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,
Respondents.

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

BRIEF OF THE UNITED STATES CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes & Bills

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's membership includes both social media companies and many businesses that rely on those platforms for commercial advertising. These platforms have diverse approaches to curating content, making expressive editorial choices about what third-party speech to publish and how to present that speech to users. Those distinctions, in turn, are attractive to different consumers and businesses and allow today's online marketplace to thrive.

The Texas and Florida laws threaten these business models and the commerce they support. And if sustained, the approach taken by these states could lead to regulation across a range of internet businesses that will stifle commerce and place

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

government in the position to regulate a great deal of private speech. The Chamber therefore has a strong interest in clarifying that the First Amendment prohibits the government from exercising control over the editorial judgments that private businesses make about the content that appears on their private websites. The Chamber urges the Court to protect the vibrant market for internet commerce by reaffirming the First Amendment's longstanding protections for the speech activity at the core of these cases.

SUMMARY OF THE ARGUMENT

These cases present two issues of particular importance to the business community: (1) whether the First Amendment prohibits state laws that restrict social media platforms' editorial decisions about the content they publish and disseminate, and (2) whether governments may impose burdensome requirements on those platforms to provide individualized explanations to users whose content has been restricted or removed. Neither can withstand the stringent constitutional scrutiny required.

I. The stakes of these cases reach beyond large social media platforms. The editorial decisions that those platforms make are critical to the commercial advertising that takes place on those websites. And the power that Texas and Florida claim poses a broader threat to online commerce. The same legal framework could be used to regulate other businesses that sell or provide products online and offer interactive features such as user reviews and messaging functions. If enforceable, such laws could lead these businesses to eliminate these highly popular features, which help consumers to make buying decisions, or

require companies to divert limited resources to explaining their efforts to curate content on their platforms—which would ultimately increase costs that would be passed on to consumers in the form of higher prices and less innovation.

II. The challenged regulations burden expressive activity at the core of the First Amendment.

A. The Court has long recognized that the type of speech at issue here is expressive. Publishers "speak" by curating and presenting the speech of others, and that speech can happen on the internet or in a newspaper, a parade, a theater, or any other forum. Editorial discretion—regardless of the editor's message, and irrespective of its motivation—has always been entitled to constitutional protection.

B. That Texas and Florida "found" social media platforms to be common carriers does not alter this conclusion. Expressive speech is entitled to First Amendment protections, and a state cannot strip a speaker of its constitutional rights merely by designating it a common carrier. Even if a speaker's common carrier status were legally relevant, social media companies lack the factual and legal characteristics of common carriers.

C. The lower courts also erred in their review of the challenged laws' requirement that a platform provide an individualized explanation when removing user content. Both the Fifth Circuit and Eleventh Circuit reviewed these laws under the deferential framework established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). But the *Zauderer* test is limited to laws aimed at preventing

misleading commercial advertisements by requiring the advertiser to disclose "purely factual and uncontroversial information about the terms under which his services will be available." *Id.* at 651. Decisions to remove or deprioritize content are not commercial advertisements; the individualized-explanation requirements do not work to prevent deception of consumers; and the required explanations do not consist of "purely factual and uncontroversial information." In addition, the significant burdens these laws impose on platforms provide a further reason to apply ordinary First Amendment scrutiny.

III. The challenged laws would give government an unprecedented degree of authority over expression in modern commerce that threatens core First Amendment values. Governments are ill-equipped to make fundamental decisions about how private actors design internet sites to serve their commercial interests. And concerns that large technology companies may dominate or skew public discourse provide no basis for making a novel exception to the First Amendment. In this instance, the time-honored response is to allow the marketplace for ideas to prevail—as the Court has done in countless other challenges across this Nation's history.

ARGUMENT

I. THE CHALLENGED LAWS HAVE SIGNIFICANT IMPLICATIONS FOR MODERN COMMERCE

These cases are about more than just social media's companies' First Amendment rights; the challenged laws threaten the framework for much modern commerce that takes place on the internet. Social media platforms play a vital role, connecting consumers

with companies and products and helping companies of all sizes reach new consumers through online advertising. The challenged laws would disrupt this vibrant economic ecosystem—and harm online commerce more generally.

A. The Challenged Laws Would Chill Commerce On Social Media Platforms

Social media platforms are vital resources for consumers. The vast majority of Americans—seven in ten, according to one study—use at least one social media platform. Pew Rsch. Ctr., *Social Media Fact Sheet* (Apr. 7, 2021).[2] In a 2023 survey, approximately 58% of U.S.-based social media users said they had purchased a product after seeing it on a social media platform. Valentina Dencheva, *Social Media Advertising and Marketing Worldwide – Statistics & Facts*, Statista (Oct. 23, 2023).[3] Unsurprisingly, businesses expend considerable resources to reach consumers through social media. In 2022, companies spent $230 billion on social media advertising, with spending expected to surpass $300 billion by 2024. Stephanie Chevalier, *Consumers Who Bought an Item After Seeing It on Social Media, by Country*, Statista (Oct. 17, 2023).[4]

The editorial judgments that social media platforms make about the content that appears on their websites are critical to this commerce, allowing

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[2] https://www.pewresearch.org/internet/fact-sheet/social-media/.

[3] https://www.statista.com/topics/1538/social-media-marketing/#topicOverview.

[4] https://www.statista.com/statistics/1275520/purchases-due-to-social-media-promoted-content-worldwide/.

platforms to create environments that will attract users and advertisers. Consumers do not wish to spend time on a platform overwhelmed with automatic spam posts from bots, offensive content, or explicitly inflammatory language. And platforms provide advertisers with "detailed suitability controls to determine where and whether advertisements, digital storefronts, and other business content appear in relation to different categories of user-generated content." Melissa Pittaoulis, *Hate Speech & Digital Ads: The Impact of Harmful Content on Brands*, Rsch. Ctr. Comput. & Commc'ns Indus. Ass'n at 3 (2023). Advertisers will be reluctant to promote their products alongside offensive speech or on platforms that drive away consumers. Experience confirms that relaxing or eliminating efforts to curate user-generated content can have drastic commercial consequences.[5]

B. The Positions Advanced By Texas And Florida Threaten Internet Commerce More Broadly

Although the Texas and Florida laws purport to apply only to large social media platforms, *see* H.B. 20

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[5] *See* CBS News, *A Year After Elon Musk Bought Twitter, X Is Struggling, Experts Say* (Oct. 28, 2023), https://www.msn.com/en-us/money/companies/a-year-after-elon-musk-bought-twitter-x-is-struggling-experts-say/ar-AA1iY6AZ (noting substantive changes to the nature of the platform following the dismantling of its user verification system, trust and safety advisory group, and content-moderation enforcement policies); David F. Carr, *One Year Into Musk's Ownership, X (Twitter) Down by Every Measure*, SimilarWeb (Oct. 17, 2023), https://www.similarweb.com/blog/insights/social-media-news/x-twitter-musk/ (finding that user traffic to X decreased by 14% from September 2022 to September 2023 and that the platform lost a substantial number of advertisers and revenue).

§ 2; S.B. 7072 § 2(1)(c), a decision upholding the constitutionality of those laws would magnify the threat to online commerce on other digital platforms.

Many sites that primarily sell products have features that mirror those that Florida and Texas single out as the basis for regulation.[6] For instance, scores of websites and apps are open to the public, permit users to make accounts, and allow users to exchange messages or post images. Indeed, consumers often look for precisely these features—reviews, user-uploaded images of products, and the ability to pose questions and receive answers—when deciding whether to engage in a commercial transaction.

If the Court holds that the Texas and Florida laws at issue here do not violate the First Amendment, governments will be empowered to impose similar requirements on a broader category of websites and seriously harm the vitality of internet commerce. Businesses prohibited from curating information in a way

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[6] Texas defines a social media platform as "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purposes of posting information, comments, messages, or images" and "functionally has more than 50 million active users in the United States in a calendar month." H.B. 20 § 2. Florida defines social media platforms as "any information service, system, Internet search engine, or access software provider" that, in relevant part: "[p]rovides or enables computer access by multiple users to a computer server, including an Internet platform or social media site"; "[d]oes business in the state"; and either (1) exceeds $100 million in gross annual revenue; or (2) "[h]as at least 100 million monthly individual platform participants globally." S.B. 7072 § 4 (cross-referencing Fla. S. § 501.2041(g)).

that is helpful to potential customers may choose to eliminate these user comments and reviews altogether—diminishing the quality of the user experience and reducing online transactions. And if businesses are forced to explain decisions to remove or reorder user comments and reviews, they will incur substantial expenses and divert resources that could be directed to innovation, expanding services, or helping consumers.

II. THE CHALLENGED LAWS IMPERMISSIBLY BURDEN EDITORIAL JUDGMENTS AT THE CORE OF THE FIRST AMENDMENT

NetChoice explains why the challenged laws violate the First Amendment. NetChoice *Moody* Br. 18-35; NetChoice *Paxton* Br. 35-49. The Chamber expands upon three points of particular importance to its membership. First, the decisions that social media platforms and other website publishers make about how to curate content are expressive activity protected by the First Amendment. Second, the States cannot escape First Amendment scrutiny of speech regulations by declaring that the entities they seek to regulate are "common carriers." And third, the Court's decision in *Zauderer* does not reach, and should not be expanded to reach, the expressive choices at issue in these cases.

A. Curating Content Involves Expressive Editorial Judgments Entitled To First Amendment Protection

Social media platforms engage in core First Amendment activities that this Court has always protected. The platforms set their own boundaries for permissible speech; they select speakers and content

to amplify; they arrange and disseminate speech based on user preferences; and they often append their own messages to others' speech. In a range of settings, this Court has confirmed that the First Amendment protects these choices. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 569-70 (1995) ("the presentation of an edited compilation of speech generated by other persons … fall[s] squarely within the core of First Amendment security"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (recognizing First Amendment right to exercise "editorial control and judgment" over content and presentation of material in newspapers); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569-70 (2011) ("dissemination" of information deserves First Amendment protection); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference.").

Like publishers in other mediums, social media platforms take diverse approaches to curating content on their platforms. *See Moody* Pet. App. 27a-28a (analyzing diversity in content-curation strategies). They make decisions about what types of content to allow on their platforms, what types of content to amplify, and the means and methods of such amplification. They also frequently change their policies, evolving and rebranding themselves in response to

shifting competitive objectives, audience preferences, and changes in corporate control.[7]

The First Amendment protects this right to editorial expression. And that is true regardless whether a publisher expresses a single, coherent message, or simply organizes and presents speech it deems "worthy of presentation." *Hurley*, 515 U.S. at 575; *id.* at 569-70 ("[A] private 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."). Presenting diverse—or even contradictory—viewpoints on the internet requires websites to select, organize, and present that content. All of those actions are expressive decisions reflecting the freedom of speech.

That commercial incentives underlie some websites' expressive decisions does not lessen their First Amendment protections. "While the burdened speech results from an economic motive, so too does a great deal of vital expression." *Sorrell*, 564 U.S. at 567; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976) ("Speech likewise is protected even though it is carried in a form that is 'sold' for profit." (internal quotation marks omitted)). "Does anyone think a speechwriter loses his First Amendment right to choose for whom he

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[7] *See* Kate Conger, *How Elon Musk Is Changing the Twitter Experience*, N.Y. Times (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/technology/elon-musk-twitter-changes.html.

works if he accepts money in return?" *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023).

When faced with laws that would compel private speakers to disseminate messages they would rather not, this Court has time and again reaffirmed that the First Amendment precludes such government interference with private choice. *See Miami Herald*, 418 U.S. at 258 (invalidating Florida law requiring newspapers to offer a "right of reply" to criticized political candidates); *Pac. Gas & Elec. Co. (PG&E) v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 17, 21 (1986) (plurality opinion) (invalidating California law requiring utility companies "to use its property as a vehicle for spreading a message with which it disagree[d]"); *Hurley*, 515 U.S. at 574-75 (invalidating requirement that parade organizers include a particular group conveying a message with which the organizers disagreed); *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating statute forcing an individual to display a message on a license plate that the individual found unacceptable).[8]

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[8] In non-expressive contexts, the Court has upheld regulations that required private property owners to open their property to other speakers. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76-77 (1980); *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.* (*FAIR*), 547 U.S. 47, 56 (2006). In both cases, the Court found no risk that the speakers' presence would affect the owner's right to free expression, or risk imputing the speakers' views to the owner. *See FAIR*, 547 U.S. at 60-61, 63-64 (law did not "limit[] what law schools may say nor require[d] them to say anything," and regulated recruiting activities that were not "inherently expressive"); *PruneYard*, 447 U.S. at 88 (no risk of "intrusion into the function of editors" in state provision permitting individuals to exercise of free speech and expression rights

As NetChoice explains, the challenged regulations here would override the platforms' editorial judgments by imposing state-preferred expressive choices. NetChoice *Moody* Br. 28-30, 32-35; NetChoice *Paxton* Br. 35-41. The First Amendment prohibits the government from replacing private decisions about what speech to feature with state-dictated editorial policies. "No government … may affect a speaker's message by forcing her to accommodate other views; no government may alter the expressive content of her message; and no government may interfere with her desired message." *303 Creative*, 600 U.S. at 596 (alterations, internal citations, and internal quotation marks omitted). As the Eleventh Circuit explained, the government has "no legitimate—let alone substantial"—interest in "leveling the expressive playing field" to counteract the editorial decisions of private speakers. *Moody* Pet. App. 58a-60a; *see Sorrell*, 564 U.S. at 578-79 ("State may not burden the speech of others in order to tilt public debate in a preferred direction"); *cf. also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (restricting speech of some to "enhance the relative voice of others" is an interest "wholly foreign to the First Amendment").

When the government itself is the speaker, it can moderate content to reflect its own values: it can select which content it wishes to amplify and what messages to exclude. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 472-73 (2009) (Free Speech

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in a private shopping center (internal quotation marks omitted)); *see also PG&E*, 475 U.S. at 12 (distinguishing *PruneYard* because owner had not alleged any infringement on his *own* right to speak).

Clause does not limit government's authority to select private monuments to display); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 213 (2015) (government may choose *not* to allow the display of certain messages on license plates). To deny that same right to private speakers flips the Constitution on its head. "The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019).

B. Social Media Platforms Are Not Common Carriers

The States attempt to justify their intrusion on expressive activity based on legislative "findings" that large social media platforms are "common carriers" subject to a duty of non-discrimination. H.B. 20 § 1(3), (4) (social media platforms are common carriers by virtue of their function and "market dominance"); S.B. 7072 § 1(5), (6) (comparing platforms to public utilities and declaring that they should be "treated similarly to common carriers"). One judge on the Fifth Circuit panel agreed, stating that common carrier doctrine "reinforced" the propriety of the Texas law. *Paxton* Pet. App. 9a (Oldham, J.). The Court should reject that attempt.

1. As the Eleventh Circuit explained, "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labelling it a common carrier." *See Moody* Pet. App. 43a. Rather, constitutional protections apply based on the expressive nature of the regulated activity. *See 303 Creative*, 600 U.S. at 592 ("no public accommodations law is immune from the demands of the Constitution" and such statutes "can sweep too broadly

when deployed to compel speech"); *Hurley*, 515 U.S. at 573 (government may not declare "speech itself to be the public accommodation"); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (a state public accommodations law cannot justify intruding on the right to free expressive association).

Allowing Texas and Florida to declare that social media entities are common carriers and, in turn, require them to host speech of all comers, would authorize governments to convert any expressive platform into forums for other people's speech to which the private party objects. On that logic, even a newspaper or magazine could be transformed into a common carrier. Such a governmental power cannot be reconciled with the basic theory of the First Amendment.

2. Even if a speaker's status as a common carrier were legally relevant, social media companies are not common carriers.

First, social media platforms do not operate like common carriers. Judge Oldham suggested that they do because they "hold [themselves] out to serve any member of the public without individualized bargaining." *Paxton* Pet. App. 60a. But almost all platforms require users to agree to explicit and detailed terms of service before joining and, more importantly, reserve the power to impose standards on third-party content. Facebook's terms of service, for example, require users to agree to follow the platform's community standards governing violence, sexual activity,

graphic content, and hate speech before they make an account.[9]

That these terms apply equally to all potential users does not support common-carrier status. *Contra id.* at 67a. The ability to accept or reject particular content is a defining feature of these terms. Each user must assent to this arrangement before they join a platform. As the Eleventh Circuit put it, a platform's services are available to a potential user *if and only if* that individual agrees to its terms of service and community standards. *Moody* Pet. App. 41a-42a. Content moderation then becomes a fundamental part of the user experience. When users sign up for a social media account, they are aware of the platform's policies and accept the nature of the platform's approach. The decision about what type of messages to post or read does not rest with each individual user. This is a bargained-for feature of social media services.

Social media platforms lack another key characteristic of common carriers: They are not mere conduits of information that third parties may employ to "communicate or transmit intelligence of their own design and choosing." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (internal quotation marks omitted). When a phone company transmits a user's message, it acts as a mere conduit. The user transmits its message to its own audience, without the phone company interfering based on its own judgment about the content. *See* Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J.

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[9] *Facebook Community Standards*, Meta, https://transparency.fb.com/policies/community-standards.

Free Speech Law 127, 127, 135 (2022). Social media platforms do not operate with such indifference. They do not merely host users' messages—they curate them, prioritize or deprioritize them based on user preferences, and actively remove content that violates their community standards. *See id.* Courts have emphasized this distinction, finding that true common carriers simply transmit messages of their users' choosing—and lack preferences of their own.[10] *See, e.g., Nat'l Ass'n of Regul. Util. Comm'rs v. FCC (NARUC I)*, 525 F.2d 630, 641 (D.C. Cir. 1976); *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC (NARUC II)*, 533 F.2d 601, 609 (D.C. Cir. 1976).

Finally, contrary to the Fifth Circuit's view, social media platforms lack the monopolistic characteristics that have informed this Court's common carrier analysis. S*ee, e.g., United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912) (describing nature of railroad monopoly). No one social media platform constitutes "the sort of unavoidable essential facility such as a local landline telephone company … or monopoly railroad facilities that have been traditionally

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[10] Section 230 of the Communications Decency Act presupposes and reaffirms that this editorial curation is expressive. If websites were acting as mere "conduits," Section 230's core provision would be superfluous. *See* 47 U.S.C. § 230(c)(1) (websites should not be "treated as the publisher or speaker" of content created by others). Instead, Section 230 reflects that websites *can* be publishers and speakers of third-party content in a way that a common carrier is not. And by shielding internet platforms from liability when they restrict access to material that they or their users consider objectionable, *see id.* § 230(c)(2)(A), Section 230 reflects Congress's judgment that websites (not governments) should be encouraged to moderate speech on their platforms.

classified as common carriers." Bhagwat, *supra*, at 138. Within the social media universe, the landscape is diverse and competitive, with multiple outlets for expression reaching different audiences. The platforms targeted by Texas and Florida therefore "are not the sorts of non-bypassable networks or services that have historically triggered common carrier treatment." *Id.* And, of course, social media platforms hardly occupy the field for public discourse. Messaging apps, online blogs, and comment sections in digital news publications provide outlets for online debate. Traditional print media remains available as well.

Regardless, a private company's market power does not determine the contours of its constitutional rights. A speech product or platform does not lose First Amendment protection because it is extremely attractive to users and effective at curating content. *See Hurley*, 515 U.S. at 577-78 ("the size and success of petitioners' parade makes it an enviable vehicle" for speech, but that fact alone does not undercut its status as an expressive speaker); *see also Miami Herald*, 418 U.S. at 254 (asserted monopoly power of a newspaper does not justify "governmental coercion" of speech). Nor does the First Amendment permit the government to level a platform's distinctive voice and erase individual website identities in the name of ensuring an outlet for certain speech. "[T]he concept that government may restrict the speech of some elements of our society"—here, private social media outlets' editorial judgments—"in order to enhance the

relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.[11]

C. The Individualized-Explanation Requirements Merit Rigorous Scrutiny

The courts below reviewed Florida's and Texas's individualized-explanation requirements under the deferential test of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)—as if they were routine commercial-speech disclosure rules, addressing uncontroversial facts and designed to prevent misleading advertising. *Paxton* Pet. App. 91a; *Moody* Pet. App. 61a-62a. That overextension of *Zauderer* implicates longstanding disagreement in the lower courts. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 & n.16 (D.C. Cir. 2015) (noting "conflict[s] in the

[11] The Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), upholding content-neutral "must-carry" provisions in the cable television industry, does not support the far different regulation, imposed on a far different industry, that the States enacted here. *Turner Broadcasting* involved government-granted cable franchises that had provided a "physical connection" to watchers, producing a "bottleneck" that the franchises could use to interfere with access to competitive channels. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646, 656 (1994). These "special physical characteristics" permitted a cable operator to block "competing speakers." *Id.* at 640, 656. Even assuming that the state laws here are content neutral—a proposition that NetChoice has challenged—the bottleneck in cable television has no counterpart in user access to the "vast democratic forums of the Internet." *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *see Packingham v. North Carolina*, 582 U.S. 98, 104 (2017); *see also Turner,* 512 U.S. at 656 (distinguishing cable television from the newspapers addressed in *Miami Herald*, which "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications").

circuits regarding the reach of *Zauderer*" and collecting cases). This Court should clarify yet again that the deferential *Zauderer* test does not apply beyond the narrow circumstances delineated in that case. *See Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari) (recognizing need for "guidance" on this "oft-recurring" issue); *see also Nat'l Inst. Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2372 (2018) (emphasizing limits to application of *Zauderer*).

1. *Zauderer*'s relaxed standard of First Amendment scrutiny—asking, in essence, only whether the regulation is "reasonably related" to preventing consumer deception and not "unduly burdensome" (471 U.S. at 651)—has a specific and limited domain: it applies only to regulations of "commercial advertising" that require the advertiser to disclose "purely factual and uncontroversial information about the terms under which his services will be available … in order to dissipate the possibility of consumer confusion or deception." *Id.* (internal quotation marks omitted).

This Court has repeatedly refused to extend *Zauderer* beyond that narrow context. This Court refused to apply *Zauderer*, for instance, to "mandatory assessments upon handlers of fresh mushrooms" primarily "spent for generic advertising to promote mushroom sales," because these assessments were not "somehow necessary to make voluntary advertisements nonmisleading for consumers." *United States v. United Foods, Inc.*, 533 U.S. 405, 408, 416 (2001). And this Court rejected the application of *Zauderer* to a California law requiring licensed crisis pregnancy centers

to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call," because the law required the centers "to disclose information about *state*-sponsored services" rather than "the services that licensed clinics provide" themselves, and the abortion-related information was far from "uncontroversial." *NIFLA*, 138 S. Ct. at 2368, 2372.

Zauderer's limited scope is confirmed by *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the *only* case in which this Court has held a regulation of speech permissible under *Zauderer*. In *Milavetz*, the Court applied *Zauderer*'s standard to review "inherently misleading commercial advertisements" remedied by "disclosures … only [of] an accurate statement" of factual information. *Id.* at 250. "[O]utside that context," the State "may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573.

2. *Zauderer* does not apply to the individualized-explanation requirements here for at least three intertwined reasons.

First, platforms' decisions to remove content are not commercial advertisements. *Zauderer* rests on the principle that those who "advertise their willingness" to enter a transaction on certain terms may be "required … to provide somewhat more information" about the terms of that transaction "than they might otherwise be inclined to present." 471 U.S. at 650. While curating content is certainly important to commercial advertising on platforms, it is not itself advertising. A platform does not propose any transaction when it removes user content.

Second, the state-law explanation requirements are not designed to counteract potential consumer deception in an advertising setting. A platform's removal of content does not mislead users about the potential terms of a transaction. *Cf. id.* at 652 (disclosure requirement necessary to clarify "the distinction between 'legal fees' and 'costs'" because "a layman not aware of the meaning of these terms of art" would likely believe "that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge"); *Milavetz*, 559 U.S. at 251 (citing "[e]vidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost"). Compelling platforms to explain each of their editorial decisions to users is not "somehow necessary to make voluntary advertisements nonmisleading for consumers." *United Foods*, 533 U.S. at 416.

Third, the required disclosures here do not consist of "purely factual and uncontroversial information about the terms under which [the platforms'] services will be available." *Zauderer*, 471 U.S. at 651. The individualized-explanation requirements demand disclosure of platforms' subjective views about particular content. And this compelled speech would necessarily be controversial: when a platform removes user-generated content, the platform and user have already disagreed about its value or appropriateness. *Cf. NIFLA*, 138 S. Ct. at 2372 (refusing to apply *Zauderer* to disclosures about "abortion, anything but an 'uncontroversial' topic"). Lower courts have understood this threshold requirement for *Zauderer*'s

application far too narrowly—including the Fifth Circuit, which since applying the *Zauderer* test to the Texas individualized-explanation requirement has gone on to compound that error. *See Chamber of Com. v. SEC*, 85 F.4th 760, 770 (5th Cir. 2023) ("It is hard to think of a more controversial topic in current public discourse than content moderation and social media censorship. If a social media company's reason for removing user content was uncontroversial in *NetChoice*, then an issuer's reason for repurchasing its own shares is uncontroversial here.").

3. *Zauderer*'s inapplicability to the individualized-explanation requirement is apparent for a further reason: its test is a misfit for this type of regulation. While *Zauderer* expressly requires courts to consider whether a particular disclosure requirement is "unduly burdensome" in the context of commercial advertising, 471 U.S. at 651, that inquiry makes little sense in this context. In a true *Zauderer* case, courts can compare the advertiser's own speech to the required disclaimers and assess whether the required disclosures are practicable without overwhelming the advertiser's message. But here, the explanation requirement is a free-standing demand for disclosure of information. Courts have no benchmark against which to assess whether the corrective disclosure is *unduly* burdensome—that is, no way to assess whether the burden is reasonably necessary to alleviate possible consumer deception.

And here that free-standing burden is mammoth. During six months in 2018, "Facebook, Google, and Twitter took action on over 5 billion accounts or user submissions—including 3 billion cases of spam, 57

million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech." *Paxton* Pet. App. 173a; *Paxton* J.A. 102a. And "in a three-month period in 2021, YouTube removed 1.16 billion comments." *Paxton* Pet. App. 173a; *Paxton* J.A. 133a. Requiring platforms to explain every one of those expressive decisions is a burden tantamount to the suppression of speech: realistically, no social media platform can comply unless they significantly reduce the amount of editorial discretion they exercise over the content that appears on their websites. When a purported disclosure requirement operates either to compel speech or compel silence—choices inimical to the First Amendment—relaxed judicial scrutiny has no place. To hold otherwise would allow evasion of the principle that "[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566.

III. THE GOVERNMENT IS ILL-SUITED TO REGULATE THE MARKETPLACE FOR SPEECH

Although these cases involve novel regulations of an emerging form of commerce and expression, they implicate a deeply rooted constitutional principle: maintaining a diverse ecosystem for speech is not a task for the government.

To enforce laws like the ones at issue here, governments would have to micromanage how companies formulate and apply content-moderation policies. The dangers of such a regime are apparent. Government actors would be placed in a position to review millions of decisions each day and determine whether each of them violated the laws' ambiguous and

subjective standards. For instance, in Florida, government officials will be tasked with deciding whether a platform's decision to remove a particular post is consistent with its treatment of other user-generated content. *See* S.B. 7072 § 1(h)(2)(b) (requiring social media platforms to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users"). That level of government scrutiny, and the risk of enforcement actions seeking substantial monetary penalties for each alleged violation, will inevitably chill and often supplant the editorial judgments of private actors. Even if the government refrained from using its power to impose its own content preferences—a risk that would be difficult to control—these laws would give governments unprecedented influence over the marketplace for ideas.

Platforms, on the other hand, interact with users and commercial advertisers on a daily basis. If they want to remain competitive in a diverse social media landscape, they must adjust their protocols to reflect consumer preferences and help companies effectively reach customers. This iterative process—in which private platforms, users, and advertisers interact with one another to produce useful online forums for speech and commerce—illustrates the free market at work.

The government is ill-suited to overlay this competitive ecosystem with onerous regulation.[12] Some

[12] There may be some instances, of course, in which government regulation of social media platforms may be appropriate, such as to enforce federal criminal law or copyright protections. But when state legislatures set their sights on expressive choices

commentators have voiced concerns that large technology companies' content-moderation policies give them outsized power in public discourse. *See, e.g.*, Bill Baer & Caitlin Chin-Rothmann, *Addressing Big Tech's Power Over Speech*, Brookings Inst. (June 1, 2021).[13] But concerns about media's power to skew public debate are not new—dominant platforms for public discourse have existed frequently in the American media. *See Miami Herald*, 418 U.S. at 248-58. And past legislatures have tried, perhaps with benign intentions, to mitigate the market power of some of those dominant forums. *Id.*

But the First Amendment's answer to that concern is consistent and unequivocal: it is not the government's job to regulate the marketplace for speech to enhance some voices at the expense of others. "[T]he First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression." *Turner*, 512 U.S. at 685 (O'Connor, J., concurring in part and dissenting in part). More than 50 years ago, this Court clearly rejected that justification for compelling speech. *Miami Herald*, 418 U.S. at 248-58 (rejecting the argument that "concentration of control of media" and resulting "bias and manipulation of reportage" justify "an enforceable right of access" to counteract "slanted" coverage (internal quotation marks omitted)). The same foundational constitutional principle applies today: the remedy of

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aimed at promoting speech and commerce, they unduly burden activity at the core of the First Amendment.

[13] https://www.brookings.edu/articles/addressing-big-techs-power-over-speech/.

government control of speech is far worse than the evil it purports to address.

CONCLUSION

The judgment of the Fifth Circuit should be reversed and the judgment of the Eleventh Circuit affirmed.

Respectfully submitted.

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