No. 22-277

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.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* PEN AMERICAN CENTER AND LIBRARY FUTURES IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amicus PEN American Center ("PEN America") is a nonprofit, nonpartisan public-policy organization with an abiding interest in protecting free expression as the cornerstone of a robust and healthy democracy. PEN America has conducted extensive research into recent efforts to suppress the expression of certain viewpoints by the state across the country, including through book bans and book restrictions, as well as through the implementation of various "educational gag orders." These legislative actions and policies present explicit prohibitions to restrict teaching about topics such as race, gender, American history, and LGBTQ+ identities in K–12 and higher education.

PEN America's most recent report on book bans, *Banned in the USA: The Mounting Pressure to Censor*, recorded 3,362 instances of bans in the 2022-23 school year, a 33 percent increase over the 2021-22 school year. PEN America also maintains the widely-used PEN America Index of Educational Gag Orders, which has now cataloged 307 bills in 45 states that aim to restrict the freedom to learn and teach. Thirty of these bills have become law in 18 states. The Index also catalogs ten state policies with similar effect, along with 22 higher education

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[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 *amici* and their counsel have paid for the filing and submission of this brief.

autonomy restrictions, two of which have become law.

Amicus Library Futures, a project of NYU's Engelberg Center on Innovation Law & Policy, is the vanguard nonprofit organization uncovering and confronting the fundamental policy issues that threaten libraries in the digital age. Library Futures believes librarians, policymakers, and community leaders must take an assertive approach to digital rights so they can protect, advocate for, and advance a fair digital future for libraries and the communities they serve. Government bans, attacks, and restrictions on the freedom to read and learn in both physical and digital libraries fundamentally implicate its mandate to advocate for and promote strong digital rights.

With this brief, *amici* seek to situate the laws at issue in this case within a broader context of nationwide efforts by state legislators to prescribe orthodoxy in the marketplace of ideas, and to punish those who violate that orthodoxy.

SUMMARY OF ARGUMENT

It is axiomatic that the First Amendment provides absolute protection against governmental efforts to "prescribe what shall be orthodox" in public discourse. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet the last several years have seen a proliferation of laws and regulations passed at the state and local level throughout the country attempting to do just that. The proponents of these

laws have in many cases publicly and repeatedly confirmed that their purpose is to shape the contours of public debate, favoring certain views over others – exactly what the First Amendment forbids.

The Texas and Florida laws (the "Challenged Laws") at issue in these cases are part of the same broad movement. Like other recent state legislation, they represent an effort by the government to insert itself into the marketplace of ideas, and place a legislative thumb on the scales of whether and how certain content and viewpoints can or cannot be expressed. As with other such laws, the proponents of the Challenged Laws make no bones about what the laws' purposes are – they are designed to correct a perceived "bias" in the way certain social media websites treat political speech. Yet this Court has made it clear that such efforts to purportedly "level the playing field" for public discourse are just as much an affront to the First Amendment as are any other content or viewpoint-based speech regulations. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011).

The Challenged Laws' proponents attempt to argue that the Laws should be treated differently from others that seek to impose orthodoxy because they are targeted at popular websites, rather than more traditional venues for public discourse. But like any entity that in some fashion has a curatorial function, these websites receive content from third parties, evaluate it through a variety of means, and determine whether and how to organize and

disseminate it. Similarly, book publishers, book stores, and private libraries carry out this mission of determining what content they carry, to whom and to what degree they may recommend it, and how they organize and display it. Just as the states could not constitutionally compel those groups to, for example, publish or distribute a controversial book against their will, or maintain some government-mandated "balance" of books, so too the state cannot force the websites to disseminate speech that violates their moderation guidelines. And none of the fact-specific rationales put forth by the states for treating the websites differently stand up to scrutiny.

Finally, *amici* are gravely concerned about the potential ripple effects of a decision upholding the Challenged Laws. In an environment where states are already proposing and passing new forms of speech-restrictive laws at an alarming rate, such a decision would be viewed as vindication of those efforts and almost certainly lead to exponentially more—and more extreme—examples of such legislation. This "race to the bottom" would be catastrophic for public discourse in this country, and would make a mockery of our collective commitment to "freedom of thought, and speech," which is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1934).

ARGUMENT

I. The Challenged Laws Are Part of a Larger Movement to Impose Political Orthodoxy on Public Discourse.

In 1943, at the height of World War II, this Court authored one of its most powerful statements reaffirming the core First Amendment principle that distinguished America from the "totalitarian enemies" it was then facing: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 641-42.

Now, eighty years later, this foundational principle is under direct and sustained attack from state and local governments around the country. As illustrated below, time and again in recent years, public officials have responded to ideas or viewpoints with which they disagree by employing the levers of government to attempt to excise those ideas from the public discourse or retaliate against their proponents. These efforts take various forms, from overtly content-based legislation to executive and administrative action, but all spring from the same unconstitutional impulse to prescribe orthodoxy in the marketplace of ideas, and to punish those who violate that orthodoxy.

This impulse is evident in recent laws passed by state legislatures around the country, but in particular in the two states whose laws are at issue here, Florida and Texas. In just the last two years, Florida and Texas have passed laws that (among other things): (1) identify a host of disfavored topics, including topics related to race, gender, and sexual orientation, and restrict teachers' ability to discuss them in the classroom, *see* Fla. HB 1557 (2022), Fla. HB 1069 (2023), Fla. HB 7 (2022), Tex. HB 3979 (2021); (2) impose content-based restrictions on public performances, including drag performances and other forms of artistic expression, *see* Fla. SB 1438 (2023), Tex. SB 12 (2023); (3) restrict students and administrators from establishing or participating in specific disfavored programs based on their content, such as diversity, equity, and inclusion initiatives, *see* Fla. SB 266 (2023), Tex. SB 17 (2023); (4) impose a "rating" system requiring publishers to identify and categorize books based on their content, and restricting schools and libraries from purchasing books in certain content-based categories, *see* Tex. HB 900 (2023); and (5) explicitly retaliate against those who have publicly criticized the foregoing laws, *see* Fla. SB 4-C (2022), Fla. HB 9-B (2023).

As Florida and Texas lead the way, other states have followed suit:

- At least six states have passed laws imposing content-based restrictions on disfavored types of public performances;[2]

- At least nine states have passed laws that restrict dissemination of "sensitive instructional materials" and may impose civil and criminal penalties for violations, leading to widespread preemptive book restrictions;[3]

- At least five states have enacted laws that restrict diversity, equity and inclusion activities;[4] and

- At least one state, Arkansas, has passed a law imposing criminal penalties on librarians and book sellers for recommending and/or selling books that contain "harmful" material.[5]

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[2] *See* Movement Advancement Project, *Equality Maps: Restrictions on Drag Performances*, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions.

[3] *See, e.g.,* PEN America, *Banned in the USA: State Laws Supercharge Book Suppression in Schools* (Apr. 20, 2023), https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/ (summarizing legislation); *see also* Iowa Senate File 496.

[4] *See Chron. of Higher Educ. DEI Legis. Tracker* (July 14, 2023), https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts;

[5] *See* Ark. Act 372 § 1.

Numerous laws that have been proposed but not enacted at this time would go even further. For example, in 2023, Florida legislators proposed a bill that would severely curtail First Amendment protections for the press, Fla. HB 955 (2023). And Texas lawmakers introduced a bill that would have banned public schools from "encourag[ing] lifestyles that deviate from generally accepted standards of society," and required instructional materials in schools to present only "positive aspects of the United States and its heritage." Tex. HB 1804 (2023).

Moreover, state and local legislative or executive efforts to impose government-sanctioned orthodoxy on public discourse are not limited to passed and proposed legislation. Because of their core mission to promote and protect the rights of authors and libraries, *amici* have been particularly alarmed by the proliferation of content-based bans and restrictions on books. *Amicus* PEN America has reported that there were 3,362 instances of books being banned or restricted from school classrooms and libraries during the 2022-2023 school year across the country, an increase of 33 percent over the previous year. Florida and Texas have led the way on these book restrictions with 1,406 book ban cases in Florida across 33 school districts, followed by 625 bans in Texas.[6] As PEN America noted in its

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[6] *See* PEN America, *Banned in the USA: The Mounting Pressure to Censor* (Sept. 2023) ("*Banned in the USA*"), https://pen.org/report/book-bans-pressure-to-censor/. Missouri, Utah, and Pennsylvania follow, with 333, 281, and 186 book bans respectively.

comprehensive report on these bans, "[o]ver the past two years, coordinated and ideologically driven threats, challenges, and legislation directed at public school classrooms and libraries have spurred a wave of book bans unlike any in recent memory, diminishing students' access to books and directly impacting their constitutional rights." *Banned in the USA.*[7]

To the extent these laws seeking to impose orthodoxy have been tested in the courts, they have overwhelmingly been enjoined on constitutional grounds.[8] And the lower courts evaluating these

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[7] Arguably less visible but equally as pernicious as legislation and book bans are indirect executive actions aimed at imposing orthodoxy and punishing those who transgress it. For example, just days ago, the Attorney General of Texas opened a fraud investigation into a prominent non-profit organization for overtly political reasons based on the non-profit's contributions to public discourse. *See* Press Release, *Att'y Gen. Ken Paxton Opens Investigation into Media Matters for Potential Fraudulent Activity*, texasattorneygeneral.gov (Nov. 20, 2023), https://texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-opens-investigation-media-matters-potential-fraudulent-activity (investigation premised on purported "schemes of radical left-wing organizations" to "ensure the public has not been deceived ").

[8] *E.g., Ariz. Sch. Bds. Ass'n v. State*, 252 Ariz. 219, 222 (2022) (holding budget legislation that included "divisive concepts" law violated Arizona Constitution); *Imperial Sovereign Ct. of Mont. v. Knudsen*, 2023 U.S. Dist. LEXIS 184720, at *57-61 (D. Mont. Oct. 13, 2023) (enjoining law explicitly banning drag performances); *Friends of Georges v. Mulroy*, 2023 U.S. Dist. LEXIS 96766, at *100-01 (W.D. Tenn. June 2, 2023) (same); *Book People v. Wong*, 2023 U.S. Dist. LEXIS 165010, at *86-87 (W.D. Tex. Sept. 18, 2023) (Texas book-rating law "likely violates the First Amendment by containing an

cases have recognized exactly why such laws are anathema to the First Amendment and the American ideal for public discourse: the laws represent efforts to "take[] over the 'marketplace of ideas' to suppress disfavored viewpoints and limit where [speakers] may shine their light on . . . specific ideas. . . . But the First Amendment does not permit the State of Florida to muzzle its [citizens], impose its own orthodoxy of viewpoints, and cast us all into the dark." *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1290-91 (N.D. Fla. 2022).

The Challenged Laws are part and parcel of this wider movement to utilize government power to control public discourse. There is substantial public evidence, including numerous statements by the legislators themselves, that the Challenged Laws are not only content and viewpoint based on their face, *see* Br. for Respondents, No. 22-277 at 27-35, but also were passed specifically to amplify favored speakers and views (and concomitantly to diminish disfavored speakers and views). For example, in introducing H.B. 20, Texas Governor Greg Abbott noted that the

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unconstitutional prior restraint, compelled speech, and unconstitutional vagueness"), *appeal filed*, No. 23-50668 (5th Cir. Sept. 20, 2023); *HM Fla.-Orl v. Griffin*, 2023 U.S. Dist. LEXIS 134665, at *1 (M.D. Fla. June 24, 2023) (enjoining Florida's drag ban, which purportedly "prevent[s] the exposure of children to explicit live performances," but in fact "is specifically designed to suppress the speech of drag queen performers"); *Woodlands Pride v. Paxton*, 2023 U.S. Dist. LEXIS 171268, at *51 (S.D. Tex. Sept. 26, 2023) (enjoining Texas's drag ban law).

bill was intended to counter a supposed "movement by social media companies to silence conservative viewpoints and ideas."[9] And in Florida, Gov. Ron DeSantis stated, "If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable."[10]

These statements precisely echo those made by the proponents of many of the similar speech-unfriendly laws identified above.[11] Maya Angelou once famously said: "When people show you who they

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[9] *See* Press Release, *Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship*, gov.tex.gov (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship.

[10] *See* Press Release, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, FLgov.com (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/.

[11] *See, e.g.*, Press Release, *Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination*, Flgov.com (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/ (upon signing the Stop W.O.K.E. Act, Governor DeSantis stated, "[W]e will not let the far-left woke agenda take over our schools and workplaces."); Press Release, *Lt. Gov. Dan Patrick: Statement on the Passage of Senate Bill 16 – Banning Critical Race Theory (CRT) in Texas Universities*, ltgov.tx.gov (Apr. 12, 2023), https://www.ltgov.texas.gov/2023/04/12/lt-gov-dan-patrick-statement-on-the-passage-of-senate-bill-16-banning-critical-race-theory-crt-in-texas-universities/ (Texas Lt. Gov. Dan Patrick, upon the passing of SB 16, stated that it was intended to ban "[l]iberal professors, determined to indoctrinate our students with their woke brand of revisionist history.").

are, believe them." Here, this Court should believe the Challenged Laws' proponents when they describe the laws in the same terms as other unconstitutional laws aimed at burdening disfavored speech. The Challenged Laws are thus properly understood as yet another example of the broader effort to control the marketplace of ideas, to privilege speech that the state governments agree with over speech with which they disagree, to curtail what can be read and taught, and ultimately to compel orthodoxy in public discourse.

II. The Fact That the Challenged Laws Target Social Media Websites Does Not Differentiate Them From Other Attempts to Impose Orthodoxy.

The impulse to control speech and impose state-sanctioned orthodoxy is self-evident in the myriad content-based laws identified in Section I, including the Challenged Laws. That impulse is not less dangerous—or less unconstitutional—because the Challenged Laws target social media websites, rather than more traditional venues for public discourse. Yet that is exactly the basis on which the states attempt to justify the Challenged Laws. But the distinctions that the states attempt to draw between regulating social media websites and regulating speech in other contexts do not stand up to scrutiny. As explained below, if similar laws were applied to more traditional intermediaries like book publishers or bookstores, their unconstitutionality would be self-evident. Thus, the fact that the Challenged Laws target social media websites is

irrelevant both to their place in the larger movement to impose political orthodoxy, and to the analysis of their constitutionality under the First Amendment.

This Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)) (collecting cases). Indeed, "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* As this Court has offered by way of example, if "the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties," then "[n]o one, we trust, would seriously argue that the First Amendment permits this." *Id.* at 2464.

In passing the Challenged Laws, Florida and Texas transformed that unconstitutional example into a reality. Under Texas's law, a social media website must disseminate the speech of its users, no matter how vile or antithetical to the message the site's owners hope to convey that speech may be, unless the content meets one of two very limited exceptions. Tex. Civ. Prac. & Rem. Code § 143A.006(a). And under Florida's law, a social media company must continue to disseminate the speech of any user who happens to be a "candidate" for public office, no matter how abhorrent that user's

speech might be to the company or the public. Fla. Stat. Ann. § 106.072(2).

If these governmental regimes targeted more traditional types of intermediaries—such as book publishers, bookstores, or libraries—then no one, *amici* trust, would seriously argue that the First Amendment permits them. Like social media websites, libraries, bookstores, and book publishers principally disseminate speech authored by others, but it is beyond dispute that in making the choice of *whether or not* to publish, sell, or distribute a particular book, those intermediaries are engaging in expressive activity fully protected by the First Amendment. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").[12]

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[12] To be clear, *amici* do not take the position that social media companies are categorically immune from regulation. Rather, *amici* submit that when such regulation is content- or viewpoint-based or compels the dissemination of objectionable speech, those regulations are subject to searching judicial scrutiny under the First Amendment. *Amici* likewise do not suggest that social media websites are necessarily akin to publishers, booksellers, and libraries in all respects, nor that those traditional fora for dissemination of third-party content are necessarily all uniform for all First Amendment purposes. For example, public libraries may in some respects have less discretion over their curatorial function than do private publishers. *Amici's* point is simply that the Challenged Laws at issue *here*—which create a government mandate forcing

Consider, then, if the Challenged Laws applied to the "five major publishing houses — [Penguin Random House], HarperCollins Publishers, [Simon & Schuster], Hachette Book Group, and Macmillan Publishing Group, LLC — which are known as the 'Big Five.'" *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1, 12 (D.D.C. 2022). Under the provision preventing intermediaries from "de-platforming" candidates, could Florida compel Penguin Random House to continue publishing former President Trump's *The Art of the Deal* even if the company wished to discontinue publication? Could a copycat law in Delaware compel Macmillan to continue publishing President Biden's *Promise Me, Dad*? The answer that the First Amendment demands, to both questions, is clearly no.

Applying the Challenged Laws to bookstores would yield the same conclusion: they are plainly unconstitutional. Following the Texas model, could California compel its resident bookstore owners to sell guides to self-induced abortions, on the grounds that a bookstore owner who refuses to do so is "censoring" authors based on their "viewpoint"? Could Alabama likewise compel its resident bookstore owners to sell how-to manuals for building firearms, on the grounds that a bookseller who refuses to do so out of support for gun control is "censoring" those authors? Of course not. As Justice

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intermediaries to disseminate speech which they otherwise would not—are equally unconstitutional when applied to any of these categories.

Thomas has explained, "[i]f Congress passed a law forcing bookstores to sell all books published on the subject of congressional politics, we would undoubtedly entertain a claim by bookstores that this law violated the First Amendment principles established in *Tornillo* and *Pacific Gas*." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 824 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

Unfortunately, the Challenged Laws go even further. Texas's law would force social media companies to disseminate statements denying the existence of the Holocaust on the grounds that not doing so is "censoring" the "viewpoint" of the Holocaust deniers. Florida's law would, a decade ago, have forced social media companies to disseminate the racist screeds of David Duke given his status as a perennial "candidate" for public office.[13] It is impossible to imagine that a law imposing those same burdens on America's publishers or booksellers or libraries would survive this Court's scrutiny.

Similarly, libraries, which increasingly rely on digital services to augment their collections, would be dramatically affected by the Challenged Laws if they extended to other intermediaries. Statutes preventing libraries from removing or restricting materials consistent with their collection policies – whether electronically supplied or traditional books –

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[13] *See, e.g.*, Alan Blinder, *David Duke, Ex-K.K.K. Leader, to Seek Senate Seat in Louisiana*, N.Y. Times (July 22, 2016), https://www.nytimes.com/2016/07/23/us/david-duke-senate-louisiana.html.

could result in collections that are filled with misinformation and hate speech.[14]

Texas and Florida put forward various rationales for why this Court should treat social media companies differently from traditional intermediaries. None of their arguments have merit.

First, Texas and Florida argue that the social media companies are subject to more regulation because of "their size and market dominance." *See* Resp. to Pet., No. 22-555 at 30; Pet., No. 22-277 at 8. But this Court has considered and expressly rejected the theory that a medium's size and influence permits the regulation of the content it carries. *See Miami Herald Publ'g v. Tornillo*, 418 U.S. 241, 249, 256 (1974) (acknowledging appellee's argument that "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful

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[14] *See, e.g.*, Meg Woolhouse, *Public libraries unwittingly offered 'hate' books through a private service*, WGNH.org (Apr. 20, 2022), https://www.wgbh.org/news/2022-04-20/public-libraries-unwittingly-offered-hate-books-through-a-private-service; Statement, Library Futures & Library Freedom Project (Feb. 22, 2022), https://libraryfreedom.medium.com/we-demand-accountability-from-hoopla-digital-and-overdrive-regarding-the-platforming-of-fascist-c47c88e62ddc ("While collections vary based on the needs and interests of the community each library serves, libraries do not usually collect material that is abjectly false disinformation. . . . Holocaust denial misinformation does not fit within public libraries' collection standards. If public libraries choose to collect these materials for research purposes, they should be able to make that decision for themselves and their communities . . . . ").

and influential in its capacity to manipulate popular opinion and change the course of events," but nevertheless concluding that "compulsion to publish that which reason tells them should not be published is unconstitutional") (cleaned up).

Second, Texas and Florida argue that the social media websites' own public statements in favor of free speech somehow justify the Challenged Laws. *See, e.g.*, Resp. to Pet., No. 22-555 at 3. All of the Big Five publishers have made similar pronouncements decrying censorship,[15] yet it is still hard to imagine

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[15] *See, e.g.*, *Our Story*, penguinrandomhouse.com, https://www.penguinrandomhouse.com/about-us/our-story/ ("[W]e fiercely protect our authors' intellectual property and champion freedom of expression, ensuring that their voices carry beyond the page and into the folds of communities and societies around the globe."); *Philanthropy*, harpercollins.com, https://www.harpercollins.com/pages/values-commitments ("HarperCollins believes in freedom of expression and stands against censorship in all its forms. We strive to publish a multitude of voices, present a diversity of thought, and protect the rights of creators."); *Banned Books Resources*, simonandschuster.com, https://www.simonandschuster.com/p/banned-books-resources ("Simon & Schuster stands against censorship in all its forms and supports authors, librarians and educators, booksellers and readers who work to defend and expand access to books for all."); *Banned & Challenged Books*, hachettebookgroup.com, https://www.hachettebookgroup.com/landing-page/banned-books/ ("Hachette Book Group stands with our authors and illustrators, and with educators and librarians as we fight to protect the freedom to read, one of the most important foundations of a free society."); *Banned Books*, macmillan.com, https://sites.macmillan.com/banned-books ("We proudly stand with authors, librarians, teachers, booksellers, and fellow readers against book banning. We believe everyone should have

that a law that, for example, compelled those publishing houses to print books denying the Holocaust, or claiming that the children murdered at Sandy Hook Elementary were merely crisis actors, or peddling conspiracy theories about September 11, would survive constitutional scrutiny. Yet these are all types of content that the Challenged Laws would require the websites to publish, or refrain from removing.[16]

Third, Texas and Florida argue that the Challenged Laws are permissible because social media companies merely disseminate the speech of their users and have no message of their own. *See, e.g.*, Pet., No. 22-277 at 22 ("Hosting others' speech

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access to books and we actively support organizations that champion the freedom to read.").

[16] These concerns are far from hypothetical, as examples abound of candidates for public office making such statements. *See, e.g.*, Julia Jacobs, *Holocaust Denier in California Congressional Race Leaves State G.O.P. Scrambling*, N.Y. Times (July 6, 2018), https://www.nytimes.com/2018/07/06/us/politics/john-fitzgerald-holocaust-denial.html; Sophie Tatum, *Holocaust denier is officially the GOP nominee in Chicago-area House race*, CNN (Mar. 21, 2018), https://www.cnn.com/2018/03/20/politics/holocaust-denier-gop-illinois-third-district/index.html; A.G. Gancarski, *Gubernatorial candidate Randy Wiseman says his Parkland 'crisis actor' posts were in error*, Fla. Politics (Feb. 21, 2018), https://floridapolitics.com/archives/256941-gubernatorial-candidate-shares-posts-saying-parkland-survivor-crisis-actor/; Robert Mackey, *Oregon Sheriff Shared Sandy Hook Conspiracy Theory on Facebook*, N.Y. Times (Oct. 2, 2015), https://www.nytimes.com/2015/10/03/us/oregon-sheriff-shared-sandy-hook-conspiracy-theory-on-facebook.html.

does not interfere with the platforms' own message because the platforms have no message."). Yet the same could be said of book publishers, bookstores, and libraries, which likewise curate, disseminate, and amplify the speech of others. It would strain credulity—not to mention ignore decades of this Court's rulings—to suggest that publishing, selling and lending books is not expressive activity. *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58, 71 (1963) (protecting book publishers from a state scheme of "informal censorship").[17]

As this Court has observed, "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."

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[17] Texas and Florida also attempt to differentiate these laws from others by framing the social media websites' content moderation decisions as a form of "censorship." *See, e.g.*, Resp. to Pet., No. 22-555 at 18 (referring to the companies' "censorship decisions"); Pet., No. 22-277 at 2 (stating that the companies "censor speech"). But that is merely a rhetorical flourish, not a legal argument—the websites could just as easily characterize the Challenged Laws as "censorship" of their speech. Moreover, to the extent the States' characterization of the websites' content moderation decisions as censorship can be construed as a legal argument, it is one that this Court has already rejected. Pat Tornillo made *exactly the same argument* about the Miami Herald's rejection of his proposed reply to the paper's editorial. *See* Br. of Appellee, *Miami Herald Publ'g v. Tornillo*, 1974 WL 185860, at 6 (U.S. Aug. 30, 1974) (asserting that "the only censorship that has occurred in the case before this Court is attributable to the appellant"). Mr. Tornillo lost his case, and the argument is no better now than it was then.

See Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Guided by those same "basic principles," *amici* submit that there is no constitutionally meaningful distinction between forcing traditional intermediaries to disseminate books against their will and forcing social media companies to disseminate posts against their will.

III. Upholding the Challenged Laws Will Intensify the Race to Exercise Government Control Over Public Discourse.

It is critical to understand the Challenged Laws as part of a broader movement to prescribe cultural and political orthodoxy because that context illuminates what is at stake in these cases. This is not, as the Laws' proponents would have it, a laudable attempt to "level the playing field" for speech on social media.[18] Properly understood, it is an attempt to privilege some speech (that of political

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[18] Even if it were, that would not be a constitutionally permissible exercise of legislative power:

> Leveling the playing field can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair.

Bennett, 564 U.S. at 750.

candidates or others protected by the Challenged Laws) over other speech (that of the social media websites, as expressed in their content moderation policies and decisions). That is exactly the type of governmental intrusion into the realm of public discourse the First Amendment was designed to protect against.

Moreover, understanding the myriad ways in which state legislatures around the country are already inserting themselves into the marketplace of ideas provides insight into the potential ramifications of the Court's decision in these cases. As described in detail in Section I, *supra*, the past three years have seen an explosion in state legislatures and local authorities attempting to use governmental power to interfere with public discourse and suppress speech with which they disagree. If this Court grants its imprimatur to the Challenged Laws, it is a sure bet that the current wave of legislation infringing on public discourse will only intensify, likely by orders of magnitude.[19]

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[19] The phenomenon of Supreme Court decisions leading to a proliferation of state-level legislation is well-documented. *Cf.* Aaron Tang, *After Dobbs: History, Tradition, & the Uncertain Future of a Nationwide Abortion Ban*, 75 Stan. L. Rev. 1091, 1094 (2022) (describing legislative activity in nearly 40 states to either restrict or protect the right to abortion following *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)); Brandon Posivak, *The Demise of the Hub-and-Spoke Cartel & the Rise of the Student Athlete: A Significant Step Toward a New Era of Conferences in NCAA v. Alston*, 31 U. Miami Bus. L. Rev. 38, 60 (2022) (noting "state legislatures acting quickly [to enact laws governing payment of student athletes] in the wake of" this

While there is no way to know exactly what kinds of laws state legislatures will pass in the future, current legislative activity may provide some clues. Given the dramatic rise in efforts to restrict access to books based on their content, for example, and armed with a precedent that seemingly justifies content-based regulation of private actors that disseminate the work of others, states may very well turn their attention to booksellers, publishers, or libraries. It is not difficult to imagine laws that would purport to forbid (or compel) those entities from stocking or publishing disfavored (or favored) authors based on those authors' personal politics.[20] Or states might seek to prohibit booksellers, publishers, or libraries from disseminating material addressing disfavored *subjects* in much the way they have already tried to do so in schools. *See* Section I, *supra*.[21]

Court's decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021)); Molly Townes O'Brien, *Private School Tuition Vouchers & the Realities of Racial Politics*, 64 Tenn. L. Rev. 359, 375 n.87 (1997) (describing the "avalanche of legislation that allowed for the conversion of public education to private education" after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

[20] While *amici*, with their organizational focus on supporting the rights of authors and libraries, have a particular concern for hypotheticals impacting books, the areas of potential government encroachment on free speech are certainly not so limited. One might just as easily imagine a state law prohibiting Spotify from disseminating (or compelling it to disseminate) a certain podcast, or Netflix a certain documentary.

[21] Or consider a recent news story involving law reviews, which like social media websites, book stores, publishers, and

Nor is it a satisfactory response that such action and reaction would be nothing more than democracy and federalism in action. That may well be true when this dynamic crops up in some areas of law, but it is decidedly not the case when the laws in question burden First Amendment rights. Laws impinging on free speech are uniquely dangerous because "freedom of thought, and speech" is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko*, 302 U.S. at 326-27. Indeed, the First Amendment is alone among the Bill of Rights in imposing an explicit limitation on the government's power to make law at all. U.S. Const. amend. I (beginning "Congress shall make no law"). That framing is why it is a bedrock principle of free speech law that "the remedy to be applied [to speech legislators disagree with] is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927).

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libraries, engage in the process of curating content created by others. In November of 2023, the editorial board of the Harvard Law Review voted not to publish a commissioned article by a well-credentialed scholar that was critical of Israel's recent military actions in Gaza. *See* Robert Tait, *Harvard journal accused of censoring article alleging genocide in Gaza*, The Guardian (Nov. 22, 2023), https://www.theguardian.com/education/2023/nov/22/harvard-law-pro-palestinian-letter-gaza-israel-censorship. Could Massachusetts constitutionally pass a law *requiring* the Law Review to publish the article despite the wishes of its editors? Certainly not. *Cf. Avins v. Rutgers*, 385 F.2d 151, 153-54 (3d Cir. 1967). Yet that is exactly what the Challenged Laws purport to require of the social media websites.

In this case, that principle requires government officials to explain to the public their beliefs regarding why and how the social media websites are exhibiting bias, not to seek to "correct" that perceived bias using legislation. By purporting to decide what is "fair" or "biased" in the content moderation policies and practices of social media websites, the state is simply substituting its judgment as to what kinds of content are permissible on those websites for the judgment of the websites' stakeholders. But the First Amendment both affords the websites the right to make those decisions, and prohibits the state from doing the same. The former represents the websites' rightful participation in the marketplace of ideas; the latter is an unconstitutional attempt to prescribe orthodoxy in public discourse.

If this Court ultimately concludes that the Challenged Laws are a permissible exercise of state power, it will be sending a dangerous message to state and local governments throughout the country: that they may permissibly use their sovereign power to shape public discourse in ways that they perceive to be in their political interest. Such a result would be disastrous for public discourse in this country, and anathema to the most basic principles of the First Amendment.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the Eleventh Circuit, and reverse the decision of the Fifth Circuit,

with respect to the issues on which it has granted *certiorari*.

Respectfully submitted,

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