricia A. Bloodgood, with the firm Zimmerman Reed, PLLP, Counsel for Defendant-Appellant
- Paul D. Clement, Viet D. Dinh, Jeffrey M. Harris, C. Harker Rhodes IV, with the firm Bancroft PLLC, Counsel for *Amici Curiae* Digital Citizens Alliance, the Taylor Hooton Foundation, and Ryan United
- Jack Conway, Attorney General, Commonwealth of Kentucky, Sean Riley, Chief Deputy Attorney General, Commonwealth of Kentucky,

Todd Leatherman, Executive Director, Office of Consumer Protection, Commonwealth of Kentucky, Laura S. Crittenden, Assistant Attorney General, Commonwealth of Kentucky, Mark Brnovich, Attorney General, State of Arizona, James D. "Buddy" Caldwell, Attorney General, State of Louisiana, Stacie Lambert Deblieux, Assistant Attorney General, State of Louisiana, Counsel for *Amici Curiae* Attorneys General of the Commonwealths of Kentucky, Massachusetts, and Pennsylvania, the States of Arizona, Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the District of Columbia

- Jonathan Band, with the firm Jonathan Band PLLC, Counsel for *Amici Curiae* Computer & Communications Industry Association, Engine, Consumer Electronics Association
- Computer & Communications Industry Association, *Amicus Curiae*. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it does not have a parent corporation, and that no publicly held corporation has an ownership stake of 10% or more in it.
- Engine, *Amicus Curiae*. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it does not have a parent corporation, and that no publicly held corporation has an ownership stake of 10% or more in it.
- Consumer Electronics Association, *Amicus Curiae*. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it does not have a parent corporation, and that no publicly held corporation has an ownership stake of 10% or more in it.

/s/ Jonathan Band

Counsel of Record

August 3, 2015

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INTEREST OF *AMICI*[1]

The Computer & Communications Industry Association (CCIA) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $465 billion in annual revenues.[2]

Engine is a technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Engine creates an environment where technological innovation and entrepreneurship thrive by providing knowledge about the start-up economy and constructing smarter public policy. To that end, Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community and the general public on issues vital to fostering technological innovation. Engine has worked

[1] No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici*, their members, and counsel made such a contribution. Plaintiff Google is a member of CCIA and CEA, but took no part in the preparation of this brief. The parties have consented to the filing of this brief; *amici*'s foregoing motion seeks leave to file pursuant to Fifth Cir. R. 29.1.

[2] A complete list of CCIA members is available at https://www.ccianet.org/members.

with the White House, Congress, federal agencies, and state and local governments to discuss policy issues, write legislation, and introduce the tech community to Washington insiders.

The Consumer Electronics Association (CEA) is the preeminent technology trade association promoting growth in the $208 billion U.S. consumer electronics industry through market research, education and public policy representation. CEA members lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services sold to consumers.[3]

This case presents a question of great interest to *amici*: whether a state law enforcement official may informally demand that online services suppress third party speech, and upon being rebuffed, retaliate with lengthy punitive subpoenas ghost-written by movie industry lawyers, regarding matters of federal law. *Amici* represent cutting-edge Internet, technology, and consumer electronics providers, many of which would lack the legal resources to respond to a sprawling retaliatory investigation. *Amici*'s small business and startup members are not equipped to dispute such extra-judicial demands by state law enforcement officials, and few online services could manage varying demands to limit access to content

[3] A complete list of CEA members is available at http://ce.org/Membership/MembershipDirectory.aspx.

originating from 50 different states, each with their own view of what speech may be permitted online. Therefore, the undersigned *amici* urge the court to affirm the district court decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

To promote the development of the Internet, Congress limited the liability of Internet service providers for unlawful third-party activity that occurred over those providers' systems. Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, provides "interactive computer services" with broad immunity from liability for all claims arising from user actions except federal criminal and intellectual property infringement claims. Section 512 of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, partially fills this intellectual property gap by restricting the remedies for copyright infringement available against providers of online services. Congress could have forced service providers to police the Internet by making service providers liable for the unlawful online activities of others. But Congress made a different policy choice. It decided that the national interest would be better served by the robust growth of the Internet, and sought to encourage that by limiting the liability of online intermediaries for unlawful third-party activities. The liability-limiting architecture created by Congress has succeeded as planned. Internet companies, and the Internet economy

as a whole, have flourished in the United States due to Congress's prescient decision to provide a legal environment that unambiguously encouraged innovation and investment in the Internet.

Attorney General Hood disagrees with Congress's national Internet policy, evidently believing that service providers should monitor and filter the Internet for content he deems objectionable. The record makes clear that this belief was encouraged by the motion picture industry, which likewise disagrees with Congress's policy choices (notwithstanding that it supported Congress's policy choices at the time of enactment).

The district court below found that when Google refused to engage in the blocking activities demanded by Attorney General Hood, his office retaliated by launching a burdensome investigation utilizing subpoenas drafted by motion picture industry lawyers. *Google v. Hood*, 2015 WL 1546160 (S.D. Miss. Mar. 27, 2015) at *9.[4]

[4] *See also* Notice of Supplemental Evidentiary Submission in Further Support of Google Inc.'s Motion to Compel at 2, Exh. 1 at 6, Dkt. 40, *Google Inc. v. Twenty-First Century Fox, et al.*, No. 15-00150 (S.D.N.Y. July 23, 2015) (memorandum from office of Attorney General Hood to MPAA official identifying CIDs as "a final step, if necessary" if efforts including media manipulation and attempts to depress Google stock share price did not succeed in forcing the company to "fully respond" to requests); *accord* Memorandum of Points and Authorities in Support of Google Inc.'s Rule 45 Motion to Compel Compliance with Subpoena at 6-7, Dkt. 5-1, *Google Inc. v. Jenner & Block LLP*, No. 15-00707 (D.D.C. June 1, 2015).

The district court correctly enjoined this investigation when it recognized that the investigation was nothing more than a naked attempt to subvert the federal policy of limited Internet service provider liability. Allowing this subversion jeopardizes the success of the Internet by subjecting service providers to the whims of 50 state attorneys general.

To be sure, state attorneys general and the motion picture industry are perfectly free to (a) exercise their authority in the many areas where doing so does not contradict national Internet policy, or (b) lobby Congress to change that policy. Indeed, state attorneys general have repeatedly lobbied Congress to expand their authority, but with no success. This Court should not allow state attorneys general to use burdensome investigations to undermine national policy and obtain power Congress has thus far declined to grant.

Although state law enforcement officials are not wholly precluded from enforcing state laws that affect the Internet, Congress unambiguously intended to limit states' ability to regulate Internet intermediaries' display of third party content – which is precisely what Attorney General Hood seeks to do here.

ARGUMENT

I. To Promote The Development Of The Internet, Congress Limited The Liability Of Internet Service Providers For Unlawful Third-Party Activity.

Through the safe harbors found in Section 230 of the CDA and Section 512 of the DMCA, Congress aimed to foster a vibrant Internet "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), and to provide "greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities," S. REP. NO. 105-190, at 20 (1998).

A. Section 230 gives broad immunity to service providers like plaintiff-appellee.

Section 230 of the Communications Decency Act limits online service providers' potential liability for information posted by third parties. This Court has recognized that "Congress provided broad immunity under the CDA to Web-based service providers for all claims stemming from their publication of information created by third parties." *See Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008), *cert. denied*, 555 U.S. 1031 (2008) (citing § 230(c)(1)). In its affirmation of the purpose of the Section 230 safe harbors and the broad immunity they provide online services, this Court is joined by a resounding consensus of *all other circuit courts* (save the specialized Federal Circuit, which has not had the opportunity to consider the matter). *See Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015); *Green*

v. America Online, Inc., 318 F.3d 465 (3d Cir. 2003), *cert. denied*, 540 U.S. 877 (2003); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000); *Dowbenko v. Google Inc.*, 582 F. Appx. 801 (11th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 680 (2014).

Congress's intent in adopting the Section 230 safe harbors in 1996 included encouraging economic investment, and limiting regulation by the federal government — and the states. Section 230 explicitly states that "[i]t is the policy of the United States" not only "to promote the continued development of the Internet and other interactive computer services and other interactive media," § 230(b)(1), but also "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," § 230(b)(2). As the district court noted, "Google correctly points out that Congress intended to promote the free-flowing exchange

of ideas on the Internet by passing the CDA." *Google v. Hood*, 2015 WL 1546160 at *7 (citing 47 U.S.C. § 230).

Section 230 not only limits liability; it is also intended to prevent costly burdensome litigation from being brought in the first place. The Ninth Circuit has explained that Section 230 was designed "to protect websites not merely from ultimate liability, but *from having to fight costly and protracted legal battles*." *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1175 (9th Cir. 2008) (emphasis added). The Fourth Circuit has concurred, saying "Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process. As we have often explained in the qualified immunity context, immunity is an immunity from suit rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (internal quotation omitted). Similarly, the Sixth Circuit recently observed that "[g]iven the role that the CDA plays in an open and robust internet by preventing the speech-chilling threat of the heckler's veto, we point out that determinations of immunity under the CDA should be resolved at an earlier stage of litigation." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014).

B. Section 512 also contains important safe harbors for online service providers.

In response to pressure from the entertainment industry, Congress excluded any federal law "pertaining to intellectual property" from the broad Section 230 safe harbor. *See* 47 U.S.C. § 230(e)(2); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007). Instead, after lengthy negotiations in which the motion picture industry actively participated, Congress fashioned a narrower safe harbor addressing the remedies available against online service providers for copyright infringement that occurs over their systems.[5] While a web host does not lose its Section 230 immunity if it does not respond to a complaint about defamatory material posted by a user, the web host would lose its protection under Section 512 of the Digital Millennium Copyright Act if it does not expeditiously remove allegedly infringing material after receiving a notice from the copyright owner. The DMCA creates a regime of shared responsibility, *see* H.R. REP. NO. 105-551, pt. 2, at 21 (1998), under which the copyright owner has the duty to identify the infringing content and notify the service provider, and the service provider has the duty to respond expeditiously to the notice. If the service provider hosts the infringing content, the service provider must remove the content. If the service provider links to the infringing content, the service provider must disable

[5] Although the DMCA safe harbor is narrower than the CDA safe harbor with respect to Internet functions such as hosting and linking, it is nearly as broad as the CDA with respect to transmission of content, *see* 17 U.S.C. § 512(a).

the link. In essence, the DMCA provides a mechanism under which a copyright owner is able to obtain an automatic injunction without going to court. Significantly, in a subsection labeled "Protection of Privacy," the availability of the safe harbor is not conditioned on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity." 17 U.S.C. § 512(m).

Although the protections of the DMCA are narrower in certain respects than those of the CDA, they nonetheless provide important limitations on copyright infringement liability. Just as with the CDA, Congress was "loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions," *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1014 (9th Cir. 2013), and therefore adopted limitations on secondary liability for copyright infringement in Section 512 of the DMCA in order to "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand." S. REP. NO. 105-190, at 8 (1998). As with Section 230, several federal courts have upheld liability limitations under the Section 512 safe harbors. *See, e.g.*, *Shelter Capital*, 718 F.3d 1006 (9th Cir. 2013); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Viacom v. YouTube*, 676 F.3d 19 (2d Cir. 2012); *cf. CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) ("It is clear that Congress

intended the DMCA's safe harbor for ISPs to be a floor, not a ceiling, of protection").

C. The secondary liability limitations created by Congress to encourage the growth of the Internet have succeeded as planned.

Today, thanks to Congress passing the unique legal regimes found in Section 230 of the CDA and Section 512 of the DMCA, the U.S. Internet sector leads the world. The countless services that form the Internet economy have "flourished . . . with a minimum of government regulation." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (quoting 47 U.S.C. § 230(a)). They represent an extraordinary portion of the U.S. economy and exports, and provide substantial economic benefits to multiple sectors. As early as 2009, the Internet was adding an estimated $2 trillion to annual GDP, over $6,500 per person, according to the National Economic Council.[6] The value of the global Internet economy is projected to reach $4.2 trillion in a few years.[7] The Internet accounted for 21% of the GDP growth in mature economies over the past 5 years, with 75% of the benefits captured by

[6] Exec. Ofc. of the President, Nat'l Econ. Council/OSTP, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs* (Sept. 20, 2009), at 5, http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation.

[7] David Dean et al., *The Internet Economy in the G-20: The $4.2 Trillion Growth Opportunity*, Boston Consulting Group (Mar. 19, 2012), at 3, https://www.bcgperspectives.com/content/articles/media_entertainment_strategic_planning_4_2_trillion_opportunity_internet_economy_g20/.

companies in more traditional industries.[8] There is a growing international consensus that "[i]ntermediaries are increasingly important and empower end-users" and that "[l]imitations on their liability for the actions of users of their platforms have encouraged the growth of the Internet."[9]

II. The Investigation At Issue Exceeds Attorney General Hood's Authority In A Manner That Jeopardizes The Success Of The Internet.

A. The views of state attorneys general on online safe harbors have been at odds with established Congressional policy.

In the 1990s, when Congress was considering how existing laws such as defamation and copyright should apply in the Internet environment, Congress could have forced service providers to police the Internet by making them liable for their users' unlawful activities. The monitoring and filtering necessitated by such a liability regime would have imposed significant costs on service providers, which in turn likely would have led to fewer and more constrained free platforms. The vigorous, open, and diverse Internet that is now essential to modern society would not have been possible.

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[8] Matthieu Pélissié du Rausas et al., *Internet Matters: The Net's sweeping impact on growth, jobs and prosperity*, McKinsey & Company (May 2011), at 9, http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters.

[9] *See* OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (Sept. 2011), at 15, http://www.oecd.org/internet/ieconomy/theroleof internetintermediariesinadvancingpublicpolicyobjectives.htm.

Fortunately, Congress made a different policy choice. It decided that the national interest would be better served by the robust growth of the Internet that would be encouraged by limiting the liability of the intermediaries for unlawful third-party activities. Congress could not have been clearer in its articulation of its intent. It made the following findings in support of its adoption of Section 230:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[10]

Based on these findings, Congress declared that:

> It is the policy of the United States—
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and]
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation….[11]

[10] 47 U.S.C. § 230(a)(1)-(5).
[11] 47 U.S.C. § 230(b)(1)-(2).

Congress recognized that there was a role for blocking and filtering technologies, but Congress intended for such technologies to be deployed by users, not Internet intermediaries. Thus, Congress sought:

> (3) to encourage the development of technologies which maximize *user control* over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and]
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower *parents* to restrict their children's access to objectionable or inappropriate online material….[12]

Similarly, in the DMCA, to protect user privacy, Congress explicitly provided that eligibility for the DMCA safe harbors was not conditioned on a service provider monitoring its service or affirmatively seeking facts indicting infringing activity.[13]

Defendant-appellant and his *amici* disagree with this policy. They believe that service providers should be liable for their users' activity. In fact, two years ago, forty-seven state attorneys general, including Attorney General Hood, wrote a letter to Congress asking for the Section 230 framework to be altered,[14] claiming that it was "used as a shield by those who intentionally profit from prostitution and crimes against children." They also express disappointment that "[f]ederal courts

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[12] 47 U.S.C. § 230(b)(3)-(4) (emphasis supplied).
[13] 17 U.S.C. § 512(m)(1).
[14] *See* Supplemental Record Excerpts for Plaintiff-Appellee, Tab C, filed July 27, 2015 (letter from forty-seven Attorneys General to Congress).

have broadly interpreted the immunity provided by the CDA" – the very interpretation that a Congressional committee explicitly endorsed in 2002.[15]

B. Rights holder industries' views on online safe harbors have also been at odds with established Congressional policy.

Some rights holder industries have also grown dissatisfied with the DMCA safe harbors. Although online services promptly remove content alleged to be infringing, and search engines such as Google expeditiously remove links to allegedly infringing URLs, certain rights holders now want service providers to affirmatively police online content. Some have sought to convince courts that intermediaries lost their Section 512 protections if they did not cause allegedly infringing content to "stay down" once it has been the subject of a DMCA claim. *But see Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003) ("It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries."). When courts declined to do so, the motion picture industry and other entertainment industry sectors sought to change the DMCA's notice and takedown framework, either directly through

[15] H.R. REP. NO. 107-449, at 13 (2002) ("The Committee notes that ISPs have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence and defamation.") (citations omitted).

amendment of Section 512, or indirectly through other legislative initiatives, such as the ill-fated "Stop Online Piracy Act." Jonathan Wiseman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html ("Internet activists rallied opposition to the legislation through Internet blackouts and cascading criticism, sending an unmistakable message to lawmakers grappling with new media issues: Don't mess with the Internet.").

While targeting intermediaries rather than the actual parties engaged in unlawful online activities may be more convenient for Attorney General Hood and the movie industry representatives that have supported his investigation, Congress has repeatedly declined to impose this burden on the Internet. Congress was aware that it was allocating burdens of policing content when it adopted the CDA and DMCA in the 1990s, and more recently as it enacted related statutes.[16] Congress has decided and repeatedly reaffirmed its decision that the costs of imposing liability on intermediaries for third party conduct outweighed any claimed benefits.

[16] *See, e.g.*, 31 U.S.C. § 5365(c) (limiting remedies against interactive computer services for third party Internet gambling activities); 18 U.S.C. § 2257(h)(2)(B)(iv) & (v) (excluding the provision of Internet services providers from the definition of producing sexually explicit content); 21 U.S.C. § 841(h)(3)(iii) (excluding the provision of Internet services from the definition of distributing controlled substances via Internet pharmacies).

To be sure, state attorneys general and the motion picture industry have the right to lobby Congress to change the national Internet policy. What is not permissible, by contrast, is for state attorneys general to use burdensome investigations to achieve what they could not in Congress. Yet, that is precisely what is occurring in this case.[17]

C. This Court should not allow state attorneys general to subvert national Internet policy through the use of investigative powers.

If this Court were to permit Attorney General Hood to proceed with a punitive investigation, it would encourage officers of other states to make similar informal demands of online intermediaries. Fifty state officers, each with a different policy agenda, could impose on all Internet intermediaries vague and potentially conflicting obligations to censor advertising and third-party content that they believe to be objectionable. An environment where the most aggressive state official in the nation may effectively dictate the availability of Internet content is incompatible with robust online speech and innovation. Congress acknowledged this principle when it enacted Section 230 of the CDA and Section 512 of the DMCA. The district court, too, recognized that Attorney General Hood's conduct was unduly burdensome, noting that "interference with Google's judgment,

[17] *See generally* Russell Brandom, *The full story of Project Goliath and Hollywood's quest to control the web*, THE VERGE, Dec. 16, 2014, http://www.theverge.com/2014/12/16/7402285/project-goliath-and-hollywoods-quest-to-control-the-web.

particularly in the form of threats of legal action and an unduly burdensome subpoena, then, would likely produce a chilling effect on Google's protected speech, thereby violating Google's First Amendment rights," *Google v. Hood*, 2015 WL 1546160 (S.D. Miss. 2015), at *9.[18]

Notwithstanding the fact that national policy in this matter is well established, many companies and innovators represented by *amici* would lack the legal resources to defend this policy. Defending sound legal positions can still be financially disastrous, even for a "promising start-up" with federal intermediary liability law and policy its side. *See, e.g.*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).[19] As the experience of Veoh demonstrates, financially strained start-ups are vulnerable even to unfounded legal claims. The industries that *amici* represent, where the most significant innovations often come from start-ups and small businesses, would be highly susceptible to potential intimidation via investigation.

[18] The district court noted, for instance "it is well-settled that the Attorney General may not retaliate against Google for exercising its right to freedom of speech by prosecuting, threatening prosecution, and conducting bad-faith investigations against Google", *id.*, and that Hood must "not wage an unduly burdensome fishing expedition into Google's operations", *id.* at *10.

[19] Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED, Feb. 12, 2010, http://www.wired.com/business/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/ ("History will add online video site Veoh to the long list of promising start-ups driven into bankruptcy by copyright lawsuits.").

This risk that state officials may seek to impose inconsistent obligations upon online services is not theoretical. As this Court's *Doe v. MySpace* opinion reflects, some state attorneys general had demanded that websites like MySpace install mandatory age verification technology. *MySpace*, 528 F.3d at 421-22. This pressure was applied in spite of the fact that Congress had previously made a different federal policy choice in enacting the Children's Online Privacy Protection Act of 1998 (COPPA), Pub. L. No. 105-277, 112 Stat. 2681, which specifies how online services may interact with minors, and assigned enforcement authority of the matter to the U.S. Federal Trade Commission.

D. The role of state officials in regulating Internet content is limited.

Contrary to the protests of Attorney General Hood (Appellant's Br. at 8), state officials are not without power to enforce state law online. Most relevant state laws will apply with equal force, regardless of whether Internet communications are involved. State law enforcement officials remain capable of enforcing state laws against actors who are directly engaging in wrongful conduct. Section 230 speaks to entities that are providing general purpose services to hundreds of millions of users, with which a small set of third parties may engage in wrongful conduct. Limitations on Attorney General Hood's regulation of Internet service providers take nothing away from Attorney General Hood's ability to directly enforce Mississippi law against wrongful actors themselves. While

Congress decided that Attorney General Hood should not be empowered to persecute messengers beyond what federal law provides, he remains fully capable of enforcing Mississippi laws against the volitional actors who are directly engaged in wrongful activities.

There is no question, however, that Congress clearly limited the ability of the states to regulate in the federal Telecommunications Act and Copyright Act, such that state officials do not have the power to dictate what third party content appears on online services. *Google v. Hood*, 2015 WL 1546160 at *7-8. This Court has affirmed that the import of Section 230 is that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" with that provision of the federal Telecommunications Act. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (citing 47 U.S.C. § 230(e)(3)).

This logic also extends to the subject of intellectual property. "Because material on a website may be viewed . . . in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-

law regimes." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007).[20]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting injunctive relief.

Respectfully submitted,

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August 3, 2015

[20] *See also PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) ("The content of the Internet is analogous to the content of the night sky. One state simply cannot block a constellation from the view of its own citizens without blocking or affecting the view of the citizens of other states."); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.").

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,729 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Jonathan Band

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August 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2015, I electronically filed the foregoing Brief *Amici Curiae* of the Computer & Communications Industry Association, Engine, and the Consumer Electronics Association in Support of Defendant-Appellant, with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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