

Nos. 22-277, 22-555

IN THE
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, *et al.*,
Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,
Respondents.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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

**BRIEF OF WIKIMEDIA FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENTS IN NO. 22-277 AND
PETITIONERS IN NO. 22-555**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Wikimedia Foundation (“the Foundation”) is a non-profit organization based in San Francisco, California that operates thirteen free-knowledge projects (the “Wikimedia Projects”) on the Internet, including Wikipedia.² The Wikimedia Projects host factual and educational content that is created, edited, and moderated by over 300,000 volunteer users per month worldwide. Core to its mission, the Foundation enables people around the world to access and use the Wikimedia Projects’ content free of charge, and it is not funded by advertising.

The most well-known Wikimedia Project is Wikipedia—the largest and most-read reference work in history. As of 2023, Wikipedia was ranked as the seventh-most popular website in the world. Users have authored over 6.5 million English-language articles on Wikipedia since its creation. And in October 2023 alone, the Wikimedia Projects received approximately 28 billion page views, including nearly 13 billion page views on the English-language version of Wikipedia. That same month, users submitted over 5 million edits to Wikipedia’s English-language articles.

¹ No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amicus and its attorneys have paid for the filing and submission of the brief.

² The other free-knowledge projects operated by the Foundation are Wikibooks, Wiktionary, Wikiquote, Wikimedia Commons, Wikisource, Wikiversity, Wikispecies, Wikidata, Wikifunctions, MediaWiki, Wikivoyage, and Wikinews, (along with the Meta-Wiki project coordination software tool). *See Our Work*, Wikimedia Foundation, <https://wikimediafoundation.org/our-work/wikimedia-projects/#a1-reference> (last visited Dec. 4, 2023).

The Foundation has a distinctive governance structure in that Wikimedia Project *users* develop the policies that govern content and conduct on the Wikimedia Projects, including Wikipedia. Users decide, for example, whether edits to Wikipedia articles fit within content guidelines, whether an editor’s online conduct constitutes harassment, and what penalties to impose for violations of conduct policies. Users also decide appeals of policy violations. The Foundation does not typically involve itself in these user-driven content moderation decisions and only blocks user accounts in extraordinary circumstances pursuant to published policies. The volunteer user community’s decision to perform nearly all content and conduct moderation—and the Foundation’s choice to support this community editorial structure—are themselves editorial decisions that directly impact the content offered on Wikipedia.

Laws like Texas’s House Bill 20 (“H.B. 20”) and Florida’s Senate Bill 7072 (“S.B. 7072”), violate the First Amendment. And though aimed at major social media platforms like Facebook, YouTube, and X (formerly known as Twitter), these laws risk sweeping in online projects like those operated by the Foundation. If H.B. 20 and S.B. 7072 were read to apply to projects like Wikipedia, they would violate the First Amendment rights of the Wikipedia user community and the Foundation, chill speech on important topics of debate, and degrade the quality and useability of Wikipedia to the great detriment of the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

H.B. 20 and S.B. 7072 are unprecedented restrictions on private speech and a misplaced effort to rein in “big tech.” These statutes would deny operators of online platforms editorial control over their own websites and force them to publish speech they do not wish to disseminate. Although heralded by their proponents as “anti-censorship” laws, H.B. 20 and S.B. 7072 in fact violate the First Amendment. If allowed to stand, these statutes would gravely imperil the exercise of free speech online.

The First Amendment dangers posed by H.B. 20 and S.B. 7072 are exacerbated by their unintended potential consequences. While ostensibly targeted at the country’s largest social media platforms, both statutes rely on impermissibly vague definitions that risk misapplication to non-profit entities like the Foundation. The Eleventh Circuit observed as much in preliminarily enjoining S.B. 7072, noting that while the law’s “size and revenue thresholds . . . appear to target the ‘big tech oligarchs,’” the law’s “broad conception of what a ‘social media platform’ *does* may well sweep in other popular websites, like . . . Wikipedia[.]” *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1205 (11th Cir. 2022) (hereinafter “*Moody*”).

The vagueness problems embodied in these laws are particularly acute when considering the types of “content moderation” activity that the laws purport to regulate. Community-run projects like Wikipedia rely on millions of user editorial decisions every month to implement content policies and guidelines. It is unclear how the laws’ proscriptions would apply in such a context. Indeed, the statutes’ vagueness could be weaponized against entities like the Foundation—

especially Florida’s law, which has a particularly sweeping definition of “social media platform” and allows for private rights of action. Where, as here, First Amendment freedoms are implicated, particularly heightened scrutiny is required of vague statutes with uncertain terms. H.B. 20 and S.B. 2072 fail that scrutiny.

H.B. 20 and S.B. 2072 violate the First Amendment even if they were limited to the “big tech” platforms they target. But were these laws read to apply to websites like Wikipedia, they also would violate the long-established First Amendment rights of the Foundation and millions of Wikipedia users. Fifty years of precedent from this Court has cemented the right of publishers to decide the material that appears on their platforms and thus the message they convey. That right extends to decisions about how to compile speech and which speech to exclude or disavow. H.B. 20 and S.B. 7072 disregard those settled protections: they would preclude Wikipedia users from removing viewpoints with which they do not wish to associate, in turn violating the editorial choice of the Foundation to defer to its users on such matters. For Wikipedia—an encyclopedic reference guide trusted the world over for its accurate and verifiable information—this would be devastating and untenable.

H.B. 20 and S.B. 7072’s blunderbuss approach also fails to account for a model like Wikipedia’s. Wikipedia’s users are responsible for day-to-day editorial decision-making. Far from deploying a caricatured algorithmic approach to editorial control as envisioned by the Fifth Circuit, Wikipedia’s content decisions are the result of human users’ careful calibration and collaboration.

The laws' content-moderation restrictions and individual-explanation requirements also pose a very real chilling effect on the Foundation and its community of users. Rather than be forced to disseminate obviously false information or to provide a thorough rationale each time a Wikipedia article is edited, the Foundation and its users may decide that the safer course is to avoid certain topics altogether—thus resulting in an “encyclopedia” that omits mention of critical social and political issues of the day. Restricting the ability to address the potential influence of nefarious actors on Wikipedia (*e.g.*, dictators attempting to sway public opinion) likewise jeopardizes the Foundation's mission to provide free and accurate information for all.

H.B. 20 and S.B. 7072 are unconstitutional, dangerous, and ill-advised. They would allow the government to step in, compel speech, and wrest control from private actors—contrary to this Court's settled First Amendment precedent. If read to apply to the Wikimedia Projects, they would degrade the quality and useability of Wikipedia to the detriment of the public, including the billions of people who rely on Wikipedia worldwide.

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

ARGUMENT

I. The Statutes are Impermissibly Vague, Threatening to Sweep in Projects like Wikipedia.

As explained below, H.B. 20 and S.B. 7072 violate the First Amendment. *See infra* Section II. This is so regardless of whether they are read to apply only to the “big tech” social media platforms targeted by the laws. At the outset, though, it must be noted that both statutes rely on vague definitions and phrasing that could easily be distorted and misapplied to Internet companies beyond Facebook, YouTube, and X. Indeed, in evaluating Florida’s S.B. 7072, the Eleventh Circuit recognized that the law’s “broad conception of what a ‘social media platform’ *does* may well sweep in other popular websites, like the crowdsourced reference tool Wikipedia[.]” *Moody*, 34 F.4th at 1205. The Texas and Florida laws also lack clarity regarding potential application to online projects where—as with Wikipedia—community members, not top-down decision makers, largely create and implement content policies and practices.

It is well-settled that “[v]ague laws offend several important values” and “that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.*; *see also Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974) (“[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”) (quoting *Connally v. Gen. Const. Co.*, 269

U.S. 385, 391 (1926)). Additionally, “laws must provide explicit standards for those who apply them,” to prevent “arbitrary and discriminatory enforcement.” *Grayned*, 408 U.S. at 108. Finally, where—as here—First Amendment freedoms are implicated by vague statutory terms, particularly heightened scrutiny is required. *See id.* at 109 (noting that “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked”).

The parties to these cases seem to assume that H.B. 20 and S.B. 7072 apply only to large social media companies—in particular, Facebook, YouTube, and X. For example, the Attorney General of Texas has stated that the “Platforms” affected by H.B. 20 would likely include only “Facebook, YouTube, and Twitter.” *Paxton Br. in Resp. 7*. Similarly, the Attorney General of Florida has referred to “Big Tech” and the actions of “social-media behemoths like Twitter and Facebook” when discussing the applicability of S.B. 7072. *Moody Pet. 2*. And the “Questions Presented” by the Solicitor General and certified by the Court state that “[t]hese cases concern laws enacted by Florida and Texas to regulate major social media platforms like Facebook, YouTube, and X (formerly known as Twitter).” *Solicitor General Amicus Br. (I)*.

The statutes’ definitions of “social media platform,” however, are not clearly limited to the “big tech” companies on which the parties focus. To the contrary, the definitions are so vague and sweeping that they risk being applied to the Wikimedia Projects. H.B. 20, for example, broadly 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 purpose of posting information, comments, messages, or images.” Tex. Bus. & Com. Code § 120.001(1). This vague definition could be distorted to apply to Wikipedia, which provides the ability for registered users to communicate with other registered users via email or public discussion pages; and arguably, Wikipedia users “communicate with other users” when they create or edit articles. For example, most edits on Wikipedia include an edit summary in the page’s historical logs where the editor provides a communication for use by other editors about what they changed or why they changed it. Wikipedia users also engage in discussions about potential edits to the encyclopedic articles on “Talk” pages associated with each article.³ Thus, even though Wikipedia is not a “social media platform” as that term is commonly understood, one could argue that H.B. 20’s vague definition sweeps in projects like Wikipedia.

S.B. 7072’s definition of “social media platform” is even broader, defining this term as “any information service, system, Internet search engine, or access software provider that,” *inter alia*, “[p]rovides or enables computer access by multiple users to a computer server, including an Internet platform or social media site” and that “[h]as at least 100 million monthly individual platform participants globally.” Fla. Stat. § 501.2041(1)(g). Again, this definition could be argued to apply to the Wikimedia Projects. Wikipedia could be considered an “information service” that

³ Wikipedia “Talk pages,” also known as “discussion pages,” are administration pages where user-editors can discuss their edits and improvements to articles. Each Wikipedia article has its own associated “Talk page,” *see, e.g., Talk:Supreme Court of the United States*, Wikipedia, https://en.wikipedia.org/wiki/Talk:Supreme_Court_of_the_United_States (last visited Dec. 4, 2023).

“enables computer access” by “multiple users to a computer server . . . [or] an Internet platform.” Furthermore, while the statute does not define “individual platform participants,” if that term were interpreted to include anyone who views a Wikipedia page, it is possible that the Wikimedia Projects would reach the threshold to fall within the statute: Wikipedia is accessed by more than 1.5 billion unique devices each month, and there are approximately 46.5 million registered users on English Wikipedia alone.⁴

The vagueness problems with H.B. 20 and S.B. 7072 are particularly acute when considering the types of actions that the laws purport to regulate. H.B. 20 purports to regulate the manner in which “the social media platform . . . moderates content,” including the “decision[s] made by the social media platform to remove content posted by the user.” *See* Tex. Bus. & Com. Code §§ 120.051, 120.101. Likewise, S.B. 7072 purports to restrict the platforms’ activities, not users’ activities: “[a] social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the

⁴ S.B. 7072 is also vague and confusing because of its proscriptions concerning journalism. S.B. 7072 prohibits a “social media platform” from “tak[ing] any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.” Fla. Stat. § 501.2041(2)(j). The statute defines a “journalistic enterprise” as, *inter alia*, “an entity doing business in Florida that [p]ublishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users.” *Id.* § 501.2041(1)(d)(1). It is unclear whether the Wikimedia Projects would fall into this definition based on the user-generated Wikipedia articles that are “published” online. That the Foundation could possibly be considered both a social media platform and a journalistic enterprise under the law only adds to the confusion.

platform.” Fla. Stat. § 501.2041(2)(b). It is unclear how these types of content-moderation provisions would be read to apply to a community-run encyclopedic project like Wikipedia. Decisions about removing or altering content that users post on Wikipedia pages are almost exclusively made by users themselves and reflected in millions of edits and deletions to Wikipedia article pages each month. The Wikipedia community even has special “administrator” roles for designated users (selected via community election, not by the Foundation) who help enforce content and conduct policies on the platform.⁵

Thus, while the parties appear to agree that H.B. 20 and S.B. 7072 were not enacted to restrict the rights of entities like the Foundation, nor to apply in the context of user-generated online encyclopedias like Wikipedia, the statutes’ poor construction leaves persons “of common intelligence [to] necessarily guess at [their] meaning” and application to a variety of online projects. *Smith*, 415 U.S. at 572 n.8. There is significant risk that the vague definitions and proscriptions in these laws could be weaponized against entities like the Foundation or individual contributors to Wikimedia Projects and thereby degrade a variety of important online resources. Moreover, Florida’s law, which has the more sweeping definition of “social media platform,” *see supra*, allows for private suits for damages and injunctive relief. Fla. Stat. § 501.2041(5), (6). The threat of private lawsuits attempting to enforce S.B. 7072—even if misguided and ultimately defeated—could create substantial costs for a non-profit entity like the Foundation. These vague laws cannot withstand constitutional scrutiny.

⁵ See *Wikipedia:Administrators*, Wikipedia, <https://en.wikipedia.org/wiki/Wikipedia:Administrators> (last visited Dec. 4, 2023).

II. The Statutes Violate the First Amendment.

A. The Statutes Violate the First Amendment's Prohibition of Compelled Speech.

In enjoining Florida's law, the Eleventh Circuit explained that "a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment." *Moody*, 34 F.4th at 1212 (analyzing S.B. 7072). This is correct under established First Amendment law and affords the proper protection for operators of online platforms, including the Foundation.

The Eleventh Circuit's analysis is grounded in this Court's bedrock First Amendment jurisprudence. In 1974, this Court held in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), that a publisher, such as a newspaper, has a First Amendment right to exercise "editorial control and judgment" over content and its "treatment of public issues and public officials." The Court thus invalidated the right-of-response law at issue, which would have required newspapers to publish political candidates' responses to negative news coverage. The Court reaffirmed and extended this holding a decade later in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 17 (1986) (plurality op.), ruling it unconstitutional to force an entity (there, a public utility) "to use *its* property [a newsletter] as a vehicle for spreading a message with which it disagree[d]."

The Court further crystallized the First Amendment compelled speech doctrine in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In affirming the First Amendment right of private parade organizers to select parade

participants, the Court determined that compositional choices are likewise protected speech. “[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate a specific message as the exclusive subject matter of the speech[.]” *Id.* at 558. The “selection of contingents,” whether in a parade or a newspaper, retains constitutional protection. And two years later, that protection was explicitly extended to Internet-based communications. *See Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997).

This Court’s precedent thus provides the applicable governing principle: Internet publishers have a First Amendment right to control what material and message appears on their platforms—including the right to compile and the right to exclude.

H.B. 20 and S.B. 7072 run headlong into this precedent. Their prohibitions against viewpoint- and content-based editorial actions by online platforms cannot be reconciled with half-a-century of guidance from this Court forbidding such interference under the First Amendment. H.B. 20 prohibits a social media platform from “censor[ing] a user, a user’s expression, or a user’s ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user’s expression or another person’s expression; or (3) a user’s geographic location in this state or any part of this state.” Tex. Civ. Prac. & Rem. Code § 143A.002(a). Likewise, S.B. 7072 prohibits a social media platform from “tak[ing] any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.” Fla. Stat. § 501.2041(2)(j). The Florida statute further prohibits a social media platform from “willfully deplatform[ing]

a candidate for [public] office,” or using “post-prioritization or shadow banning algorithms for content and material posted by or about” a candidate. *Id.* §§ 106.072(2), 501.2041(2)(h).

By severely restricting an online platform operator’s ability to remove content and users, each statute compels online publishers to carry content that may or may not conform with the platform’s message or purpose. As a result, each statute encroaches the platform operator’s right to control its editorial decision-making and judgment. The state, not the companies that operate the platform or its users, becomes editor-in-chief. This Court’s First Amendment case law forbids this result.

Were the statutes applied to the Wikimedia Projects, *see supra* Section I, the intrusion into constitutionally protected speech would be unmistakable. Prohibiting or curtailing the ability to implement editorial rules is antithetical to an encyclopedia aimed at conveying accurate, verifiable information. As Wikipedia has explained, it “is not a soapbox, an advertising platform, a vanity press, an experiment in anarchy or democracy.”⁶ To the contrary, it “strive[s] for articles with an impartial tone” and relies on its users to “use, edit, and distribute” articles.⁷ Indeed, user-generated content and community-led moderation are the hallmark of the Wikimedia Projects. The challenged laws risk placing these values in irreconcilable conflict.

If applied to the Wikimedia Projects, the statutes would require the publication of user-generated content with which the user community or the

⁶ *Wikipedia:Five Pillars*, Wikipedia, https://en.wikipedia.org/wiki/Wikipedia:Five_pillars (last visited Dec. 4, 2023).

⁷ *Id.*

Foundation disagrees.⁸ Notably, the laws' exceptions to their bans on content removals are narrowly drawn. S.B. 7072, for instance, borrows its definition of "obscene" from Florida law, characterized as material which, *inter alia*, "[t]he average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest." *Id.* § 501.2041(4) (citing *id.* § 847.001(10)(a) ("Definitions")). In layperson's terms, then, the only enumerated exception in the Florida statute's content moderation provision for obscenity is explicitly sexual material. Thus, editors, administrators, and the Foundation could be forced to allow non-encyclopedic material on Wikipedia, such as: hate speech and attacks on political candidates; shocking and violent images, gore, animal cruelty, and other disturbing material without educational or encyclopedic value; advertising; and fringe theories.

Such restrictions are incompatible with *Tornillo*. The newspaper's right to exercise "editorial control and judgment" over the content it publishes correlates directly to the First Amendment right of the Wikimedia Projects' communities to exercise "editorial control and judgment." Such editorial judgment is expressive speech: "When a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in 'speech' within the meaning of the First Amendment. Laws that restrict platforms' ability to speak through content moderation therefore trigger First Amendment

⁸ Under H.B. 20 and S.B. 7072, platform operators can only remove content that is illegal, obscene, or incites criminal activity. See Tex. Civ. Prac. & Rem. Code § 143A.006(a); Fla. Stat. § 501.2041(4).

scrutiny.” *Moody*, 34 F.4th at 1210. Indeed, H.B. 20 and S.B. 7072 are far more sweeping than the law at issue in *Tornillo*, as they curtail any editorial decisions based on user viewpoint. These laws thus fail First Amendment scrutiny.

Moreover, H.B. 20 and S.B. 7072 would pose particular concern were they applied to community-based platforms like the Wikimedia Projects. The Foundation’s model, after all, relies on users—rather than any centralized editorial structure—to generate, edit, and (if needed) remove content. It is these users who decide upon and implement content generation and moderation policies and practices. These contributions include, for example, deciding what Wikipedia pages to create, how (if at all) to edit an existing page, how to resolve disputes over content, whether a user should be blocked from contributing, whether a page should be protected from further editing in light of vandalism, and even whether to delete a page.⁹ Users also elect administrators who are granted heightened technical and access controls and are responsible for reviewing appeals from blocked users.¹⁰ Given the Foundation’s community-based governance structure, laws that purport to limit the ability to remove specific content or disruptive users from a platform would restrict both the Foundation *and its users*. Thus, such laws would violate not just the First Amendment

⁹ See *Wikipedia:Contributing to Wikipedia*, Wikipedia, https://en.wikipedia.org/wiki/Wikipedia:Contributing_to_Wikipedia (last visited Dec. 4, 2023).

¹⁰ See *Wikipedia:Administrators*, Wikipedia, <https://en.wikipedia.org/wiki/Wikipedia:Administrators> (last visited Dec. 4, 2023).

rights of the Foundation, but also the First Amendment rights of its millions of users.¹¹

The Wikimedia Projects’ community-based governance model—and the dangers it faces under laws like those at issue here—further exposes the flawed reasoning of the Fifth Circuit’s opinion. The Wikimedia Projects’ model reinforces why the Fifth Circuit’s assumptions imperil not just organizations like the Foundation, but the contributor community as well, including countless Texans and Floridians who wish to participate in Wikimedia Projects. For example, the Fifth Circuit held that, unlike newspapers, social media platforms “exercise virtually no editorial control or judgment,” presuming that platforms “use algorithms to screen out certain obscene and spam-related content” and “virtually everything else is just posted . . . with *zero* editorial control or judgment.” *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 459 (5th Cir. 2022). Setting aside whether this assumption is valid for so-called “big tech” platforms (and the Foundation submits it is not), it is clearly untrue for Wikipedia articles. Wikipedia’s

¹¹ For the number of Wikipedia users, see *Wikipedia:Wikipedians*, <https://en.wikipedia.org/wiki/Wikipedia:Wikipedians> (last visited Dec. 4, 2023). That there are so many Wikipedia volunteer users who make editorial contributions also underscores the unworkable nature and chilling effect of the individualized-explanation provisions in H.B. 20 and S.B. 7072. For instance, S.B. 7072’s requirement that platforms give users a detailed explanation, containing “thorough rationale” (Fla. Stat. § 501.2041(3)(c)), each time it removes or alters content would effectively require each of Wikipedia’s hundreds of thousands of user editors to provide a thorough explanation—ostensibly on behalf of the entire Wikipedia community—each time they edit a Wikipedia article. This would flood Wikipedia with comments or, more likely, simply discourage users from making edits or additions at all.

article pages are constantly reviewed, updated, and edited by Wikipedia users. Judgment and editorial decision-making are exercised by the hundreds of thousands of volunteer users who build and curate the project. Indeed, sharing editorial control among the users, instead of consolidating it within the Foundation’s staff, is the Foundation’s own editorial decision and expressive conduct.

Likewise, the Fifth Circuit’s suggestion that social media platforms “are free to say whatever they want to distance themselves from the speech they host,” *id.* at 462, is no answer. At the threshold, it fails to credit *Tornillo*’s recognition of a First Amendment right to “editorial control and judgment.” 418 U.S. at 258. But as to Wikipedia specifically, the Fifth Circuit’s suggestion is unworkable. A Wikipedia article is not attributed to a particular user, nor is it realistically possible to have Wikipedia users post disclaimer banners on behalf of the community. In conflating various platform models, the Fifth Circuit justifies constitutional curtailment on a suggested policy change that is unworkable in the model of the Wikimedia Projects. A First Amendment that fails to heed these distinctions, as the Fifth Circuit envisions, is illusory.

B. H.B. 20 and S.B. 7072 Threaten to Degrade the Quality and Useability of Wikipedia.

Must-carry laws like H.B. 20 and S.B. 7072, while nominally enacted to increase freedom of speech, actually risk “reducing the free flow of information and ideas that the First Amendment seeks to promote.” *Pac. Gas. & Elec.*, 475 U.S. at 14. This chilling effect occurs because platform operators may decide that instead of disseminating “hostile views”—or, in the case of Wikipedia, inaccurate information—“the safe[r] course is

to avoid controversy.” *Id.* (internal quotation marks omitted). And such an effect is especially pronounced where, as here, there is inherent vagueness in the laws, which threaten to chill speech. *See Grayned*, 408 U.S. at 109 (noting that “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked”); *see also supra* Section I.

The statutes’ content-moderation restrictions and individual-explanation requirements pose a very real risk of chill on the Foundation and its users. Indeed, if required to carry every political viewpoint or opinion on any given topic, it is likely that Wikipedia would quickly lose its identity as an encyclopedia, devolving into an unreliable murk of dubious content. Likewise, if users were forced to provide thorough explanations each time they edited a Wikipedia article, they might simply opt out of editing altogether.

For example, Wikipedia users currently maintain an article on climate change that includes nearly 400 footnotes of third-party sources.¹² That article states unequivocally that “[t]here is a near-complete scientific consensus that the climate is warming and that it is caused by human activities. As of 2019, agreement in recent literature reached over 99%. No scientific body of national or international standing disagrees with this view.”¹³ In short, the “climate change” article accepts, as a matter of scientific and global agreement, that climate change is real. There are separate Wikipedia articles addressing the “global warming controversy,” *i.e.*, “whether [climate change] is occurring,

¹² *Climate change*, Wikipedia, https://en.wikipedia.org/wiki/Climate_change (last visited Dec. 4, 2023).

¹³ *Id.*

. . . how much has occurred in modern times, what has caused it.”¹⁴ This organizational decision—bifurcating the science behind climate change and the controversy—was made by Wikipedia users. They decide what content to include (and exclude) from the main article on the topic, and what content to include in the supplemental article on the controversy. H.B. 20 and S.B. 7072 endanger these crucially important editorial decisions.

When making these sorts of organizational editorial decisions, some Wikipedia users employ the “Pokémon test.”¹⁵ Until 2007, Wikipedia had standalone articles for each of the nearly 500 Pokémon established in the Pokémon franchise at that time. Users discussed and decided to cull those articles, deciding that only the most notable Pokémon warranted their own articles and relegating the remaining Pokémon to various lists.¹⁶ Today, users invoke the Pokémon test when deciding whether to add or remove Wikipedia articles—e.g., “Is this topic as notable as Charizard?”¹⁷ Curtailing users’ ability to remove less noteworthy articles in this way risks degrading the quality and utility of an online encyclopedia like Wikipedia.

¹⁴ *Global warming controversy*, Wikipedia, https://en.wikipedia.org/wiki/Global_warming_controversy (last visited Dec. 4, 2023).

¹⁵ *Wikipedia:Pokémon test*, Wikipedia, https://en.wikipedia.org/wiki/Wikipedia:Pok%C3%A9mon_test (last visited Dec. 4, 2023).

¹⁶ *List of Pokémon*, Wikipedia, https://en.wikipedia.org/wiki/List_of_Pok%C3%A9mon (last visited Dec. 4, 2023).

¹⁷ *Charizard*, Wikipedia, <https://en.wikipedia.org/wiki/Charizard> (last visited Dec. 4, 2023).

A core tenet of Wikipedia is that “anyone can use, edit, and distribute” the content therein.¹⁸ Indeed, the Foundation’s decision to allow its community of users to edit articles directly is itself a discretionary editorial decision that has been enormously successful. But this openness requires guardrails to ensure Wikipedia continues providing free and accurate information for all—including the ability to ban malicious actors from the platform. One of the biggest challenges with overseeing an online encyclopedia is attempts by public figures or governments to seek to alter information reflected in Wikipedia articles. Bad actors (often through proxies) frequently attempt to skew the public record by altering or deleting articles relevant to them. These efforts can range from publishing demonstrably false facts to more subtle forms of propaganda meant to sway public opinion. For example, in May 2023, the CEO of a Gulf state-owned oil company reportedly edited Wikipedia pages to “greenwash” his image and “control public perception of his record in the fossil fuel industry.”¹⁹ And in 2022, a French presidential candidate reportedly attempted to manipulate the Wikipedia page about him in order to influence the election.²⁰

¹⁸ *Wikipedia:Five Pillars*, Wikipedia, https://en.wikipedia.org/wiki/Wikipedia:Five_pillars (last visited Dec. 4, 2023).

¹⁹ Ben Stockton, *Cop28 president’s team accused of Wikipedia ‘greenwashing,’* THE GUARDIAN (May 30, 2023), <https://www.theguardian.com/environment/2023/may/30/cop28-president-team-accused-of-wikipedia-greenwashing-sultan-al-jaber>.

²⁰ Jon Henley, *French reporter infiltrates campaign of far-right presidential candidate Éric Zemmour,* THE GUARDIAN (Feb. 17, 2022), <https://www.theguardian.com/world/2022/feb/17/french-reporter-infiltrates-campaign-of-far-right-presidential-candidate-eric-zemnour-france>.

H.B. 20 and S.B. 7072, if read to apply to the Wikimedia Projects, would handicap users' and the Foundation's ability to curtail this type of activity on Wikipedia, directly undermining Wikipedia's purpose to provide free and accurate information for all. Practically speaking, those with the greatest resources and sharpest agendas would be given free rein to create and edit Wikipedia articles as they see fit. For example, under the H.B. 20 regime, a Texas resident with support from the Chinese Communist Party could more easily manipulate articles about pro-democracy protests in Hong Kong by citing Chinese state media sources that call Hong Kong protestors "radical terrorists."

Platform operators like the Foundation, as well as users of the Wikimedia Projects, have developed expertise over decades in evaluating trust and safety issues and developing appropriate content-moderation policies based on the purpose of those platforms. Moderation of "lawful-but-awful" content—including that promoted by "state-sponsored attackers"—is hugely valuable. See Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. Free Speech L. 191, 208 (2021). "If Internet services don't make these 'trust & safety' efforts, problematic content producers will overrun any undefended service, flooding it with material that other users don't want." *Id.* The Foundation and its community of users are motivated to police these bad actors because they have the most at stake in ensuring that the Wikimedia Projects promote healthy and appropriate discourse. For a government to step in, compel speech, and wrest control from these organizations—and their communities of users—is not only unconstitutional, but it also ignores the practical realities of online expression and is thus woefully ill-advised.

Ultimately, far from their stated goals of promoting the free flow of information and divergent viewpoints, H.B. 20 and S.B. 7072 gravely risk a profound chilling effect on speech hosted on a wide range of vibrant online platforms, including the Wikimedia Projects. The laws would make for a less trustworthy Internet and risk destroying collaborative resources like Wikipedia by inviting spam, vandalism, and propaganda.

CONCLUSION

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

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