

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, D.B.A. NETCHOICE, ET AL.,

Respondents.

NETCHOICE, LLC D/B/A/ NETCHOICE, ET AL.,

Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF TEXAS,

Respondent.

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

**BRIEF OF CENTER FOR DEMOCRACY &
TECHNOLOGY AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS IN NO. 22-
277 & PETITIONERS IN NO. 22-555**

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INTEREST OF THE *AMICUS CURIAE*

The Center for Democracy & Technology (CDT) is a non-profit public interest organization. For over twenty-five years, CDT has represented the public's interest in an open, decentralized Internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates before legislatures, regulatory agencies, and courts in support of First Amendment rights on the Internet, including limits on governmental authority to compel or to silence speech.¹

A key issue in these cases is whether social media platforms' content moderation decisions—their determinations regarding which third-party content to prohibit and how to display third-party content to their users—constitute the exercise of editorial discretion protected by the First Amendment. *Amicus* submits this brief to explain how platforms make these decisions in order to demonstrate that platforms exercise the very same editorial discretion that this Court has consistently held in a variety of contexts to be protected by the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present questions regarding the validity under the First Amendment of two sets of statutes. First, laws regulating social media platforms' moderation of third-party content by barring

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

platforms from deciding to remove or otherwise deter access to that content. Second, laws requiring platforms to provide individualized explanations of their content-moderation decisions to the affected users.

This brief explains that the provisions regulating platforms' content moderation are unconstitutional because they interfere with platforms' exercise of editorial discretion in violation of the First Amendment.

Social media platforms host content supplied by third parties—the platforms' users. Virtually all platforms exercise editorial discretion over third-party content through the formulation and application of content moderation standards. These standards define the categories of third-party content that the platform prohibits, which reflect the platform's judgment regarding the content its users may not want, as well as the type of community it seeks to build and/or the values or messages it wishes to convey. Different platforms adopt different standards, just as different newspapers have different content on their opinion pages or in their letters to the editor. And those standards can and do change over time.

Platforms invest substantial resources in technological tools and human reviewers in order to identify content that violates their standards, determinations that themselves often require the exercise of editorial judgment. Once identified, the platform can take any of several actions—such as removing the content; making the content less likely to be viewed by users; or adding explanatory material to the content.

Platforms also exercise editorial discretion with respect to the third-party content that complies with their terms of service—by selecting and organizing the content that each user sees. That process is

essential because platforms host a huge volume of third-party content. Without some system to single out the content that the platform believes will interest each particular user, users would receive a random selection of third-party content—the online equivalent of snippets randomly selected from pages of different books in the Library of Congress.

A platform makes these selections by applying its algorithm to a set of data collected from the user as well as other information the platform deems relevant. Making choices about what content to display and how to display it is the quintessential activity of traditional content distributors. Here, each platform’s algorithm embodies its editorial judgments about what content may be most interesting to its users.

Platforms’ exercise of editorial discretion with respect to third-party content are entitled to the same First Amendment protection that this Court has accorded to exercises of such editorial discretion in other contexts—to newspapers, corporations, and parade organizers, among others. Because the challenged laws regulating platforms—like the state laws held invalid in those other contexts—would force platforms to convey messages to which they object, these laws are unconstitutional.

ARGUMENT

I. Social Media Platforms Exercise Substantial, Active Editorial Discretion Regarding Third-Party Content.

“Content moderation” refers to the set of policies, systems, and tools that online platforms hosting third-party content create and then employ to shape their users’ experience. It includes deciding what third-party content to allow or forbid, as well as how that

content will be displayed and arranged for individual users.²

As the Eleventh Circuit explained, “a social-media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby participate in the community it has created.” 22-277 Pet. App. 6a. That “creates a virtual space in which every user * * * can be both speaker and listener.” *Ibid.*

To perform this role, “platforms invest significant time and resources into editing and organizing * * * users’ posts into collections of content that they then disseminate to others.” 22-277 Pet. App. 6a.

Different platforms permit different types of third-party content, and prioritize different types of content, depending on the audiences or interests that they target and the platform’s determination of the types of content that are beneficial or detrimental to its users. In addition, platforms may strictly control the third-party content that they host, or allow relatively unmoderated forums for discussion, or set the dial somewhere in between.³

Platforms’ different choices regarding the standards for permissible content enable them, in the Eleventh Circuit’s words, to “develop particular market niches, foster different sorts of online communities,

² See Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1, 5 (2021); James Grimmelman, *The Virtues of Moderation*, 17 Yale J.L. & Tech. 42, 47 (2015).

³ See Nellie Bowles, *The Complex Debate Over Silicon Valley’s Embrace of Content Moderation*, N.Y. Times (June 5, 2020); Will Duffield, *Two Cheers For Unfiltered Information*, Techdirt (May 29, 2020).

and promote various values and viewpoints.” 22-277 Pet. App. 6a-7a. That benefits users, who are able to choose the kind of information environment in which they wish to participate.

The content moderation process generally encompasses a number of different steps:

- specifying permissible and impermissible content as well as defining the factors that determine which permissible content will be displayed to a particular user;
- detecting content that may violate the platform’s policies or applicable law;
- evaluating that content to determine whether it in fact violates a host’s policies or the law;
- taking an enforcement action against violative content, which can include removing the content or “deprioritizing” the content so it is less likely to be displayed to users;
- allowing the third party who submitted the content to appeal or otherwise seek review of a content moderation decision that he or she believes was erroneous; and
- educating users about content moderation policies and their enforcement.⁴

As we next discuss, each step requires the platform to exercise editorial discretion about the content it

⁴ Seny Kamara et al., *Outside Looking In: Approaches to Content Moderation in End-to-End Encrypted Systems*, Ctr. for Democracy & Tech. 9–11 (2021).

wishes to allow or forbid, and how to display or arrange that content.

A. Standards governing third-party content vary from platform to platform based on the platform’s purpose and standards.

1. *Platforms adopt terms of service specifying standards for third-party content and modify those standards based on changing circumstances and feedback from their stakeholders.*

To open an account on a social media platform, users virtually always are required to accept the platform’s terms of service.⁵

The terms of service typically describe an aspirational goal for the community of users that the platform seeks to create. Facebook, for example, seeks to “be a place where people feel empowered to communicate.”⁶ Glassdoor, “a thriving community for workplace conversations,” is “inspired by a vision to make positive workplace change through radical transparency.”⁷ And at Etsy, “sellers use community spaces to find inspiration, share knowledge, discuss ideas, and

⁵ See, e.g., X, *Terms of Service* (Sept. 29, 2023), <https://bit.ly/46H2hFK> (“You may use the Services only if you agree to form a binding contract with us and are not a person barred from receiving services under the laws of the applicable jurisdiction”); Instagram, *Terms of Use* (July 26, 2022), <https://bit.ly/3NfIdTS> (“When you create an Instagram account or use Instagram, you agree to these terms”).

⁶ Facebook, *Facebook’s Community Standards*, <https://bit.ly/47ZUZ0E> (last visited Nov. 26, 2023).

⁷ Glassdoor, *About Us*, <https://bit.ly/46GYatn> (last visited Nov. 30, 2023).

build relationships that help them grow their businesses.”⁸

The terms of service virtually always identify the categories of third-party content that the platform prohibits.⁹

First, platforms bar illegal content—child pornography, works that infringe copyrights, and other material that is prohibited by law.¹⁰

⁸ Etsy, *Community Policy* (May 25, 2023), <https://etsy.me/3NccMdh>.

⁹ Some platforms use their terms of service to set baseline standards for prohibited conduct but then empower their users to adopt additional content rules that reflect users’ preferences and values. For example, the social media site Reddit consists of a network of communities called “subreddits” that are created and run by users. Reddit, *Reddit Content Policy*, <https://bit.ly/3uMnC3p> (last visited Dec. 7, 2023). While Reddit itself has a content policy, it also allows each individual subreddit to shape its own culture by establishing more specific rules. *Ibid.* Thus, a subreddit devoted to respectful discussions about the Catholic faith can bar content “[a]dvocating leaving the Catholic Church or disobedience to her teachings or her leaders.” See Reddit, *Catholicism: All about the Catholic faith*, <https://bit.ly/485HP2j> (last visited Dec. 7, 2023). A subreddit devoted to a popular television show prohibits “series spoilers” about the show in titles of posts. See Reddit, *The Great British Bake Off*, <https://bit.ly/41ceUra> (last visited Dec. 7, 2023).

¹⁰ See, e.g., Facebook, *Adult Nudity and Sexual Activity*, <https://bit.ly/3tbeSTK> (last visited Dec. 3, 2023) (“We restrict the display of nudity or sexual activity because some people in our community may be sensitive to this type of content. Additionally, we default to removing sexual imagery to prevent the sharing of non-consensual or underage content”); YouTube, *Copyright*, <https://bit.ly/3NeEB4C> (last visited Dec. 3, 2023) (“Creators should only upload videos that they have made or that they’re authorized to use. That means they should not upload videos they didn’t make, or use content in their videos that someone else

Second, many platforms prohibit content they believe their users will find objectionable. That category may include statements supporting terrorism, hate speech, violent or graphic content, nonconsensual intimate images, promotion of suicide and self-harm, and misinformation.

For example, Facebook prohibits content that “praises” or “substantively supports” violent events or their perpetrators, including terrorist attacks or hate crimes; and content that “praises” or “substantively supports” certain hateful ideologies, such as Nazism and white supremacy.¹¹

Different platforms take different approaches—and users can review the standards and choose services with the approach they prefer.

For example, X “limit[s] amplification of misleading content,” and only removes posts “if [the] offline consequences could be immediate and severe.”¹² X also allows users to attach “a note” containing “additional information” to posts that may be misleading.¹³

Meta, by contrast, views misinformation as “different from other types of speech addressed in [its]

owns the copyright to, such as music tracks, snippets of copyrighted programs, or videos made by other users, without necessary authorizations”); X, *The X Rules*, <https://bit.ly/489zJWF> (last visited Dec. 3, 2023) (“You may not use our service for any unlawful purpose or in furtherance of illegal activities”).

¹¹ Facebook, *Dangerous Individuals and Organizations* (Nov. 12, 2021), <https://perma.cc/Y964-6W5S>; see also TikTok, *Suicide & Self-Harm* (Nov. 12, 2021), <https://perma.cc/A2Y4-5BXS> (prohibiting content promoting or glorifying suicide and self-harm).

¹² X, *How we address misinformation on X*, <https://bit.ly/47BGfFD> (last visited Nov. 30, 2023).

¹³ *Ibid.*

Community Standards because there is no way to articulate a comprehensive list of what is prohibited.”¹⁴ Meta’s platforms (Facebook and Instagram) therefore “remove misinformation where it is likely to directly contribute to the risk of imminent physical harm.”¹⁵ They also remove “content that is likely to directly contribute to interference with the functioning of political processes and certain highly deceptive manipulated media.”¹⁶

Third, platforms prohibit content that, even though lawful and unobjectionable, is inconsistent with their principles and purposes.

The International Automotive Technicians Network, for example, hosts “2.5 million messages and roughly 500 posts,” but is restricted to “automotive topics.”¹⁷ The Vegan Forum—featuring “[a]ll things vegan in one elegant” place—refuses to host content from “members who promote contrary agendas.”¹⁸ And Barbershop Forums—a “meeting place and online community to talk about men’s stuff just as if they were in a physical barbershop”—hosts only discussions on topics that are “of interest to men,”

¹⁴ Meta, *Misinformation*, <https://bit.ly/41b9hcM> (last visited Nov. 30, 2023).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ iATN, *Professional Automotive Discussion Forums*, <https://bit.ly/47IO8ZL> (last visited Nov. 26, 2023).

¹⁸ Vegan Forum, *Membership Rules*, <https://bit.ly/47QQciM> (last visited Nov. 26, 2023).

including “male grooming,” “men’s haircuts,” and “the art of shaving.”¹⁹

Fourth, platforms review and revise their content policies and terms of service over time and in response to changing circumstances and feedback from stakeholders.²⁰

For example, several platforms reacted to Russia’s invasion of Ukraine by making changes to their content moderation policies or practices regarding content from Russia’s state-sponsored media outlets and made other changes to their content policies to address disinformation about the war.²¹

In sum, a platform’s content moderation standards are the means by which the platform exercises its editorial discretion to shape each user’s experience to accord with the service it advertised.

¹⁹ Barbershop Forums, *About*, <https://bit.ly/4aaKpWu> (last visited Nov. 30, 2023).

²⁰ See, e.g., Twitch, *Community Guidelines*, <https://link.twitch.tv/community-guidelines> (last visited Nov. 30, 2023) (“We consider our guidelines to be a living document”); Yubo, *Community Guidelines*, <https://bit.ly/3GxXpIw> (last visited Nov. 30, 2023) (these “guidelines are a living document”); Apple, *App Store Review Guidelines*, <https://apple.co/3NetlFr> (last visited Nov. 30, 2023) (“This is a living document”).

²¹ See Human Rights Watch, *Russia, Ukraine, and Social Media and Messaging Apps* (Mar. 16, 2022); Mathew Ingram, *War in Ukraine is Latest Platform Moderation Challenge*, Col. J. Rev., (Mar. 31, 2022).

2. *Platforms actively enforce their terms of service by expending substantial resources to identify violative content and take action against that content.*

Platforms do not simply set standards and expect users to self-enforce. Most platforms actively enforce their standards—editing their content to conform to the standards.

Enforcement of content moderation policies involves two basic steps. The platform first must identify third-party content that violates its policies. Second, it must decide what action to take with respect to that content.

Identifying unlawful or objectionable conduct is a demanding task because of the enormous volume of third-party content posted on platforms. As this Court recently observed, “for *every minute* of the day, approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter.”²²

Platforms expend considerable efforts, using a variety of tools, to identify third-party content that violates their terms of service.²³

Algorithms are used to block some content—such as child sexual abuse material—from being uploaded to the platform. This “*ex ante* algorithmic moderation” takes place after the user hits “upload,” and before the content is placed on to the website.²⁴ In that extremely

²² *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023).

²³ See generally Goldman, 28 Mich. Tech. L. Rev. at 23–39; Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1636 (2018).

²⁴ Klonick, 131 Harv. L. Rev. at 1636.

short window of time, the platform applies software to check the submitted picture or video against a database of known child pornography. If there is a match, the content is blocked from appearing on the website.

Platforms detect and remove copyrighted content using a somewhat similar process—software that “allows creators to give their content a ‘digital fingerprint’ so that it can be compared against other uploaded content.”²⁵ In addition, copyright holders can alert platforms about infringing content through “notice and takedown” procedures.²⁶

Platforms use other cutting-edge technology to identify objectionable content. For example, YouTube employs algorithms and human reviewers to identify and remove terrorist content²⁷ and Facebook combines artificial intelligence tools and human reviewers to accomplish that task.²⁸ The decisions to create and use these technologies to aid in identifying potentially violative content are themselves editorial choices made by platforms.

²⁵ *Id.* at 1637. These systems are not perfect. Because content-filtering software cannot identify context or nuance, it cannot evaluate whether a particular use of copyrighted material is fair use or falls under some other copyright exception. Carey Shenkman *et al.*, *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, CDT, (May 20, 2021), <https://bit.ly/3TkGGQa>.

²⁶ Klonick, 131 Harv. L. Rev. at 1637.

²⁷ Rita Katz, *To Curb Terrorist Propaganda Online, Look to YouTube. No, Really*, *Wired* (Oct. 20, 2018), <https://bit.ly/3Td4hSQ>.

²⁸ *Terrorism and Social Media: #IsBigTechDoingEnough?*, *Hearing Before the S. Comm. On Commerce, Science and Transportation*, 115th Cong. 6 (2018) (statement of Monika Bickert, Head of Product Policy and Counterterrorism, Facebook).

In addition, a substantial amount of objectionable content is identified through platform users' complaints. Typically, once a user flags a post, that material is designated for review by a content moderator, who, in turn, decides whether it violates any of the platform's rules.²⁹

To make that determination, the moderator "act[s] in a capacity very similar to that of a judge."³⁰ Moderators "exercise professional judgement concerning the application of a platform's internal rules."³¹ Throughout the process, they are "expected to use legal concepts like relevance," analogical reasoning, and "multifactor tests."³²

These enforcement decisions can require reviewers to make difficult editorial judgment calls, particularly when third-party content falls into a "gray area" that defies easy categorization.³³ For example, a platform that prohibits users from posting forged or altered information must decide how to apply this policy to a news outlet that posts a clip of a "deepfake" video of a political candidate as part of a story about how this technology can spread misinformation.³⁴ Both X and Meta, for instance, consider whether content they otherwise find objectionable is "newsworthy" in

²⁹ Klonick, 131 Harv. L. Rev. at 1639.

³⁰ *Id.* at 1642.

³¹ *Ibid.*

³² *Ibid.*

³³ See *Nuts & Bolts of Content Moderation: A Primer for Policymakers on Content Moderation* 5, 7–8, Engine & Charles Koch Inst.(Sept. 2019).

³⁴ *Id.* at 7.

judging whether it should nevertheless be published—and if so, how best to contextualize it.³⁵

This content moderation activity consumes significant resources. According to recent reports submitted to the European Union, Meta employs 15,000 human reviewers,³⁶ Snapchat approximately 2,200,³⁷ and X nearly 2,300.³⁸

When a platform identifies content that violates its terms of service, the platform must decide what action to take—which involves more than just the binary decision whether to take down content or allow it to remain on a service. The platform may choose to take other actions to change the manner or place in which content is displayed.

For example, the platform may decrease the availability of a post that violates or comes close to violating its content policies by downgrading the post’s visibility in search results or in users’ displays of third-party content.³⁹ In addition, or alternatively, the

³⁵ Meta, *Our Approach to Newsworthy Content* (Jan. 19, 2022), <https://perma.cc/7TR5-NEX2>; Twitter, *Our Approach to Policy Development and Enforcement Philosophy* (Mar. 18, 2022), <https://perma.cc/KVS2-PAMU>.

³⁶ Meta, *Transparency Report for Facebook* (Oct. 27, 2023), <https://bit.ly/3GxYGPE>; Meta, *Transparency Report for Instagram* (Oct. 27, 2023), <https://bit.ly/46NUgyS>.

³⁷ Snapchat, *European Union* (Oct. 25, 2023), <https://bit.ly/3uWpoi8>.

³⁸ X, *Opening Remarks* (Oct. 20, 2023), <https://bit.ly/3RetzO9>.

³⁹ See Gabriel Nichols, *Shedding Light on Shadowbanning*, CDT, (April 26, 2022), <https://bit.ly/46LDJLM>. Platforms also make choices regarding whether to notify users of these content moderation decisions based on various factors, including whether they are trying to educate a user on how not to violate rules in

platform may restrict users’ ability to forward or share the material. It also may employ “downranking”—which eliminates algorithmic delivery of the content, requiring users who wish to see such conduct to seek it out for themselves.⁴⁰ Platforms may also choose to use their own affirmative speech to enforce their content policies, such as by adding a fact-check or a warning before users may access certain content.⁴¹

Actions taken by Meta’s platforms (Facebook and Instagram) and X regarding posts concerning the war between Israel and Hamas illustrate the use of these approaches—and the different choices that platforms may make.

With respect to misinformation, violent or sensitive content, and hateful content, Meta stated that it would take “[s]tronger steps to avoid recommending potentially violating and borderline violating content.”⁴² That includes “further reduc[ing] the possibility” that users would see “potentially violating and borderline content” by “lowering the threshold at which” the platform “will take action to avoid recommending this type of content.”⁴³ It also “reduc[ed] the

the future, or preventing bad actors from learning how to evade rules in the future.

⁴⁰ See Goldman, 28 Mich. Tech. L. Rev. at 23–39; Tarleton Gillespie, *Do Not Recommend? Reduction as a Form of Content Moderation*, 8 Soc. Media + Soc’y 1 (July-Sept. 2022).

⁴¹ *Ibid.*

⁴² Meta, *Meta’s Ongoing Efforts Regarding the Israel-Hamas War* (Oct. 13, 2023), <https://bit.ly/3NhSG1g>.

⁴³ *Ibid.*

visibility of potentially offensive comments under posts on Facebook and Instagram.”⁴⁴

By contrast, X “believes that it’s in the public’s interest to understand what’s happening in real-time,” and therefore has “allowed a range of media to remain on the platform,” including content that “meets [X’s] definition of Graphic Content” (*i.e.*, “any media that depicts death, violence, medical procedures, or serious physical injury in graphic detail.”).⁴⁵

* * *

The volume of unlawful and objectionable content addressed through platforms’ various moderation processes is enormous. In just the second quarter of 2023:

- YouTube removed some 7,365,556 videos, of which 2,508,088 implicated child safety, 1,254,654 contained harmful or dangerous content, and 483,144 contained harassment or bullying.⁴⁶
- TikTok removed 106,476,032 videos from its site—15,439,024 of which violated the platform’s safety and civility policy, and 41,632,128 of which contained sensitive and mature themes deemed inappropriate for the platform.⁴⁷

⁴⁴ *Ibid.*

⁴⁵ X Safety, *Maintaining the safety of X in times of conflict* (Nov. 14, 2023), <https://bit.ly/3R9NKfR>; X Help Center, *Sensitive Media Policy* (Mar. 2023), <https://bit.ly/47KKUVE>.

⁴⁶ YouTube, *YouTube Community Guidelines Enforcement*, <https://bit.ly/47Wf5Jo> (last visited Nov. 26, 2023).

⁴⁷ TikTok, *Community Guidelines Enforcement Report*, <https://bit.ly/3Gv0wk7> (last visited Nov. 26, 2023).

- Instagram took some moderation action with respect to 6.6 million pieces of content featuring suicide or self-harm, 6.8 million pieces of content featuring bullying or harassment, and 321,000 pieces of content featuring child nudity or physical abuse.⁴⁸
- Facebook took action against 51.2 million pieces of content featuring adulty nudity and sexual activity, 6.4 million pieces of content featuring suicide and self-injury, 7.2 million pieces of content featuring child sexual exploitation, and 1.1 million accounts of organized hate group members.⁴⁹

Platforms also are faced with an avalanche of “spam”—the electronic version of unsolicited junk mail.⁵⁰ In the second quarter of 2023, for example, YouTube removed 767,476,193 comments, of which 84.7%—or, 650,173,151—were spam.⁵¹ In the same period, TikTok removed 577,875,814 fake “likes” from accounts on its platform.⁵²

The substantial efforts in which platforms engage to implement their content moderation policies

⁴⁸ Instagram, *Transparency Reports*, <https://bit.ly/3Rxfrkq> (last visited Nov. 26, 2023).

⁴⁹ Facebook, *Transparency Reports*, <https://bit.ly/3Rxfrkq> (last visited Nov. 26, 2023).

⁵⁰ National Institute of Standards and Technology, Computer Security Resource Center, *Spam*, <https://bit.ly/3R3xn4A> (last visited Dec. 5, 2023).

⁵¹ YouTube, *Community Guidelines Enforcement*. Note that this only accounts for the amount of content removed and not for content against which no action was taken or lesser enforcement actions were taken (*i.e.*, warnings, labels, downranking, etc.).

⁵² TikTok, *Community Guidelines Enforcement Report*.

further demonstrates their exercise of editorial discretion regarding third-party content.

B. Platforms curate the third-party content they deliver to each user.

Platforms also exercise editorial discretion with respect to the third-party content that complies with their terms of service—by selecting and organizing the content that each user sees.

This curation process is essential. Platforms host a huge volume of third-party content, and without some sort of system to identify the content that would interest each particular user, each user’s feed would be cluttered with an unending barrage of randomly selected and delivered posts.

As this Court recently explained, platforms “have developed ‘recommendation’ algorithms that automatically match * * * with each user” third-party content as well as advertisements.⁵³ Platforms have designed “the algorithms [to] generate those outputs based on a wide range of information about the user, the advertisement, and the content being viewed.”⁵⁴ Thus, “a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks, whereas someone who likes to watch professorial lectures might see collegiate debates and advertisements for TED Talks.”⁵⁵

Making choices about what content to display and how to display it is the quintessential activity of traditional content distributors (for example, in

⁵³ *Taamneh*, 598 U.S. at 480.

⁵⁴ *Id.* at 480-81.

⁵⁵ *Id.* at 481.

newspapers’ selection of material for their opinion pages). The same is true online—even if those choices are effectuated through an automated process. Indeed, each platform’s algorithm embodies its editorial judgments about what content may be most interesting to its users, be most important for its users to view, or meet some other criterion—as well as its decisions about how best to make that determination.

Typically, platforms collect data from users over time, and feed that data into algorithms designed to identify each user’s individual interests.⁵⁶ Depending on the platform and the user’s settings, algorithm results can be further tailored based on “the user’s ‘context:’ their geolocation, device, the content they have interacted with immediately prior, and so on.”⁵⁷

Most platforms also incorporate other types of information into their ranking algorithms in service of other goals, such as presenting a variety of informative content, prioritizing reliable sources, highlighting content from smaller creators to encourage other users to create content on the platform, or selecting content that is most appealing to appear alongside advertisements.⁵⁸

Each platform uses its own unique algorithm to analyze its selected data, with the goal of fostering the particular community that the platform seeks to

⁵⁶ Arvind Narayanan, *Understanding Social Media Recommendation Algorithms*, Knight First Amendment Institute (Mar. 9, 2023), <https://bit.ly/3TePqaO>.

⁵⁷ *Id.* at 20.

⁵⁸ Luke Thorburn et al., *How Platform Recommenders Work*, Medium, Understanding Recommenders (Jan. 20, 2022), <https://tinyurl.com/34kd7c9a>.

build.⁵⁹ YouTube, for example, “optimizes for expected watch time.”⁶⁰ Facebook curates to generate and enhance “Meaningful Social Interactions”—“those with emotional, informational, or tangible impact that people believe enhance their lives, the lives of their interaction partners, or their personal relationships.”⁶¹ Spotify finds and adds songs or podcast episodes to the end of an existing playlist that it believes will appeal to the user based on the content of their playlist or podcast listening.⁶² And, of course, most platforms seek to maximize user engagement on the platform.

Based on the information that the platform uses as inputs for each user, the algorithm narrows down the universe of available content and populates the user’s display with an individually curated set of posts that the user is most likely to engage with—generally ranked in order from most engaging to least.⁶³

In sum, each platform’s curation algorithm reflects the platform’s editorial judgements regarding which content to display to each user. Users benefit from platforms’ freedom to make their own choices. A marketplace of platforms that approach algorithmic

⁵⁹ Narayanan, at 22-23.

⁶⁰ Narayanan, at 19.

⁶¹ Eden Litt, et al., *What Are Meaningful Social Interactions in Today’s Media Landscape? A Cross-Cultural Survey*, 6 Soc. Media & Soc. 1 (July-Sept. 2020).

⁶² Dmitry Pashtukov, *Inside Spotify’s Recommender System: A Complete Guide to Spotify Recommendation Algorithms*, Music Tomorrow Blog (Feb. 9, 2022), <https://perma.cc/4BNE-F7RG>.

⁶³ Narayanan, at 19-20; see also Priyanjana Bengani et al., *What’s Right and What’s Wrong with Optimizing for Engagement*, Medium, Understanding Recommenders (Apr. 27, 2022), <https://tinyurl.com/ynk2kmw2>.

recommendation and content moderation differently allows users to choose for themselves the information environment in which they wish to participate.

II. The Statutory Provisions Regulating Platforms' Curation Of Third-Party Content Violate The First Amendment.

This Court's precedents leave no doubt that a platform's decisions regarding removal of third-party content and decisions regarding which third-party content to display to which users are entitled to full First Amendment protection. Because the challenged provisions would impose viewpoint and content-based restrictions on platforms' content moderation decisions, they are unconstitutional.

The First Amendment protects a speaker's exercise of editorial discretion to determine whether or not to incorporate third-party content into its speech. Indeed, forcing a speaker to convey third-party content "violates the fundamental rule of protection under the First Amendment"—"that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

Thus, in holding unconstitutional a statute requiring a newspaper to include a political candidate's reply to criticism appearing in the newspaper, the Court stated "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That "intrusion

into the function of editors” violated the First Amendment. *Ibid.*

The Court’s subsequent decisions make clear that this principle is not limited to newspapers but rather protects anyone who exercises discretion in determining what third-party content to incorporate into their own speech. “The identity of the speaker is not decisive in determining whether speech is protected.” *Pacific Gas & Electric Co. v. Public Utilities Comm’n of California*, 475 U.S. 1, 8 (1986) (plurality opinion).

Thus, the Court in *Pacific Gas & Electric Co.* barred California from compelling a utility company to include particular third-party content in the company’s monthly newsletter. “The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly.” 475 U.S. at 11 (plurality opinion).

California’s compelled third-party access “impermissibly require[d] [the speaker] to associate with [third-party] speech with which [the speaker] may disagree.” *Pacific Gas & Electric Co.*, 475 U.S. at 15 (plurality opinion). And it “force[d] speakers to alter their speech to conform with an agenda they do not set.” *Id.* at 9 (plurality opinion). That violated the Constitution because “the choice to speak” protected by the First Amendment “includes within it the choice of what not to say.” *Id.* at 16 (plurality opinion); see also *id.* at 24 (Marshall, J., concurring in the judgment) (finding First Amendment violation because utility had not opened its newsletter for use by the public and the compelled third-party content was alleged to hinder the utility’s “own expression”).

For similar reasons, the Court held Massachusetts could not require a parade organizer to include a particular contingent notwithstanding the organizers' objection to the message that would have been sent by including it. The Court determined that the parade itself was expressive and therefore the organizer's decisions regarding the parade's content were protected by "its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Hurley*, 515 U.S. at 574.

"Rather like a composer, the [parade organizer] selects the expressive units of the parade from potential participants, and * * * each contingent's expression in the [organizer's] eyes comports with what merits celebration on that day." *Hurley*, 515 U.S. at 574. A speaker "does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70.

Because "every participating unit affect[ed] the message conveyed by the private organizers," Massachusetts' order "essentially require[ed the organizers] to alter the expressive content of their parade." *Hurley*, 515 U.S. at 572-73. That violated the First Amendment. Indeed, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Ibid.* (quoting *Pacific Gas & Electric Co.*, 475 U. S. at 11 (plurality opinion)).

Those principles control this case.

Platforms' aggregation, curation, and dissemination of third-party content plainly constitutes speech protected by the First Amendment. As the Eleventh Circuit explained, just like the newspaper, utility

company, and parade organizer, “social-media platforms regularly make choices ‘not to propound a particular point of view.’ Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups.” 22-277 Pet. App. 26a; see pages 3-20, *supra* (discussing platforms’ content moderation)

The Texas and Florida statutes interfere with platforms’ exercise of that editorial judgment in the same way that the state laws in this Court’s cases interfered with the speakers’ decisions not to include third-party content: depriving them of “the autonomy to choose the content of [their] own message[s].” *Hurley*, 515 U.S. at 573. In particular, the statutory provisions barring platforms from removing or de-prioritizing certain third-party content force a platform to convey messages that it does not want to convey. The same is true of the provision imposing the obligation of “consistent” application of platform standards—with consistency to be determined by the government.

Government regulations that require a speaker to alter their speech are content-based regulations that trigger strict scrutiny review. *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Hurley*, 515 U.S. at 573. The States cannot satisfy that demanding standard. See 22-277 Pet. App. 58a-62a (holding that Florida’s justifications could not satisfy the less-demanding intermediate scrutiny test).

The States’ arguments against this straightforward application of precedent are unavailing.

First, they contend that platforms are not protected by the First Amendment because they do not

have a sufficiently clear message and are not reviewing a sufficient amount of third-party content. Both arguments were squarely rejected in *Hurley*. This Court held that neither the parade organizer’s lack of a clear message nor its “lenien[cy] in admitting participants” deprived it of First Amendment protection. 515 U.S. at 569.

Second, they point to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*). Both are inapposite.

PruneYard rejected a mall owner’s First Amendment challenge to a state law requiring the owner to allow political petitioning on its property. But, as the *Hurley* Court explained, that decision “did not involve ‘any concern that access to this area might affect the shopping center owner’s exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets’ The principle of speaker’s autonomy was simply not threatened in that case.” 515 U.S. at 580. Here, by contrast, the state laws require the platforms to include speech to which they object.

FAIR does not apply because the military recruiting didn’t interfere with law schools’ own speech—it “neither limit[ed] what law schools may say nor required them to say anything.” 547 U.S. at 60.

Third, 47 U.S.C. § 230 does not alter the First Amendment analysis.

That statute generally immunizes providers of interactive computer services—a category that includes platforms—from claims that treat them as the “publisher or speaker” of third-party information. 47 U.S.C. § 230(c)(1). And it bars liability for “any action

voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” *Id.* § 230(c)(2).

Congress enacted this provision “to preserve the vibrant and competitive free market” for Internet services “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). And Section 230(c)(2) expressly protects content moderation decisions regarding any material a platform concludes is “objectionable.” It would be bizarre indeed to hold that a law protecting content moderation somehow limits First Amendment protection for those same decisions. “[C]ontent moderation ... is not only consistent with Section 230; its protection is the very *raison d’être* of Section 230.” 22-555 Pet. App. at 140a (Southwick, J., concurring in part and dissenting in part).

Certainly Congress’s decision to protect platforms against “publisher or speaker”-based liability for third-party content—and thereby eliminate what would have been a significant barrier to dissemination of that content—provides no basis for limiting platforms’ protection under the First Amendment. That is particularly true in light of Congress’s express purpose to leave platforms “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2).

Fourth, platforms are not subject to regulation as common carriers. As the Eleventh Circuit concluded, they do not exhibit the key characteristic of a common carrier: “a public offering * * * whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing”—because they “require users, as preconditions of access, to accept their terms of service

and abide by their community standards.” 22-277 Pet. App. 41a-42a (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)); see also 22-277 Pet. App. 43a (explaining that the Telecommunications Act of 1996 expressly distinguishes “interactive computer services”—a term that includes social media platforms—from common carriers).

Certainly a state cannot unilaterally classify an entity as a common carrier and thereby eliminate its protection under the First Amendment. 22-277 Pet. App. 43a-44a. And this Court in *Miami Herald* squarely rejected the argument that an entity’s success in the marketplace could provide justification for curtailing its First Amendment rights. 418 U.S. at 251, 258.

The state laws regulating content-moderation decisions therefore are invalid under the First Amendment.

CONCLUSION

The judgment of the court of appeals in No. 22-277 should be affirmed and the judgment of the court of appeals in No. 22-555 should be reversed.

Respectfully submitted.

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