Nos. 22-277 and 22-555

In the Supreme Court of the United States

ASHLEY MOODY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF FLORIDA, ET AL., PETITIONER,
v.
NETCHOICE, LLC; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, RESPONDENTS

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA, PETITIONERS
v.
KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS, RESPONDENT

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

BRIEF OF AMICI CURIAE ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION, INTERNATIONAL JUSTICE CLINIC AT UNIVERSITY OF CALIFORNIA-IRVINE SCHOOL OF LAW, AND OPEN NET ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

INTERESTS OF AMICI CURIAE[1]

Amici Curiae are organizations that aim to ensure individuals around the world may participate freely in online expression and debate matters of public concern. Amici thus have a strong interest in actions that threaten international human-rights norms related to free expression. They share the view that Texas House Bill 20 (H.B. 20)[2] and Florida Senate Bill 7072 (S.B. 7072)[3] present precisely that kind of threat.

ARTICLE 19: Global Campaign for Free Expression ("ARTICLE 19") is a nonpartisan, non-governmental organization founded in 1987, with an international office in London, UK, and regional offices in the United States, the Netherlands, Brazil, Mexico, Senegal, Kenya, and Bangladesh, among other locations. The organization, named for the corresponding article of the Universal Declaration of Human Rights, advocates for freedom of expression as a fundamental human right, including in the digital environment. It has participated as amicus curiae in free expression cases around the world and has intervened at regional bodies dealing with

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae states that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amici curiae, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] H.B. 20, 87th Leg, 2nd Spec. Sess. (Tex. 2021), 2021 Tex. Gen. Laws 3904 (H.B. 20).

[3] S.B. 7072, 2021 Sess., Gen. Sess. (Fla. 2021), Ch. 2021-32, Laws of Fla. (S.B. 7072).

intermediary liability and freedom of expression. ARTICLE 19 also actively participates in discussions at the United Nations Human Rights Council and the United Nations General Assembly on issues related to counter-terrorism and human rights.

The International Justice Clinic at the University of California, Irvine School of Law ("IJC") promotes international human rights law at the international, national, regional, and corporate levels, in the United States and abroad. IJC is directed by Professor David Kaye, the former United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Professor Kaye has written extensively on the protection of human rights in digital environments. IJC has broad experience addressing threats to human rights in the digital realm, working alongside civil society organizations and other stakeholders across the globe.

Open Net Association, Inc. is a non-profit organization based in South Korea that promotes free expression, privacy, network neutrality, and other digital rights in South Korea, Asia, and globally. Open Net has monitored and acted as a party, amicus, or legal representative on several important speech restrictions enforced by the executive branches of the world's governments, including on behalf of prosecutors. It has also participated in proceedings of the UN Human Rights Committee and worked with the special mandates on free speech of international human rights bodies in various countries, especially in Asia.

INTRODUCTION

As a party to the International Covenant on Civil and Political Rights ("ICCPR") with a reputation for staunchly promoting free speech, the United States's action—or inaction—to protect free expression has global implications. Consequently, international human rights norms, including the protection of free expression developed under Article 19 of the ICCPR, should play a significant role in this Court's consideration of whether to uphold the speech-targeted regulations adopted by Texas in H.B. 20 and Florida in S.B. 7072.

Article 19 protects a robust freedom to seek and receive information and ideas of all kinds, through any media of one's choice. As such, it requires that any limitation on free expression meet a three-part test focused on legality, necessity and proportionality, and legitimacy.

Particularly relevant here, Article 19's "legality" prong requires any speech restriction to be precise and transparent, while simultaneously prohibiting the grant of excessive discretion in enforcement. These requirements are designed to prevent politicized enforcement of speech-focused regulations, which are a key obstacle to free expression. Meanwhile, Article 19's "legitimacy" prong analyzes whether a speech restriction protects a handful of narrow interests. Favoring preferred political views is not one of them.

H.B. 20 and S.B. 7072 cannot satisfy Article 19's three-part test here. Both laws impose must-carry obligations on select major social media platforms, with the express purpose of placing their moderation of user-generated content under increased government control. There can be no doubt about

these political intentions. Officials in Texas and Florida touted these laws as tools to ensure the dissemination of certain government-preferred political viewpoints. And the laws are written to achieve that political end. They combine vague prohibitions and requirements for social media platforms with broad, discretionary enforcement authority vested in increasingly politicized offices of attorneys general. That combination creates an environment rife with the potential for politicized enforcement—precisely the kind of environment that Article 19 and international human rights law seek to preclude.

The negative impact of these laws on public discourse cannot be understated. Facing uncertain liability and potential politicized enforcement, platforms have two practical choices: (1) self-censor and promote only content aligning with the preferred government view of the day; or (2) engage in no content moderation whatsoever, resulting in a deluge of unmoderated information that cannot possibly be sorted through in any effective fashion. No matter the choice, end users will suffer, and social media platforms will cease to function coherently as part of the "vast democratic forums" lauded by this Court. *Reno v American Civil Liberties Union*, 521 U.S. 844, 868 (1997).

None of these consequences square with Article 19's protection of free expression and access to information in a rich, functional marketplace of ideas. Amici respectfully request that this Court strike down H.B. 20 and S.B. 7072 and, in the process, reaffirm the United States's commitment to international norms

protecting free expression as a fundamental human right.

TREATY INVOLVED

International Covenant on Civil and Political Rights, Article 19 provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> *(a)* For respect of the rights or reputations of others;
>
> *(b)* For the protection of national security or of public order (ordre public), or of public health or morals.[4]

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[4] International Covenant on Civil and Political Rights, Art. 19, Oct. 5, 1977, T.I.A.S. No. 92–908, 999 U.N.T.S 171 [hereinafter "ICCPR" or "Article 19"], *available at* https://treaties.un.org/pages/showdetails.aspx?objid=0800000280004bf5. The English version of the ICCPR is available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.

ARGUMENT

I. Decades ago, the United States ratified Article 19, a binding treaty that forbids politicized enforcement of laws regulating free expression.

More than 30 years ago, the United States ratified Article 19 of the ICCPR—the quintessential articulation of international human rights standards related to freedom of expression. Bearing many parallels to the First Amendment, Article 19 obligates State parties to vigorously protect the right to freedom of expression and access to information, in part by prohibiting politicized enforcement of free speech regulations.

Given the United States's position as a world leader in the human rights arena, Article 19 warrants careful consideration in analyzing the legality of Texas's and Florida's free-expression restrictions. That analysis leads to one result—those laws, which permit politicized enforcement of free-expression restrictions, cannot be squared with Article 19.

A. Article 19 forms a key part of the international mosaic of human rights laws, sharing core principles with the First Amendment.

The United States has long stood as a world leader in the creation of international human rights norms, especially for civil and political rights. The United States's early international work on free expression was led by Eleanor Roosevelt, who championed Article 19 of the Universal Declaration of Human Rights ("UDHR") before the United Nations General Assembly in 1948. *See* "*My Most Important Task": Eleanor Roosevelt and the Universal*

Declaration of Human Rights, Roosevelt House Public Policy Institute at Hunter College (2018), *available at* https://www.rooseveltthouse.hunter.cuny.edu/exhibits/my-most-important-task/. Eleanor Roosevelt's and her committee's work on Article 19 of the UDHR and an international bill of rights ultimately resulted in a binding multilateral human rights treaty—the ICCPR. *Id.* The ICCPR now boasts 173 State Parties and is one of the most widely embraced treaties in international law. *Id.*

The United States ratified the ICCPR in 1992 as part of a continued effort to support democracy and stifle autocracy following the Cold War. Authoritarian-minded governments have historically sought to control and shape public opinion by amplifying expression aligned with their agendas while suppressing dissent and criticism. Article 19 addresses this foundational threat to democratic society by establishing multiple layers of constraints on governments seeking to restrict expression, with the aim of precluding arbitrary and politicized enforcement.

President H.W. Bush, an avid supporter of the ICCPR and its protections for free expression, noted when sending Article 19 to the Senate that "[t]he end of the Cold War offer[ed] great opportunities for the forces of democracy and the rule of law throughout the world." *See* S. Exec. Comm. Rep., 102d Cong., S. Comm. on Foreign Relations Rep. on Int'l Law, App. A, Transmittal Letter from President George Bush (Aug. 8, 1991) (1992), reprinted in 31 I.L.M. 645, 660. He believed the United States had a "special responsibility to assist those in other countries who [were] working to make the transition to pluralist

democracies." *Id.* The ICCPR thus "codifies the essential freedoms people must enjoy in a democratic society," including "freedom of opinion and expression." *Id.*

Article 19 guarantees freedom of opinion and expression in two key parts, declaring that:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19, *supra* n.4.

Given the heavy influence of the United States in the inspiration, formulation, and adoption of Article 19, the principles underlying it parallel those found in the U.S. Constitution's First Amendment. Just as the First Amendment protects content moderation as a form of free expression,[5] so too does Article 19 protect not only the "freedom of expression" of those who "impart" information (including content moderation),

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[5] Other briefs before this Court provide persuasive analysis of why the First Amendment protects content moderation as a form of free expression—points with which Amici agree. *See*, *e.g.*, Brief for Respondents at 15-23, *Moody e al. v. NetChoice, LLC*, No. 22-277 (filed Nov. 30, 2023); Brief for Petitioners at 15-24, *NetChoice, LLC v. Paxton*, No. 22-555 (filed Nov. 30, 2023); Brief for Media Law Resource Center, Inc. as Amici Curiae Supporting Respondents in *Moody v. NetChoice, LLC*, No. 22-277 and Petitioners in *NetChoice, LLC v. Paxton*, No. 22-555 (filed Nov. 30, 2023) [hereinafter "MLRC Brief"].

but also the audience's "freedom to seek, receive and impart information and ideas of all kinds" through any medium of their choice. *See* Article 19, *supra* n.4. The UN Human Rights Committee's General Comment No. 34—widely considered an authoritative interpretation of Article 19—reflects this focus. It notes "[t]he public also has a corresponding right to receive media output."[6]

This separate, audience-focused aspect of free expression is just as crucial as speakers' rights for the global human rights framework supported by Article 19. Amici wholeheartedly agree with the Media Law Resource Center's related argument in the First Amendment context. Namely, that these cases implicate not only the social media platforms' rights to express themselves through content moderation, but also the public's interest in functioning forums for the exchange of ideas and information. *See* MLRC Brief at 3–9, 12. Likewise, under Article 19, the right to seek and receive useful information cannot survive if the public is left to drown in a deluge of information chaos. Article 19(2), *supra* n.4

B. Article 19 uses a three-part test to analyze the validity of restrictions on free expression.

To protect the interests in both imparting and receiving information, Article 19 requires that governments meet a strict three-part test to promulgate permissible speech regulations. Any such

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[6] General Comment 34 ¶ 13 (Article 19: Freedom of Opinion and Expression, Human Rights Committee, CCPR/C/GC/34 (Sept. 12, 2011)), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/453/31/PDF/G1145331.pdf?OpenElement [hereinafter "General Comment 34"].

limitation on expression must be (1) provided by law (legality), and (2) necessary to protect (necessity and proportionality), (3) a legitimate objective (legitimacy). *See* General Comment 34 ¶¶ 27–29, *supra* n.6.

Legality: For a government-imposed restriction on freedom of expression to be "provided by law," it must be precise, public, and transparent, while also avoiding the grant of too much enforcement discretion to government authorities.[7] General Comment 34 notes that "[a] law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution," "must be formulated with sufficient precision to enable an individual to regulate his or her conduct," and should account for the differences between broadcast, print, and internet media. General Comment 34 ¶¶ 25, 39, *supra* n.6.

Importantly then, a vague law that (1) leaves room for a government authority to subjectively choose the targets of regulation, and (2) does not allow for foreseeable compliance with the law, fails under

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[7] Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur on the Situation of Human Rights Defenders, U.N. Doc. AL G/SO 214 (67-17) G/SO 214 (107-9) VNM 3/2012 (Aug. 2, 2012), *available at* https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=19053 (raising concerns about internet usage restrictions, including lack of transparency, requirements that service providers filter out violative information, and the use of "broad and ambiguous terms [that could] be misused to censor and suppress legitimate expression which may be critical of the Government" or "generate a climate of self-censorship").

Article 19, just as it fails under First Amendment jurisprudence. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (striking down broadcasting regulations as void for vagueness, noting "rigorous adherence to [due process] requirements is necessary [when expression is involved] to ensure that ambiguity does not chill protected speech"); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1319–23 (11th Cir. 2017) (holding Florida law preventing doctors from "unnecessarily harassing a patient about firearm ownership" was void for vagueness and risked suppression and self-censorship of disfavored speech).

Necessity and Proportionality: A restriction is necessary only if it is the least intrusive means to achieve a legitimate state interest. General Comment 34 ¶ 34, *supra* n.6. Measures considered "useful," "reasonable," "effective," or "desirable" will not suffice. And the restriction must be proportionate to the aim pursued. *Id.* ¶¶ 34, 35. To prevent politically-motivated restrictions on freedom of expression under the guise of pursuing a legitimate interest under Article 19, the Human Rights Committee stated: "when a state invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat." *Id.* ¶ 35.

Legitimacy: A state's restriction on freedom of expression is "legitimate" only if it aims to protect the narrow interests specifically identified in Article

19(3): (i) the rights or reputation of others, or (ii) national security, public order, or public health or morals. *See* Article 19, *supra* n.4; *see also* General Comment 34 ¶¶ 28–32, *supra* n.6. Simply trying to protect certain government-backed viewpoints or a government official's political interests cannot satisfy the legitimacy prong.

Article 19's three-part test applies to every type of restriction on freedom of expression, including those aimed at online platforms. In fact, General Comment 34 specifically recognized the emergence of social media platforms and the need to foster their independence through Article 19. General Comment 34 advises signatory parties to "take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto." General Comment 34 ¶ 15, *supra* n.6. Doing so serves the overarching human rights goals of the ICCPR because "[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other [ICCPR] rights. It constitutes one of the cornerstones of a democratic society." *Id.* ¶ 13.

H.B. 20 and S.B. 7072—with their nebulous provisions and broad grant of enforcement authority to attorneys general—fail Article 19's three-part test.[8]

[8] Amici agree with other briefs before this Court that argue strict or heightened scrutiny should apply to H.B. 20 and S.B. 7072. *E.g.*, MLRC Brief at 17–18. Article 19's three-part test looks very much like a form of strict or heightened scrutiny that this Court would apply under the First Amendment, further supporting the application of such scrutiny here.

II. The Texas and Florida laws run afoul of Article 19 by allowing politicized enforcement, among other flaws.

While H.B. 20 and S.B. 7072 might superficially appear to be neutral, there can be no doubt about their underlying political motivations. Targeting only a select group of social media platforms perceived to have a "leftist" viewpoint, these laws seek to eliminate the editorial discretion of such platforms to ensure the dissemination of "conservative," government-favored political views. *See* Tex. Bus. & Com. Code § 120.001(1) *et seq.*; Tex. Civ. Prac. & Rem. Code § 143A.001 *et seq.*; Fla. Stat. § 501.201 *et seq.*; J.A. 21a, 25a ("It is now law that conservative viewpoints in Texas cannot be banned on social media."); Pet.App.7a (enacted to "guarantee[] protection against the Silicon Valley elites" and their perceived "discriminat[ion] in favor of the dominant Silicon Valley ideology").

To achieve that political purpose, these laws rely on ambiguous prohibitions on content moderation, while giving broad enforcement discretion to each state's attorney general. That combination leads to one, inevitable result— these laws violate Article 19 by permitting politicized enforcement of free expression regulations to protect certain political viewpoints.

A. The laws suffer from an untenable combination of nebulous statutory language and broad enforcement discretion.

The Texas and Florida laws are riddled with ambiguous terminology and impose onerous regulations only on certain social media platforms,

while leaving unscathed comparable websites with different perceived viewpoints. To make matters worse, the laws grant broad enforcement authority to state attorneys general. This combination of vagueness and broad enforcement authority necessarily raises the danger of politically-motivated enforcement in violation of Article 19.[9]

A quick look at both laws shows the inevitable discretion they give to attorneys general because their provisions leave too much room for interpretation.

Texas's H.B. 20, for example, prohibits platforms from "censor[ing]" based on "viewpoint[,]" with "censor" defined 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), 143A.002. This broad definition permits the selective targeting of every conceivable moderation activity,[10] while providing no way to objectively determine whether content is given "equal access or visibility" or what "otherwise discriminating against expression" means. *Id.* Without such

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[9] As part of a multilateral treaty ratified by the United States, Article 19 is of course binding on the United States and preempts state laws that conflict with its—and the First Amendment's—mandates. *See* U.S. CONST. ART. VI, cl. 2 ("[A]ll Treaties made ... shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the ... Laws of any State to the Contrary notwithstanding.")

[10] The breadth of this definition could easily lead targeted platforms to abandon content-moderation activities altogether. That would practically result in something like a chronological display of content—and a sheer volume of information that would overwhelm users. *See* MLRC Amicus Br. at 6–7 (explaining how content-moderation prohibitions will invite information chaos).

guidance, social media platforms are left to guess what conduct qualifies as "censor[ing]" based on "viewpoint"—with great potential liability if they make the wrong call. *Id.*; *see also id.* § 143A.002(a).

Similarly, Florida's S.B. 7072 requires platforms to "apply censorship, deplatforming, and shadow banning standards" "in a consistent manner among . . . users[.]" Fla. Stat. § 501.2041(2)(b). As with Texas's law, those terms are quite broad. *Id.* §§ 501.2041(1)(a), (b), (c). And the statute does not define "consistent manner[,]" leaving the handful of targeted social media platforms again guessing how to abide by this constraint. S.B. 7072 also appears internally at odds, demanding consistency in treatment among users while simultaneously singling out for protection content by journalistic enterprises or political candidates. *Id.* § 501.2041(2)(j). How social media platforms can abide by both provisions is unclear.

As just one more example, S.B. 7072 forbids moderation of a journalistic enterprise post "based on the content," Fla. Stat. § 501.2041(2)(j), and H.B. 20 similarly broadly prohibits "viewpoint" discrimination, Tex. Civ. Prac. & Rem. §§ 143A.001, 143A.002. But neither law provides any guidance on how social media platforms can navigate the nuanced distinction between permissible subject-based and impermissible viewpoint-based moderation—an issue courts have struggled with for decades. "[T]he level at which 'subject matter' is defined can control whether discrimination is held to be on the basis of content or viewpoint." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001). A decision to exclude all posts about a specific war, for example, could be considered

subject-based moderation at a high-level, or it could be considered viewpoint-based moderation because posts about other wars are permitted. Once again, social media platforms are left guessing as to how and when they might be subject to liability for moderation decisions.

The problems posed by such provisions are only compounded by the expansive enforcement authority granted to the offices of Texas's and Florida's attorneys general. *See* Tex. Bus. & Com. Code § 120.151; Fla. Stat. §§ 501.203(2), 501.207. Relying on either overbroad definitions or ambiguities, such offices—increasingly influenced by political affiliations[11] or donors[12]—can decide whether to pursue legal action related to virtually any content moderation decision by the targeted social media platforms.

What is more, both laws enable their respective state attorneys general to act on the *mere possibility* of a violation. H.B. 20, for example, empowers the attorney general to seek an injunction for "a potential violation[,]" an obviously nebulous concept. Tex. Civ. Prac. & Rem. Code § 143A.008(b). So long as there is *any* argument that content moderation *may*

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[11] *See generally* Marissa Smith, Note, *Politicization of State Attorneys General: How Partisanship is Changing the Role for the Worse*, 108 CORNELL L. REV. 2 (2023), *available at* https://www.cornelllawreview.org/wp-content/uploads/2023/04/Smith-note-final-version.pdf.

[12] Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html (last accessed Dec. 7, 2023).

potentially be based on viewpoint, H.B. 20 gives permission to seek injunctive relief.

Likewise, Florida's S.B. 7072 permits its attorney general to file a civil or criminal contempt case if the office merely "suspects that a violation . . . is imminent, occurring, or has occurred[.]" Fla. Stat. § 501.2041(5). That authority comes with concomitantly broad investigatory powers, *id.*, including the ability to subpoena any algorithm used by a social media platform. *Id.* § 501.2041(8). This seemingly unbounded enforcement authority makes it exceedingly easy to investigate and target content moderation that promotes disfavored expression or that does not sufficiently support the enforcer's preferred political viewpoint.[13]

The Florida law also sets up a purely administrative system whereby the Election Commission can unilaterally fine a social media platform for "deplatforming" a state-wide candidate. Fla. Stat. §§ 106.072(3), 501.2041(5). This could lead to a politicized Election Commission and attorney general effectively controlling the selected social media platforms long before the platforms obtain any recourse to a court. In addition to fines, Florida's administrative bodies could, for example, prohibit platforms from banning accounts of political candidates that express government-favored views, thereby amplifying government-favored speech over

[13] Both laws also create private causes of action in certain circumstances, another troubling attribute. Tex. Civ. Prac. & Rem. Code § 143A.007; Fla. Stat. § 501.2041(2), (6). These provisions further threaten free expression by allowing individuals to use private lawsuits to harass platforms into promoting certain viewpoints.

oppositional speech. Such censorship power by an administrative body raises the specter of prior restraint and lacks the procedural safeguards required by both the First Amendment and international law. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65–72 (1963) (striking down as "informal censorship" a Rhode Island administrative scheme that implicitly pressured publishers to drop "objectionable" publications).[14]

H.B. 20's and S.B. 7072's grant of expansive enforcement authority over inherently subjective speech regulations creates the perfect environment for politicized enforcement.

B. Article 19's three-part test forbids precisely that combination.

H.B. 20 and S.B. 7072 cannot pass Article 19's three-part test. There can be no question these laws fail to pursue legitimate state interests under Article 19—the whole point of the laws was to ensure dissemination of certain government-endorsed viewpoints. *See* J.A. 21a, 25a ("It is now law that conservative viewpoints in Texas cannot be banned on

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[14] France's Constitutional Council also recently struck down much of a law under which the administrative authorities could require social media platforms to remove certain illegal content within either one hour or twenty-four hours, depending on the nature of the content. *See* Library of Congress, *France: Constitutional Court Strikes Down Key Provisions of Bill on Hate Speech* (June 29, 2020), https://www.loc.gov/item/global-legal-monitor/2020-06-29/france-constitutional-court-strikes-down-key-provisions-of-bill-on-hate-speech/ (original opinion in French available at https://perma.cc/72VE-SMDJ). The court concluded these regulations improperly circumvented the court system and risked inducing self-censorship, violating protections for free expression under a test similar to Article 19's three-part test. *Id.*

social media."); Pet.App.7a (enacted to "guarantee[] protection against the Silicon Valley elites" and their perceived "discriminat[ion] in favor of the dominant Silicon Valley ideology").

H.B. 20 and S.B. 7072 are equally infirm under proportionality, given that they appear to prohibit content moderation wholesale. Eliminating all content moderation would destabilize the online marketplace of ideas, threatening the protected freedom of the audience to receive information under Article 19. *See supra* Part I.A, n.9.[15]

Nor can H.B. 20 and S.B. 7072 pass Article 19's legality requirements. The legality prong mandates the use of precise, public, and transparent regulations, while avoiding the grant of too much enforcement discretion to government authorities. *See supra* n.7. H.B. 20 and S.B. 7072 fail on both fronts.

The undeniable ambiguity infecting both laws leaves room for each state's enforcing authority to subjectively choose the targets of speech regulation for political gain. Nothing in these laws prevents an enforcer from actively investigating and targeting content moderation that favors his or her own political party or disparages the opposition. And nothing prevents that same enforcer from ignoring similarly prohibited content moderation that might block posts critical of the government or donors. Moreover, these laws provide no sure way for social media platforms to foreseeably comply with them and thus avoid liability.

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[15] Amici agree with the obvious benefits of organizing and ranking content online, while not endorsing how any specific platform has undertaken its content moderation function. Certainly, there is room for improvement.

If allowed to stand, H.B. 20 and S.B. 7072 will turn Texas and Florida into fertile ground for politicized restrictions on free expression in violation of Article 19. Other international bodies have not hesitated to find violations of the right to free expression when faced with similar laws. *See, e.g.*, *Navalnyy v. Russia*, [GC], European Court of Human Rights, Nos. 29580/12 §§ 115-118 (November 15, 2018) (concluding arrests of Russian opposition figure under domestic laws failed legality prong under analogous test due to lack of foreseeability and unduly broad discretion granted to Russian authorities); *Karastelev and Others v. Russia*, European Court of Human Rights, No. 16435/10, §§ 7–23, 78–92 (Oct. 6, 2020), *available at* https://laweuro.com/?p=12709 (holding overly broad Russian laws prohibiting "extremist activity" infringed on free expression and violated legality principles of analogous international convention by delegating too much power to prosecutors without sufficient safeguards to prevent politicized abuse); *Scanlen & Holderness v. Zimbabwe*, Case 297/2005, African Comm'n on Hum. and People's Rts. §§ 98–124 (2009), *available at* https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/09/Scanlan-and-Holderness.pdf. (applying analogous standards to conclude law requiring prior accreditation of journalists gave too much discretion to government accreditation officials, thus violating guarantees for freedom of expression).[16]

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[16] United Nations Special Rapporteurs on Freedom of Expression—United Nations Human Rights Council appointees charged with monitoring free speech issues globally—have also

The United States should not hesitate either. Article 19 supports striking down H.B. 20 and S.B. 7072.

C. Judicial involvement in the injunctive process does not mitigate the laws' flaws.

That a court might be involved in the injunctive process cannot mitigate the ambiguity and risk of politicized enforcement present in H.B. 20 and S.B. 7072.[17] Rather, the ambiguities in these laws mean that overbroad injunctions, prior restraint, and self-censorship will be unavoidable. That cannot be squared with this Court's prior jurisprudence.

In *Near v. Minnesota*, this Court struck down as an unconstitutional prior restraint a similarly vague

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expressed concern about the risk of politicized suppression of speech in violation of Article 19. For instance, in a recent communication addressed to the Government of Bangladesh, the Special Rapporteur criticized a proposed cyber security act for its vague and overly broad provisions, cautioning that such provisions could result in arbitrary and unpredictable decisions by officials. The Special Rapporteur also warned against the expansive regulatory authority granted to Bangladesh regulators to censor data or restrict access to websites based on vaguely defined grounds like harming "solidarity" or the "public discipline of the country[.]" Mandate of Special Rapporteur on Promotion and Protection of the Right to Freedom of Expression (OL BGD 7/2023) at 1, (Aug. 28, 2023), *available at* https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28358.

[17] Because under Florida's law, an enforcing authority can bring a "civil or administrative action[,]" there is no guarantee that social media platforms will initially have recourse to a court at all. Fla. Stat. §§ 501.2041(5), 106.072. Such administrative systems give fewer due-process guarantees and are potentially more subject to political manipulation, exacerbating S.B. 7072's problems.

Minnesota statute that allowed attorneys general to seek court orders enjoining "malicious, scandalous and defamatory" publications. 283 U.S. 697, 701–03, 722–23 (1931). This Court noted Minnesota's statute did not define some of its vague terms and that the effect of an injunction was to suppress a broad array of further publication upon threat of contempt. *Id.* at 712–13.

Likewise, H.B. 20 and S.B. 7072 contain vague prohibitions and explicitly provide for courts or administrative bodies to enjoin future content-moderation—i.e., expression—by social media platforms. Tex. Civ. Prac. & Rem. Code §§ 143A.007, 143A.008; Fla. Stat. § 501.2041(5)-(6). Indeed, for private actions, H.B. 20 explicitly *requires* courts to "hold the social media platform in contempt" for any "fail[ure] to promptly comply with a court order," though H.B. 20 does not define what constitutes "prompt" compliance. Tex. Civ. Prac. & Rem. Code § 143A.008(c).

Given such vagueness, courts cannot appropriately tailor injunctions. To avoid contempt, targeted social media platforms would be forced to either: (1) obtain pre-moderation approval of future expression, *see Near*, 283 U.S. at 701–03, 712–13, 722–23; or (2) self-censor a broad range of expression. These laws therefore risk the same kind of prior restraint that this Court has forbidden for nearly a century. *See also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122 S. Ct. 775, 780 (2002) (noting that even facially content-neutral restrictions can "stifle free expression" when officials are given "unduly broad discretion" to "favor or disfavor speech").

Neither Article 19 nor the First Amendment permit such an outcome.[18]

III. Article 19 provides yet another reason why Texas's and Florida's laws cannot stand.

Article 19 provides a strong basis for rejecting H.B. 20 and S.B. 7072, both of which permit precisely the type of politicized enforcement that Article 19 prohibits. Since the end of World War II, the United States has been intimately involved with global efforts to guarantee free expression, which is foundational to other human liberties and free societies. *See supra* Section I.A; *e.g.*, *Near*, 283 U.S. at 713–18 (noting freedom of expression and the press are essential to securing "all the triumphs which have been gained by reason and humanity over error and oppression"). Indeed, the United States led the way in drafting and adopting Article 19 as the quintessential international standard for protection of free expression. The United States should not turn its back on these important principles now.

If H.B. 20 and S.B. 7072 stand, nothing prevents other countries from similarly restricting expression in favor of government-favored viewpoints, or worse. Authoritarian regimes throughout the world continue to seek ways to expand their influence, including by suppressing oppositional voices. As one of the most strident defenders of free expression, the United States has been at the forefront of the battle against

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[18] *See Near*, 283 U.S. at 701–03, 712–13, 722–23; *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971) (vacating injunction preventing disbursing pamphlets in a particular city as an unconstitutional prior restraint); *Americans for Prosperity Found. v. Bonta*, 594 U.S. __, 141 S. Ct. 2373, 2387–89 (2021) ("[t]he risk of a chilling effect . . . is enough" for invalidation).

authoritarianism and for international human rights. That battle will become significantly more difficult if the United States shies away from its international treaty obligations.

Beyond that, the public's right to functional online discourse is at stake. Article 19 equally protects this right as part of the audience's "freedom to seek, receive and impart information and ideas of all kinds" through any chosen medium. Article 19(2), *supra* n.4. Yet, whether through government censorship, self-censorship, or a lack of content moderation, H.B. 20 and S.B. 7072 threaten to take a functioning online marketplace of ideas and introduce utter dysfunction and chaos. Consequently, these laws would destroy the medium of choice for so many users worldwide in the name of certain government-favored viewpoints. Neither the First Amendment nor Article 19 permit that result. Both require private interests in expression to cede to the public's freedom to receive information in these circumstances. *See supra* Part I.A, II.B, n.9; MLRC Amicus Br. at 3–9, 12.

Because H.B. 20 and S.B. 7072 conflict with Article 19's important human-rights objectives and the United States's international obligations, they should be struck down.

CONCLUSION

Amici support Respondents in No. 22-277 and Petitioners in No. 22-555 in their request that this Court strike down H.B. 20 and S.B. 7072, as they violate both Article 19's and the First Amendment's protections for free expression.

Respectfully Submitted,

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