Nos. 22-277, 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL., *Petitioners*,
v.
NETCHOICE, LLC, DBA NETCHOICE, ET AL., *Respondents*,

NETCHOICE, LLC, DBA NETCHOICE, ET AL., *Petitioners*,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, *Respondent*,

On Writs of Certiorari to the United States Court of Appeals for the Eleventh and Fifth Circuits

BRIEF OF AMICUS CURIAE FRANCIS FUKUYAMA IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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STATEMENT OF INTEREST[1]

Dr. Francis Fukuyama is the Olivier Nomellini Senior Fellow at Stanford University's Freeman Spogli Institute for International Studies (FSI). He is also a faculty member of FSI's Center on Democracy, Development, and the Rule of Law, and directs Stanford's Ford Dorsey Master's in International Policy. He serves on the boards of multiple nonprofits focused on development of democratic institutions within the United States and around the world. His academic work focuses on development and international politics, and is widely published and cited in these areas. He has written well over one hundred articles, as well as 28 books and monographs, including his influential 1992 book *The End of History and the Last Man*.

Dr. Fukuyama is a leading political scientist with expansive experience in the study of democratic institutions and values. Among the interests critical to him is the core role of free speech in American democracy. In furtherance of that interest, Dr. Fukuyama submits the following brief describing the importance of minimizing state intervention into the sphere of public discourse, and proposing less restrictive means of doing so than Florida and Texas offer in the contested statutory provisions. He describes certain technical principles of social media

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or his counsel made a monetary contribution to its preparation or submission.

platforms which allow for several means of achieving the States' goals with less imposition on users' speaking and listening rights. He outlines the benefits of these tools, which he calls "user controls." These tools serve the States' purposes in preserving discussion and dissemination of information, while preserving social media users' autonomy and control over their own experiences on these platforms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Florida Senate Bill 7072 (S.B. 7072) and Texas House Bill 20 (H.B. 20) impose state control over the dissemination of speech and ideas online. Though they purport to protect Internet users from private platform "censorship," the laws instead put control over speech into government hands. This Court's precedent and the values underlying the First Amendment are anathema to any such approach. None of the collateral damage to lawful speech can be justified given that the States' asserted goals can be advanced through much less restrictive means: User controls.

The basic design of the Internet permits—and indeed has already led to—better solutions than those proposed by Florida and Texas. User controls, which allow individual speakers and listeners to make their own choices about online speech, can protect the diversity of voices and forums on the Internet without this unprecedented expansion of government power over free expression online. The Florida and Texas laws establish differing rules for lawful speech based on its content, and burden the rights of Internet users and platforms alike. Their requirements will likely

backfire in practice, encouraging platforms to remove more user speech than they do today.

User controls, on the other hand, allow people to choose the kind of content moderation and recommendation systems they prefer, and make their own decisions about the curation of their social media experience. User controls put power over each individual's experience on social media in the hands of the people, rather than the State. Technology including *middleware* and *interoperability* can unlock a competitive ecosystem of diverse content moderation providers, letting users decide on their own preferred rules for online speech without forfeiting the networks and connections enabled by large platforms today. State action to encourage or unleash the development of more and better user controls would advance the States' goals by far less restrictive means than Texas and Florida propose.

The core First Amendment principle at issue in this case is well-established: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). For content-based regulations like those in Florida and Texas, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* 815. The laws at issue in this case would fare no better under this Court's intermediate scrutiny precedent, given the poor fit between the laws' goals and the means chosen to advance them, and the high likelihood that the laws

will backfire, restricting rather than expanding ordinary people's opportunities for online speech.

The Florida and Texas laws exceed First Amendment limits on the related ground that they are unconstitutionally vague. In their efforts to set forth the correct standards for platform content moderation, the States have enacted unworkable and sometimes incomprehensible mandates. It is impossible to say what design choices or algorithmic ranking would bring current platforms into compliance with the law. The reason for this impossibility is not just poor legislative drafting; it is fundamental to the nature of the Internet and human communication. There is no one right, fair, consistent, or natural way to organize the vast ocean of speech on the Internet; the States cannot dictate speech rules as if there were. Every speaker and listener may have different preferences, and each possesses a First Amendment protected right to act upon them. User controls are the best tools to make that possible.

The attempts by Florida and Texas to reshape online speech through top-down, state-imposed rules for content moderation will be as ineffective as they are unconstitutional. The laws should be struck down.

ARGUMENT

I. THE STATES' GOALS CAN BE ACHIEVED THROUGH LESS RESTRICTIVE MEANS: USER CONTROLS, WHICH ALLOW INDIVIDUALS TO MAKE THEIR OWN CHOICES ABOUT ONLINE SPEECH.

The Florida and Texas statutes supposedly advance the States' interests in diversifying speech online and reducing centralized control by platforms. To do so, they harness massive state power, imposing new, state-created rules for online speech. These rules both compel and restrict speech and they affect the First Amendment rights of Internet users as well as platforms. They are content-based and thus subject to strict scrutiny. But even under more lenient intermediate scrutiny standards, the Florida and Texas laws fail constitutional review, because the fit between legislators' goals and the means used to advance them is remarkably poor.

It is questionable whether the States' imposition of uniform new speech rules on a wide array of existing platforms can, in fact, advance the States' asserted goals at all. This Court has noted the diversity of uses and speech on online platforms ranging from LinkedIn to Twitter to Amazon. *See Packingham v. North Carolina*, 582 U.S. 98, 104-06 (2017). Platforms also organize, curate, and display content in different ways. The Florida and Texas laws would flatten these distinctions, leaving users to encounter similar material no matter which platform they use. Users in Florida, for example, may find speech on every platform drowned out by the same political candidates and journalistic enterprises.

Existing and potential Internet technologies offer far simpler means to achieve the States' goals. A wide array of user control tools can foster the free flow of information online by putting power over speech in the hands of Internet users rather than the States. User controls will let users post the speech they want to share and reach interested audiences, while leaving other users free to make their own decisions about what content they wish to see. User controls can preserve incumbent platforms' ability to define editorial policies, while empowering an array of competitors to do the same. Given the existence of dramatically less restrictive means, the laws should be struck down.

A. The Internet is designed to allow information to flow freely while preserving individual users' control.

Florida and Texas assert an interest in "protect[ing] their citizens' access to information," Petition for Writ of Certiorari at 3, *Moody v. NetChoice, LLC,* No. 22-277 (Sept. 21, 2022) (Fla. NetChoice Cert. Petition), and "protect[ing] the widest possible dissemination of information from diverse and antagonistic sources," Response to Petition for Writ of Certiorari at 27, *NetChoice, LLC v. Paxton,* No. 22-555 (Dec. 20, 2022) (Tex. NetChoice Cert. Petition Response). Such goals are foundational to America's system of constitutional governance and have animated the technical design of the Internet. Existing and developing Internet technologies offer mechanisms to advance these goals, along with States' related goals of "rein[ing] in" what they describe as "the Platforms' discriminatory conduct," *id.* at 5, and

"ability to dominate public discourse." *Id.* at 12. Technologies that enhance user control can achieve these goals without resorting to the States' drastic measures, which impose government controls over speech.

The division of power is central to the Internet's structure. The Internet was designed to allow information to flow freely while enabling different ways of choosing what to see and hear. The Internet's foundational "end-to-end" design principle dictates that the lower layers of digital infrastructure should focus on efficient and speedy data transmission that is largely agnostic about content.[2] As this Court has noted, "[n]o single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web." *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996)). At the edges of the network, where most people experience the internet, however, a dynamic and evolving "content layer" allows the creation of diverse technical applications and forums for speech. Developers can create new

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[2] *See* Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. Sci. & Tech. L. 193, 199-201 (2018); Jack M. Balkin, Beth Simone Noveck, & Kermit Roosevelt, *Filtering the Internet: A Best Practices Model*, *in* Protecting Our Children on the Internet: Towards a New Culture of Responsibility 199 (Jens Waltermann & Marcel Machill eds., 2000) (describing 1990s user control technologies); Daphne Keller, *The Future of Platform Power: Making Middleware Work*, 32 J. Democracy 168, 169-70 (2021) (comparing 1990s user control technologies to current middleware).

applications at the content layer without seeking permission to do so.

The Internet still works this way today. What has changed since the 1990s is not the basic technical design, but rather the significant concentration of users on a small number of websites and applications at the Internet's content layer. These applications (1) allow people to find and communicate with each other, and (2) enable curation and recommendation systems. The Internet's flexible design allows the separation of these two functions, dividing the power to facilitate communication from the power to curate and recommend. This separation makes user control of content curation possible, without requiring users to forfeit their ability to communicate with broad networks of people.

Importantly, technologies that enable user controls can achieve the goals of S.B. 7072 and H.B. 20 without resorting to the laws' drastic measures: substituting government-imposed speech rules for the editorial choices of private platforms and users themselves. Amicus shares the States' concern about the "dangers of platform power" over online speech. Francis Fukuyama, *Making the Internet Safe for Democracy*, 32 J. Democracy 37, 38 (2021). But the policy response to "excessively concentrated power" over discourse "should *not* aim at silencing speech" or otherwise imposing state control over speech. *Id.* at 39. Instead, sound platform regulation can be built on the same design principles embedded in the U.S. Constitution: power over speech should not rest with the government, but instead should "be controlled only by dividing it." *Id.*

B. The statutes' goals can be advanced through user controls.

User controls are tools that allow people to choose the kinds of curation and recommendations for the content they receive. In this way user controls enable competition among providers of curation and recommendation services. This promotes the free flow of speech online without substituting state control for private power.

The simplest form of user controls are platform-provisioned settings that allow individuals to determine their own tolerance for potentially offensive or controversial content.[3] But user controls can be far more sophisticated, giving different companies the ability to provide curation and recommendation systems. In this way they displace platforms as centralized gatekeepers for speech on the Internet.

There are several ways that user control technologies can work. Amicus has written about one,

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[3] Settings of this sort offer imperfect content moderation, but can be implemented using easily licensed tools. *See, e.g.*, *Moderating Content*, Amazon Web Services, https://perma.cc/AAD2-LFB9 (last visited Dec. 5, 2023) (tool for website or application providers to restrict specific kinds of content such as material about "[p]ills," "[g]ambling," and "[w]eapons"). The Texas law might permit use of such tools, or might be construed to allow only user-initiated blocks of specific posts. It seemingly does not allow users to block accounts, even if another account consistently posts harassment, sexually explicit material, or other unwanted content. *See* Tex. Civ. Prac. & Rem. Code § 143A.006 (setting forth that platforms are not restricted from "authorizing or facilitating a user's ability to censor specific expression on the user's platform or page at the request of that user.").

known as "*middleware*." Middleware providers are third-party companies or organizations, each offering distinct curation and recommendation systems with different editorial values or rules for speech. By selecting their own middleware, users can choose which editorial rules they want applied to their existing social media feeds. *See* Francis Fukuyama, *Making the Internet Safe for Democracy*, 32 J. Democracy 37, 41-43 (2021). Another major approach is technical *interoperability* between diverse platforms. Interoperability diversifies control over online speech by allowing platforms to exchange content. This brief explains how these approaches can effectively advance Florida's and Texas's stated goals without substituting state speech rules for private ones.

Middleware works by "outsourc[ing] content curation" from current tech giants "to a competitive layer of 'middleware' companies." *Id*. at 40. A market for middleware companies can offer each user a diverse menu of providers for content moderation, ranking, labeling, or other editorial functions. When creating an account, users can "be given a choice of middleware providers that would allow [them] to control [their] feed or searches," much as users now have a choice of browsers. *Id.*[4]

A middleware system can leave platforms free to offer the same editorial services they provide today.

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[4] Interoperability can be analogous to telecommunications law's unbundling approach. In competition terms, unbundling is seen as a means to introduce competition when a resource is too expensive to produce, or impossible due to other factors like network effects.

They would do so, however, as just one option competing for users' attention. Middleware of this sort already exists. Block Party is a third party tool that gave users advanced options to block harassing or threatening posts on Twitter. Tracy Chou, *The Path to a Better Internet for Everyone*, Block Party Newsletter (2023), https://perma.cc/LF77-YQ2W (last visited Dec. 5, 2023). It was functional and widely used before recent changes to the platform. The existence of middleware options like Block Party allowed Twitter to tolerate controversial voices while letting individual users avoid messages or speakers they found offensive. Another social network, Bluesky, is explicitly designed to permit users to choose third-party filters or content moderation rules. Jay Graber, *Composable Moderation*, Bluesky (2023), https://perma.cc/263S-H7KG (last visited Dec. 5, 2023).

Another way of empowering users and decentralizing control over speech is to require interoperability between social media platforms. In technical terms, systems are interoperable when they speak a common language, or when systems provide the capacity to share, interpret and present data in a way that the other systems can understand. Mike Masnick has shown how the existence of common protocols for information can disrupt the control over speech that is currently "centralized among a small group of very powerful companies." Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, Knight First Amendment Inst., Colum. Univ. (Aug. 21, 2019), https://perma.cc/UPY2-CRL6 (last visited Dec. 5, 2023).

Interoperability allows diverse platforms or nodes in a network of platforms to exchange content. This is essentially how email works today: Users of commercial services like Gmail freely communicate with those who rely on Yahoo Mail, use email accounts provided by schools or workplaces, or even maintain their own email servers. Applying this model to social media would allow people on one social media site to post to—and view posts from—other sites. More importantly, interoperability would allow an end-run around tech giants' content moderation systems and enable the development of third party content moderation systems, achieving a result similar to the middleware model described above.

An interoperable social networking system that functions in this manner, Mastodon, already exists, and recently experienced a significant uptick in usage. Alan Z. Rozenstein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. Free Speech L. 217, 218 (2023). Users can choose to establish accounts on one of Mastadon's interoperable "nodes," while communicating with other users on other nodes that may follow different speech rules. Much like middleware, interoperability uses competition and user choice as tools to respond to platforms' power over speech by diversifying control, rather than centralizing it. Masnick envisions competitors offering different "interfaces, filters, and additional services, allowing whichever ones work best to succeed, without having to resort to outright censorship." Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, Knight First Amendment Inst., Colum. Univ. (Aug. 21, 2019),

https://perma.cc/UPY2-CRL6 (last visited Dec. 5, 2023).

The current role of a few major platforms is in part a product of network effects. People want to be on Facebook because others are already on the site. This drives much of tech giants' power over discourse. To get the benefits of a network that everyone else is on, users must accept the platforms' speech rules. But middleware and interoperability approaches would diversify users' choices about online speech, while still allowing them to benefit from network effects.[5] A user who made one set of choices about content moderation could still communicate with a friend who made different choices. Posts would flow freely so long as the speaker's posts comply with the listener's preferred speech rules. This is essentially how email is delivered today; you get email sent to your inbox unless it violates the anti-spam or other content control settings in your email application.

There are many ways to achieve better user controls for social media through market competition and government incentives. See Forrester, *Key to Meta's Threads Success: Interoperability*, Forbes (July 7, 2023), https://perma.cc/U385-R4DE (last visited Dec. 5, 2023) (describing Meta's voluntary adoption of interoperable technical protocols). Amicus's own writing contemplates the use of state power to promote user controls through competition-based laws

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[5] *See* Jack M. Balkin, *To Reform Social Media, Reform Informational Capitalism*, *in* Social Media, Freedom of Speech, and the Future of our Democracy 233, 248 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (explaining how interoperability shifts the benefits of network effects to end users).

requiring that platforms interoperate and otherwise cooperate with middleware providers. Yet another option would be for governments to directly facilitate better user control tools by investing in their development, just as the federal government once invested in developing the Internet itself. *See Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004) (noting that lawmakers could "encourage" the development of user-controlled filters or "take steps to promote their development by industry" as less restrictive options than directly regulating protected speech). At the very least, state and federal lawmakers could revise or eliminate the archaic laws that thwart the growth of middleware and interoperability. If lawmakers really want to promote free speech and reduce tech giants' centralized control over discourse, laws encouraging user controls or taking away the legal tools that platforms use to block interoperable systems and middleware would more effectively achieve these goals.[6]

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[6] Some legal changes to support user controls and interoperability are within States' control and raise none of the First Amendment concerns at issue in this case. For example, both Texas and Florida could amend the state laws relied on by platforms in legal challenges to interoperation technologies. *See* Cory Doctorow, *Interoperable Facebook*, Elec. Frontier Found. 7-8 (Sept. 12 2021), https://perma.cc/F6M8-2R9Q (last visited Dec. 5, 2023) (discussing reform of "laws that Facebook and other tech giants use to block interoperability"). Others might require resolution of First Amendment or preemption questions. These include questions relating to Section 230, which was at issue in platforms' initial challenges to the Texas and Florida laws, but not in scope of the questions under review in this case.

C. The Court has recognized in other cases about information technologies that user controls are a less restrictive means of achieving States' goals.

The preference for individual control over what to see and hear is deeply embedded in this Court's jurisprudence about the First Amendment and information technology: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818.

In *Playboy*, the Court struck down a requirement that cable operators block pornography, holding that letting individual subscribers make their own choices would serve the government's goals through less restrictive means. *Playboy*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."). The case turned explicitly on the fact that, unlike broadcast systems, "[c]able systems have the capacity to block unwanted channels on a household-by-household basis." *Id.* at 815. The Court reasoned that the law forcing cable operators to block pornography when individually targeted controls were available was unconstitutional because the user controls were "less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.* The Court explained that "if a less restrictive means is available for the Government to achieve its

goals, the Government *must* use it." *Id*. (emphasis added).

Technology that "expands the capacity to choose" is far more prevalent and feasible on the Internet than on cable television. *Playboy*, 529 U.S. at 818. The Court has rejected overbroad Internet speech regulation in part because of the "mere possibility that user-based Internet screening software would 'soon be widely available.'" *Id.* at 814 (quoting *Reno*, 521 U.S. at 876-77); *see also Ashcroft*, 542 U.S. at 670 ("The choice [in *Playboy*] was between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it."). The technical feasibility of individual control drove outcomes for earlier technologies as well. *See Playboy*, 529 U.S. at 814 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130-131 (1989)) ("In *Sable Communications*, for instance, the feasibility of a technological approach to controlling minors' access to 'dial-a-porn' messages required invalidation of a complete statutory ban on the medium.").

The Court's decision in *Ashcroft* affirmed the constitutional preference for user-controlled Internet filtering software over direct governmental regulation. It upheld a preliminary injunction against enforcement of a law restricting the transmission of material deemed harmful to minors, identifying parent-controlled blocking software as a less restrictive means to achieve legislators' goals. User controls can, the Court noted, allow for "selective restrictions on speech at the receiving end, not universal restrictions at the source." *Ashcroft*, 542

U.S. at 667. This approach allows for user-specific content control, thereby ensuring that adults retain unencumbered access to lawful speech, while preserving a means for parents to set controls for their households or devices. Long-standing laws mirror the guidance given by this Court. For example, the V-Chip, a device mandated for inclusion in televisions, lets parents block programming they deem inappropriate for their children. Telecommunications Act of 1996, 47 U.S.C. § 303(x).

These principles should guide the Court's analysis here. User controls place content-based discretion in the hands of the user, limit the incidental burdens of speech regulation, and quantitatively limit the amount of regulated speech. *See Playboy*, 529 U.S. at 815 (household controls over cable television would allow the government to advance its interests "without affecting the First Amendment interests of speakers and willing listeners").

II. THE STATUTES FAIL BOTH STRICT AND INTERMEDIATE SCRUTINY.

A. The statutes are subject to strict scrutiny, which they fail.

Both States defend their laws as permissibly treating platforms like "common carriers." Fla. NetChoice Cert. Petition at 23; *see also* Tex. NetChoice Cert. Petition Response at 6. In reality, Florida S.B. 7072 and Texas H.B. 20 both suppress and compel the speech of platforms and their users based on the contents of a message or the identity of the speaker. The laws are undeniably subject to strict scrutiny.

i. Both laws impose content- and speaker-based rules for speech.

Contrary to Florida's portrayal, S.B. 7072 is not a common carriage statute that makes platforms "openly accept users." Fla. NetChoice Cert. Petition at 23. Instead, the law mandates preferential treatment for particular users, based on their identity, and for particular online speech, based on its content. S.B. 7072 requires that platforms' ranking algorithms give special prominence to any speech "by or about" political candidates, and it restricts almost all platform moderation of posts from speakers that are, under the statute, deemed "journalistic enterprise[s]." Fla. Stat. § 501.2041.

The Texas statute likewise establishes legal preferences based on the content of users' speech. H.B. 20 prohibits moderating most speech based on its "viewpoint," Tex. Civ. Prac. & Rem. Code § 143A.002, but the law effectively disfavors some "lawful but awful" speech through its content-based exemptions. Platforms may remove racially-targeted threats of violence, for example, regardless of viewpoint.[7] Another exemption permits platforms to freely remove some forms of harassment, as long as the speech at

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[7] Subsection 143A.006(a)(3) permits moderation of content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." *See* Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. Chi. L. Rev. Online, (June 28, 2022), https://perma.cc/HSE2-L6UK (last visited Dec. 5, 2023) (discussing Texas's law and arguing that user controls would be more constitutionally defensible).

issue has been identified by state-favored organizations.[8]

Texas's special rules establish state preferences among lawful expression. They are not limited to posts that violate civil or criminal laws, which are addressed in a separate exemption that frees platforms of state-imposed obligations to carry "unlawful expression." Tex. Civ. Prac. & Rem. Code § 143A.001(5). H.B. 20's rules instead give platforms special leeway to silence particular messages that, while likely offensive or harmful, constitute First Amendment-protected speech under this Court's jurisprudence. The law's provisions superficially resemble this Court's legal standards in cases like *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam), but its plain terms exclude from the law's viewpoint neutrality mandate entirely lawful speech because the State disapproves of its message.[9]

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[8] Subsection 143A.006(a)(3) permits moderation of content that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment." Texas lawmakers considered and rejected other content-based limitations for content that promotes terrorism or denies the Holocaust. *See* Tex. H.R. Journal, 87th Leg., 2nd Called Session at 232-33, (Aug. 27, 2021), https://perma.cc/2J9G-32FY (last visited Dec. 5, 2023).

[9] Texas and Florida have also advanced an interpretation of Section 230 that would add more content-based exceptions to the States' own laws. *See* Petition for Writ of Certiorari at 27, *Moody v. NetChoice, LLC,* No. 22-277 (Sept. 21, 2022). Interpretation of Section 230 is not in scope of the certiorari grant in this case, and neither the related federal statutory questions nor their implications for the constitutionality of the States' laws have been adequately briefed. *See* Blake Reid, *Section 230's Debts*, 22

ii. Both laws are subject to, and fail, strict scrutiny.

Florida S.B. 7072 and Texas H.B. 20 burden both platforms' and users' speech based on the message or the identity of the speaker. This Court applies "the most exacting scrutiny" to laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) (*Turner I*) (plurality opinion). The laws' speaker-based distinctions also trigger strict scrutiny because "a regulation of speech cannot escape classification as facially content-based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022).

The Court's precedent regarding restrictions or burdens on speech applies with equal force to laws that compel speech: "Laws that compel speakers to *utter or distribute speech* bearing a particular message are subject to the same rigorous [(i.e., strict)] scrutiny." *Turner I*, 512 U.S. at 642 (emphasis added). S.B. 7072 and H.B. 20 establish state-backed favoritism that will lead to both compelled publication of speech (such as speech about candidates in Florida) and speech restrictions (such as the speech identified in Texas's content-based carve-outs). As discussed below, in practice, the laws will also likely lead to further restrictions on lawful speech as platforms, in

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First Amendment L. Rev. (forthcoming 2024), https://perma.cc/CH85-PWG7 (last visited Dec. 5, 2023).

order to remain "consistent" or "viewpoint neutral," prohibit speech on entire topics.

A content-based regulation of this sort "can stand only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813. Such laws must be "narrowly tailored to promote a compelling Government interest" with no less restrictive alternatives. *Id*. Where user-controlled "targeted blocking is a feasible and effective means of furthering" the State's interest, "the Government must use it" in lieu of more sweeping controls on speech. *Id*. at 815.

Content-based restrictions and compulsions for speech on the Internet are to be reviewed using this same strict standard. *Reno*, 521 U.S. at 869. The less rigorous scrutiny this Court applied to broadcast and cable systems would be entirely inappropriate for speech on social media. *Cf. Turner I*, 512 U.S. at 640 (noting "the special physical characteristics of broadcast transmission" that underlie the Court's broadcast jurisprudence). Indeed, the intermediate scrutiny in *Turner I* was applied not because the case involved cable television, but because the law was not content-based. *Id.* at 648. More fundamentally, given the Internet's basic design and tremendous capacity to enable new websites, apps, and speech—as well as user controls—at the content layer, there is no justification for applying anything less than the strictest scrutiny. The medium-specific concerns for cable and broadcast "are not present in the cyberspace," and "the Internet can hardly be considered a 'scarce' expressive commodity." *Reno*, 521 U.S. at 868, 870.

The Florida and Texas laws fail strict scrutiny because less speech-restrictive user controls can address the States' concerns. They can allow users to modify the message they receive, or to choose their preferred sources of moderation, without asserting new state control over substantive speech rules.[10]

B. Even under intermediate scrutiny, the statutes fail because they do not effectively advance the States' asserted interests and burden substantially more speech than necessary.

The Court has applied intermediate scrutiny to *content-neutral* must-carry regulations for cable systems because of the "bottleneck" produced by cable transmission systems. *See Turner I*, 512 U.S. at 648, 656. Because the Texas and Florida statutes are content-based, not content neutral, intermediate scrutiny does not apply.

Even if the Texas and Florida statutes were content-neutral, and the Court applied intermediate

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[10] User controls allow the government to create competition and address market power without regulating content. *C.f. United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 432 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (Rather than addressing any problem of market power, the net neutrality rule instead compels private Internet service providers to supply an open platform for all . . . ."). Given that social media platforms naturally create network effects, these effects can be limited by allowing users to choose the moderation regime most appropriate for them. Producers of moderation regimes can compete with one another, including the original platform. *See* Fiona Scott Morton & Michael Kades, *Interoperability as a Competition Remedy for Digital Networks* (March 19, 2021), https://perma.cc/DYQ4-PRFW (last visited Dec. 5, 2023).

scrutiny, the statutes would still be unconstitutional because they do not address the actual source of any bottleneck—the ability of social media companies to make use of their current centralized control over content moderation. With a middleware system or an interoperability rule, by contrast, there would be no bottleneck, because social media companies could not leverage network effects to block speech between willing senders and willing listeners.

S.B. 7072 and H.B. 20 do not, in any case, satisfy even intermediate scrutiny. Under intermediate scrutiny, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Specifically, "[n]arrow tailoring" under intermediate scrutiny "requires . . . that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner I*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799). And the government "must demonstrate . . . that the regulation will in fact alleviate [identified] harms in a direct and material way." *Id.* at 664 (citations omitted). Neither Florida nor Texas can meet this burden.

Both States lack an adequate fit between legislators' goals and the means used to advance them. User controls advance the States' asserted interests more effectively, because they expand individual users' choices instead of preserving existing bottleneck points of control within large platforms in order to

impose state-created rules for speech. The laws also burden substantially more speech than necessary. They incentivize platforms to restrict discussion of controversial subjects entirely and will thus burden Internet users in their capacities as both speakers and as listeners.

i. The statutes are inadequately tailored to advance the States' goals.

To put it mildly, Florida and Texas lack an adequate "fit between [the States'] asserted interests and the means chosen to advance" those interests. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213 (1997). The States' laws allegedly serve the goals of "protecting the free exchange of ideas and information," H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021), and ensuring that platforms remain "a unique place in preserving first amendment [sic] protections," S.B. 7072, 123rd Leg., Reg. Sess. (Fla. 2021). However, user controls would advance those interests far more effectively.

ii. The statutes burden far more speech than is necessary by incentivizing platforms to remove more user content, not less.

The statutes' requirements for consistent or viewpoint neutral content moderation will likely result in platforms restricting *more* user speech, rather than less. The laws effectively present platforms with two unappealing choices: They can open the floodgates to speech that most users do not like or want to see, or they can adopt broad bans on controversial topics to avoid losing users and

advertisers. *See* Melissa Pittaoulis, *Hate Speech & Digital Ads: The Impact of Harmful Content on Brands* 3 (2023), https://perma.cc/F8B7-ZFPS (last visited Dec. 5, 2023) (noting that users who see hate speech on platforms report "lower likelihood of purchasing" products in adjacent ads and more negative sentiment toward platforms and advertisers).

Because the economically rational choice for platforms will be to restrict entire topics of discussion, rather than inundate users with speech they will seek to avoid, the laws will achieve the same stifling effect of state-enforced viewpoint neutrality that this Court previously rejected. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("[E]ditors might well conclude that the safe course is to avoid controversy."). If the Florida and Texas laws transform platforms' moderation policies from scalpels into hacksaws, then individuals and the public will lose out on opportunities to engage in and to hear discussions about topics of vital interest to them and to our nation.

iii. The Florida and Texas laws unnecessarily burden Internet users as both speakers and listeners.

Rather than empowering users to access the content they want, the laws would force users to listen to the voices that yell the loudest or most frequently. The States' "anti-censorship" mandates do this by undermining the very mechanisms used by speakers and willing audiences to find one another in the Internet's maelstrom of content. The result is an

avoidable set of burdens on Internet users' First Amendment rights to both speak and listen.

Without basic platform housekeeping functions such as spam-reduction, the messages users wish to hear will be drowned in a sea of noise. To illustrate the scale of the problem, Facebook in 2022 took action against 5.7 billion pieces of content for violating its anti-spam rules. *See Spam*, Meta: Transparency Center, https://perma.cc/LSA3-Q4CJ (last visited Dec. 5, 2023).

Users' ability to find speech they want to hear will be further reduced if platforms cannot use algorithmic ranking or targeting tailored to their individual preferences. Users' attention spans are not infinite, and users generally appear to prefer algorithmically ranked feeds that surface content of particular interest to them, including content from accounts they did not originally follow but instead learned about through platform ranking or recommendations.[11] Listeners' rights to listen to messages of their choosing should not be conditioned on their willingness to navigate a barrage of unwanted, state-mandated messages.

Listeners similarly have the right to hear platforms' own speech, in the form of editorially curated feeds, if they so desire. Platforms' individual designs, algorithms, and content moderation policies facilitate the development of distinct editorial

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[11] *See* Andrew M. Guess et al., *How Do Social Media Feed Algorithms Affect Attitudes and Behavior in an Election Campaign?*, 381 Science 398 (2023) (confirming Facebook users' preference for algorithmically ordered content over chronological order).

products and unique online communities. These may or may not appeal to any particular user. The range of platform editorial voices will be flattened and homogenized under the States' mandates, depriving users of choice among messages.

Curation, moderation, and ranking by Internet intermediaries helps users find the speech they are interested in, and exercise their rights as listeners to "receive information and ideas" of their own choosing. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (internal citations omitted). Improved user controls can increase individuals' ability to make their own choices; the Florida and Texas laws instead reduce it dramatically. The laws cannot survive either strict or intermediate scrutiny.

III. THE STATUTES ARE UNCONSTITUTIONALLY VAGUE.

A "fundamental principle in our legal system" is that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). S.B. 7072 and H.B. 20 do not meet this standard. These statutes use confusing rules to tell platforms when to use algorithms, how to design those algorithms, and how to design their user interfaces—the arrangement of text, images, and other content or functional elements that users see when they visit an application or a webpage. The mandates are so unclear that it is difficult to envision how platforms could comply, and they are thus unconstitutionally vague. Because these laws regulate speech, the Court should demand "rigorous adherence" to requirements for precise legislative

drafting "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54; *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement.").

Texas's law incorporates impermissibly vague requirements in its rules restricting "censor[ship]," which it defines as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." Tex. Civ. Prac. & Rem. Code § 143A.001(1). Platforms generally may not carry out any of the listed acts against "a user's expression, or a user's ability to receive the expression of another person" based on viewpoint. *Id.* § 143A.002(a). This nebulous mandate requires decisions about ranking or relative visibility of content in the user interface to be made without discriminating based on viewpoint, except for the content-based carve-outs approved by the State.

Florida's rules are even more impenetrable. Among other things, the rules (1) mandate "consistent" content moderation, Fla. Stat. § 501.2041(2)(b), (2) prohibit "shadow ban[ning]" journalistic enterprises based on their content, *id.* § 501.2041(2)(j), and (3) prohibit using algorithms to "shadow ban" or "post-prioritize" posts by or about candidates, *id.* § 501.2041(2)(h). "Shadow ban[ning]" includes any acts that "limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." *Id.* § 501.2041(1)(f). "Post-prioritization" includes any

action that places "certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results." *Id.* § 501.2041(1)(e). Platforms may, however, post-prioritize the covered journalistic or candidate-related content when paid to do so. *Id.* § 501.2041(2)(h), § 501.2041(2)(j). These laws both raise more questions than they answer.

User interface design requirements. It is highly unclear what Florida expects platforms to do, even in basic user interface design for a website's homepage or a user's personal page. Some applications, like TikTok, populate a user's feed before the user makes any selections of their own. The sheer number of videos uploaded each second would make pure chronological ordering effectively random and useless for most users, presenting them with everything from content in foreign languages to spam and sexually explicit content.

Florida's requirements with respect to posts by and about political candidates create additional problems. To avoid "post-prioritization" of candidate posts, should platforms put all of those posts in chronological order at the top of a user's screen, and the ranked feed of other people's speech below? That would effectively crowd out any other users' speech. Should candidate posts be isolated on the left or right of the page? Can platforms allow users to click to bypass the candidate posts, or must they scroll past the state-mandated content to see the speech they actually came for? How does this change if journalistic enterprises or candidates pay to "post-prioritize" their speech?

Limits on use of algorithms. The Florida statute's limits on use of algorithms to organize candidate-related and journalistic content are similarly vague in specifying the conduct required, unless interpreted by a plain meaning that would render platform operations impossible. *See* Fla. Stat. § 501.2041(2)(h). Algorithms are, as Justice Kagan has noted, "endemic to the Internet." Transcript of Oral Argument at 9, *Gonzalez v. Google LLC,* 598 U.S. 617 (2023). There is no way for platforms to design and present their constantly evolving webpages or apps without using algorithms.

Speech ranking requirements. More fundamentally, the rules established by both Florida and Texas seem to assume the existence of a platonic ideal—a correct way of ranking, ordering, or exposing users to particular speech, departure from which would "deny equal access or visibility" to or "discriminate against" particular content. Tex. Civ. Prac. & Rem. Code § 143A.001.

The idea of a correct "baseline" for ranking speech is absurd as both a legal and technical matter. *See* Luke Thorburn et al., *Making Amplification Measurable*, Tech Policy Press (Apr. 28, 2023), https://perma.cc/E4ZV-TRX3 (last visited Dec. 5, 2023). Chronological ordering is no solution. In addition to deviating from users' apparent preferences, it rewards frequency of posts without regard to users' actual interests, and can lead to increased spam, irrelevant posts, and "borderline" or sensationalist content. *See* Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. Free Speech L.

227, 255-59 (2021). A mandate for platforms to provide "equal" access to all posted content, or to rank without "discriminating" is meaningless and unconstitutionally vague. A law that requires *courts* to decide what ranking is correct simply puts them in the role of making content-based value judgments about the relative importance of speech.

CONCLUSION

Florida and Texas seek to ensure that diverse voices are heard on social media platforms, but they do so in a manner that is antithetical to the First Amendment. They grant power over speech to the State. S.B. 7072 and H.B. 20 use that power to impose content-based preferences, rules that are likely to *reduce* distribution of lawful speech, and mandates that are vague and unworkable.

This Court has been rightly skeptical of laws that take away individual speakers' and listeners' "capacity to choose," and instead assume that "the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818. The Florida and Texas laws show the folly of that assumption. The States' free-expression goals can be far better advanced by putting control in the hands of individual Internet users.

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