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.,
Petitioners,

v.

NETCHOICE, LLC; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
Respondents,

NETCHOICE, LLC; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
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 THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

Amicus has a particular interest in these cases because of the vital role social media platforms play as forums for public discourse. These cases may have far-reaching implications for the free speech rights of the platforms and their users, and for the ability of government to enact legislation essential to ensuring that the digital public sphere serves democracy.

SUMMARY OF ARGUMENT

Social media platforms have enormous power to shape public discourse. One of the ways they exercise that power is by establishing and enforcing acceptable-use policies, i.e. by moderating user content. These cases ask the Court to consider

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

whether and when the government can restrict the platforms' content-moderation activities consistently with the First Amendment. They also require the Court to consider how the First Amendment applies to regulations that require platforms to disclose information about those activities.

Unfortunately, none of the parties in this case offers a compelling theory of how the First Amendment should apply to the regulation of social media. Florida and Texas (the "States") contend that the platforms' content-moderation decisions do not implicate the First Amendment at all. If accepted, this theory would give governments sweeping authority over the digital public sphere and impede social media companies from building distinctive online communities and from addressing real harms to users. The platforms take a diametrically opposed position, arguing that any regulation implicating their content-moderation decisions must be subjected to the most stringent First Amendment scrutiny, or perhaps even regarded as unconstitutional per se. This theory would make it nearly impossible for governments to enact even carefully drawn laws that serve First Amendment values.

The Court should reject both of these theories. As this brief explains, social media platforms' content-moderation decisions are protected by the First Amendment because they reflect the exercise of editorial judgment. On this important, threshold question, the platforms are correct. That content-moderation is protected by the First Amendment,

however, does not mean that any regulation that touches on it is unconstitutional. Here, as in other contexts, the relevant level of scrutiny will turn on the nature of the regulation, with content-neutral regulations being subject to intermediate scrutiny and content-based ones being subject to strict scrutiny. And here, as in other contexts, whether a regulation survives the relevant level of scrutiny will turn on, among other things, the strength of the government's regulatory interest and the significance of the burden the regulation imposes on First Amendment activity. In an effort to elide these questions, the platforms and some of their *amici* suggest that precedents involving the regulation of newspapers decide this case. But social media platforms and newspapers are different in important respects, and these differences should matter to the First Amendment analysis, as explained below.

The Court should also reject the parties' most extreme arguments about the disclosure provisions. As the Court has said in other contexts, regulations that require businesses to disclose purely factual and uncontroversial information about their services are constitutional unless they are "unjustified" or "unduly burden[] protected speech." *Nat'l Inst. of Family and Life Advoc. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2377 (2018); *see also Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). This is because these kinds of provisions promote the free flow of accurate information to the public about goods and services, furthering the interest that was the justification for extending First Amendment

protection to commercial speech in the first place. *Zauderer*'s framework is appropriate in this context because it accounts for both of the First Amendment interests in play—the platforms' interest in the independent exercise of editorial judgment, and users' interest in understanding the platforms that have become the infrastructure for public discourse. *Zauderer*'s undue-burden test is also flexible enough to account for the more substantial free-speech interests implicated by disclosure provisions that touch upon expressive activity.

Applying this framework, the Florida and Texas must–carry provisions are unconstitutional because they override the platforms' editorial judgment and fail even intermediate scrutiny.[2] Florida's individualized-explanation provision is also unconstitutional because it fails even under *Zauderer*, but Texas's corresponding provision, properly construed, survives *Zauderer* scrutiny because it requires the disclosure only of factual and uncontroversial information and does not unduly burden the platforms' exercise of editorial judgment.

[2] This brief does not address the other content-moderation provisions of the Florida law, including the "consistency," "30-day restriction," and "user opt-out" provisions. Fla. Stat. § 501.2041(2)(b), (c), (f), (g).

ARGUMENT

I. The Court should reject constructions of the First Amendment that would preempt legislation that serves First Amendment values.

The parties in this case offer radically different theories of how the First Amendment applies to the regulation of social media. Florida and Texas contend that laws restricting the platforms from curating the speech on their sites do not implicate the First Amendment at all because they "regulate[] conduct, not speech."[3] The platforms, by contrast, argue that any law implicating editorial judgment must be subject to strict scrutiny, or perhaps even regarded as unconstitutional per se.[4]

Thus, the parties offer two theories of the First Amendment—one that would render the First Amendment largely irrelevant to the regulation of social media, and another that would make the First Amendment a near-categorical bar to such regulation. The Court should reject both of these theories. The platforms are correct that their content-moderation policies and decisions are protected by the First Amendment because they reflect the exercise of editorial judgment. That a law

[3] *Moody* Pet. at 18–19; *Paxton* Pet. Opp. at 18.

[4] The platforms argue, for example, that the Texas law's disclosure provisions are "per se invalid as intrusions targeting editorial functions." Plaintiffs' Motion for Preliminary Injunction at 24, *NetChoice, LLC v. Paxton*, No. 1:21-cv-00840 (W.D. Tex. Nov. 1, 2021).

implicates editorial judgment, however, does not mean the law is unconstitutional. As in other contexts, content-based laws are constitutional if they survive strict scrutiny, and content-neutral laws are constitutional if they survive intermediate scrutiny. Moreover, laws requiring the disclosure of purely factual and uncontroversial information about the terms on which a service is offered are constitutional if they are not unjustified and do not impose an undue burden on speech.

The Court should accordingly reject the parties' arguments about the application of the First Amendment in this context. It should reject them not only because they are inconsistent with precedent, but also because neither of them would serve our society well. The States' version of the First Amendment would give the government sweeping authority over the digital public sphere and impede social media companies from addressing real harms online. The platforms' theory, by contrast, would make it extremely difficult, if not impossible, for governments to enact even carefully drawn laws intended to protect the free speech rights of the platforms' users and to ensure that our system of free expression serves democracy—for example, laws that would require platforms to be accountable to the users with whom they have entered into contractual agreements, protect the privacy of those users, and promote competition and interoperability.

II. The Texas and Florida laws' must-carry provisions are unconstitutional.

A. The First Amendment protects the exercise of editorial judgment.

In an important series of cases, this Court has recognized that the First Amendment protects the exercise of "editorial judgment." In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a statute requiring newspapers that criticized political candidates to afford those candidates an opportunity to reply, in the newspapers' own pages, free of charge and with equal prominence and space. 418 U.S. at 244 & n.2. The Court concluded that the statute "fail[ed] to clear the barriers of the First Amendment because [it] intru[ded] into the function of editors" by compelling them "to publish that which 'reason' tells them should not be published." *Id.* at 256, 258.

Observing that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising," the Court held that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258. In his concurrence, Justice White underscored that "the very nerve center of a newspaper," is "the decision as to what copy will or will not be included," and that the First Amendment prohibits the government from dictating "the contents of [a newspaper's] news columns or the slant of its

editorials." *Id.* at 259–61 (White, J., concurring); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) ("editing is what editors are for; and editing is selection and choice of material").

Since *Tornillo*, the Court has held that the First Amendment protects the exercise of editorial judgment in other contexts, and by other kinds of actors. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 14–16 (1986) (plurality op.) (requiring utility to include in its newsletter views opposed to its own interfered with utility's editorial judgment by forcing it to disassociate itself from those views);[5] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636, 643–44 (1994) (cable must-carry provisions interfered with operators' "editorial discretion over which stations or programs to include in [their] repertoire," through which operators "seek[] to communicate messages on a wide variety of topics"); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 572–75 (1995) (parade organizer exercised editorial judgment in excluding a gay rights group, because the group's participation would alter the parade's expressive content and thus the organizer's own message); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 683 (1998) (rejecting First Amendment challenge to broadcaster's exclusion of political candidate from debate because excluding candidate fell within broadcaster's "editorial

[5] All subsequent citations to *Pacific Gas* are to the plurality opinion.

discretion in the selection and presentation of [its] programming").

The protection that the Court conferred on editorial judgment in these cases is vital for more than one reason. Protecting editorial discretion in these contexts was a way of recognizing and affirming the "principle of autonomy to control one's own speech." *Hurley*, 515 U.S. at 574. It was also, more fundamentally, a way of protecting public discourse from government intervention that might have distorted democratic self-governance. *Tornillo*, 418 U.S. at 257 (emphasizing the danger that government intervention into editorial decisions will distort, "dampen[]," or "limit[] the variety of" public debate); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (observing that the First Amendment "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad"); *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment intended to ensure "the widest possible dissemination of information from diverse and antagonistic sources"); *see also Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam).

B. Some of what social media platforms do reflects the exercise of editorial judgment.

Social media companies exercise editorial discretion in at least two contexts: when they specify and enforce "community standards" that restrict what categories of content users can post, and when they attach warning labels to user content.

When social media companies specify and enforce community standards, they make decisions roughly analogous to the ones this Court held to be protected in *Tornillo*, *Pacific Gas*, *Turner*, and *Hurley*. They decide what categories of content will appear on their platforms and what categories will not. Their decisions reflect judgments about the relative value of those categories of content. And collectively, these decisions determine the expressive character of the product they provide to their users.[6] In *Tornillo*, the Court observed that "[t]he choice of material to go into a newspaper" is at the core of editorial judgment. 418 U.S. at 258. Here, too, decisions about what content to include or exclude are properly characterized as editorial in nature.

The platforms also exercise editorial judgment when they attach labels to third-party content. Platforms deploy these labels for a variety of reasons, including to alert users to content that may be disturbing and to flag content that platforms believe to be misleading or false.[7] Whereas most content posted on social media platforms is generated by users, labels are distinctive in that

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[6] *See* Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, Knight First Amend. Inst. at Columbia Univ. (March 25, 2020), https://perma.cc/7RVH-BV6F (observing that social media platforms, like twentieth-century mass media, "set boundaries on permissible content" and thereby "curate public discourse").

[7] Yoel Roth & Nick Pickles, *Updating our approach to misleading information*, Twitter Blog (May 11, 2020), https://perma.cc/9JJ7-JDBM.

they are generated by the platforms themselves.[8] They are roughly analogous to newspaper editorials, in which newspapers speak directly on matters of public concern. As such, they fall comfortably within the scope of "editorial judgment." As the Court made clear in *Tornillo*, editorial judgment encompasses the "treatment of public issues," which the attachment of warning labels generally is. 418 U.S. at 258. And attaching labels to content also reflects decisions about the value of the speech to which the labels are attached, just as specifying community standards does. Even if the attachment of a warning label did not entail the exercise of editorial judgment, it would still constitute speech protected by the First Amendment, for the same reasons that an editorial constitutes speech.

Of course, that social media companies exercise editorial judgment in these two contexts does not mean that all of their business practices fall within the scope of the First Amendment. The relevant inquiry is not whether a regulated entity exercises editorial judgment in *some* context, but whether the entity exercises editorial judgment in the specific context addressed by the regulation. *See e.g.*, *Assoc. Press v. NLRB*, 301 U.S. 103 (1937) (upholding NLRB order directing Associated Press to reinstate editor fired for his union activity, because the order did not in any way limit the Associated Press's freedom to publish the news as it saw fit). The important point for present purposes is that some of

[8] *E.g.*, Eugene Volokh, *Treating Social Media Like Common Carriers?*, 1 J. Free Speech L. 377, 433 (2021) (acknowledging that "posting fact-checks or warnings" is platform speech).

the platforms' activities reflect the exercise of editorial judgment—and that these activities are restricted by the challenged regulations, as discussed further below.

C. Some laws that implicate editorial judgment are consistent with the First Amendment.

Even regulations that implicate editorial judgment can be constitutional in some contexts. Content-based regulations will be constitutional if they satisfy strict scrutiny. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) ("even when we consider a regulation . . . that is subject to 'strict scrutiny,' we sometimes find the regulation to be constitutional after weighing the competing interests involved."). And content-neutral laws are constitutional if they satisfy intermediate scrutiny. Content-neutral laws are reviewed less stringently because they "do not pose the same inherent dangers to free expression, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 213 (1997) (internal quotation marks and citation omitted).

Tornillo, *Pacific Gas*, and *Hurley* show that content-based laws that interfere with editorial judgment are subject to strict scrutiny. The right-of-reply statute in Tornillo was content-based because it "was triggered by a particular category of newspaper speech," and awarded access "only to those who disagreed with the newspaper's views." *Pacific Gas*, 475 U.S. at 13. Although the forced-

access rule in *Pacific Gas* was not triggered by any speech of the utility, the Court found that it was nonetheless content-based because it provided access only to a third party with opposing views. *Id.* at 12–14. The Court in *Hurley* did not expressly state that it was applying strict scrutiny, but it suggested as much by emphasizing that the parade organizer, like the newspaper in *Tornillo* and the utility in *Pacific Gas*, was forced to "disseminat[e] a view contrary to [its] own," which "compromised" its "right to autonomy over [its] message." 515 U.S. at 576.

In *Turner*, by contrast, the Court applied only intermediate scrutiny because it concluded that the challenged provisions were content-neutral. In that case, the Court considered provisions that required cable operators to carry local broadcast stations. The Court concluded that the provisions burdened the cable operators' exercise of editorial judgment but upheld them anyway. It did so after concluding that the "overriding objective . . . was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646.

The Court expressly rejected the cable operators' argument that *Tornillo* and *Pacific Gas* required strict scrutiny merely because the must-carry provisions compelled the "operators to transmit speech not of their choosing." *Id.* at 653. The Court explained that the must-carry provisions were content-neutral, unlike the regulations at issue in *Tornillo* and *Pacific Gas*, because they were not

triggered "by any particular message spoken by cable operators," and they were not an attempt to "counterbalance the messages" of the regulated entity. *Id.* at 655. The Court also noted that cable operators would not need to alter their own messages to disavow the content of broadcasts, because cable operators' subscribers would not associate those companies with the content of broadcast channels in the first place. *Id.*

Having concluded that the must-carry provisions were content-neutral, the Court applied intermediate scrutiny and upheld the provisions, because they were "designed to address a real harm," actually alleviated this harm, and were narrowly tailored to the government's important regulatory interest. *Turner II*, 520 U.S. 180, 195, 215–16.

D. The analogy of social media companies to newspapers is helpful only to a point.

Social media platforms are like traditional newspapers in that some of their activities involve the exercise of editorial judgment. But social media platforms are different from newspapers in important ways. In any particular context, those differences might matter to whether a particular activity entails the exercise of editorial judgment, how significantly a regulation burdens that judgment, and the strength of the government's

interest in imposing the burden.[9] As the Court has emphasized, "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 595 (2002) ("The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.").

Social media platforms differ from traditional newspapers in multiple ways. For example, whereas newspapers comprise mainly of content they themselves create or specifically solicit, most content posted on social media platforms is generated by the platforms' users.[10] Newspapers are highly selective in what they publish; they exercise close curatorial control over their pages. Social media companies generally have community standards that place broad limits on what content can be published on their platforms, but within these limits they publish virtually everything that users submit to them. All of this means that newspapers are directly and "intimately connected"

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[9] *See generally* Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, Knight First Amend. Inst. at Columbia Univ. (Feb. 27, 2018), https://perma.cc/C4DY-4W7G.

[10] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1660 (2017).

with the content they publish in a way that social media platforms are not. *Hurley*, 515 U.S. at 576.

There is also a vast disparity in scale between newspapers and social media platforms. The *New York Times* online edition "publishes roughly 150 articles a day."[11] Over the same period, Facebook users share more than 1 billion stories and 100 billion messages.[12] This disparity exists because platforms and newspapers have different business models and because they operate under different legal regimes (or, perhaps more accurately, because they benefit to different extents from the same legal regime). *See* 47 U.S.C. § 230 (immunizing online services from civil liability for content posted by third parties). Because of their scale and the role they play in facilitating the speech of their users, the major platforms are gatekeepers to public discourse in a way that even the most influential newspapers are not.

Newspapers are also coherent speech products in a way that social media platforms are not. By affirmatively selecting the subjects and viewpoints that will make it into the paper, newspapers communicate their own message to readers by "combining multifarious voices." *Hurley*, 515 U.S. at

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[11] Robinson Meyer, *How Many Stories Do Newspapers Publish Per Day?* The Atlantic (May 26, 2016), https://perma.cc/Q6TQ-GEHE.

[12] *Who We Are: Company Info*, Meta, https://perma.cc/2WFD-Z9KV.

569.[13] Because social media platforms are focused on facilitating users' speech, they are not curated in the same granular way, and they are simply too sprawling and diverse to be understood as coherent speech products. Again, social media companies do set community standards that delineate the outer boundaries of permissible speech on their platforms, and they do enforce these community standards to one extent or another. But specifying and enforcing community standards is not the same thing as selecting and editing individual articles. This is why newspapers' readers tend to attribute newspapers' content to the newspapers' publishers, whereas platforms' users do not generally attribute the content on the platforms to the platforms' owners.[14]

These differences should be considered in any First Amendment analysis. Some regulations that would burden editorial judgment if imposed on newspapers might not burden editorial judgment if imposed on social media companies, or might not burden it to the same extent. And the government

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[13] *See also* Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 Fordham L. Rev. 1629, 1651 (2014) (describing newspapers as producing "an integrated expressive whole with which [the newspaper] is associated"); Volokh, *supra* at 405 (describing newspapers as providing a "coherent speech product").

[14] Bracha, *supra* at 1647–48; Genevieve Lakier, *The Problem Isn't the Use of Analogies but the Analogies Courts Use*, Knight First Amend. Inst. at Columbia Univ. (Feb. 26, 2018), https://perma.cc/WDT7-EY4J; Ramya Krishnan, *The Pitfalls of Platform Analogies in Reconsidering the Shape of the First Amendment*, Knight First Amend. Inst. at Columbia Univ. (May 19, 2021), https://perma.cc/QHD8-7JLS.

might have different reasons, and perhaps stronger ones, for imposing certain kinds of regulatory burdens on social media companies. Accordingly, the analogy of social media companies to newspapers is helpful only to a point. The similarities between platforms and newspapers are important, but, in any particular context the differences might be important, too.

E. The Florida and Texas laws' must-carry provisions fail even intermediate scrutiny.

The must-carry provisions are unconstitutional because they override the platforms' exercise of editorial discretion and cannot survive even intermediate scrutiny. These provisions force platforms to publish a vast array of speech they do not want to publish, and that they view as inconsistent with the expressive communities they are trying to foster. The provisions also preclude the platforms from attaching labels to users' posts—that is, from editorializing about them. Neither Florida nor Texas has established that these provisions are narrowly tailored to any important interest.

The Florida law prohibits "willfully deplatform[ing] a candidate" for public office, Fla. Stat. § 106.072(2), or "us[ing] post-prioritization or shadow banning algorithms for content and material posted by or about" a candidate. *Id.* § 501.2041(2)(h). It also prohibits "censor[ing], deplatform[ing], or shadow ban[ning] a journalistic enterprise based on the content of its publication or broadcast." *Id.* § 501.2041(2)(j). The law expressly bars platforms

from attaching labels to user content. *Id.* § 501.2041 (1)(b).

The Texas law's must-carry provision has a significantly broader sweep, prohibiting platforms from "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person based on . . . the viewpoint of the user or another person, [or] the viewpoint represented in the user's expression or another person's expression." Tex. Civ. Prac. & Rem. Code § 143A.002. It does not matter whether "the viewpoint is expressed on a social media platform or through any other medium." *Id.* Because a great deal of user content expresses a viewpoint, the Texas law's must-carry provision extends to a broad swath of content. Moreover, like Florida's law, the Texas law defines "censor" broadly to include almost any action taken by a platform to restrict the visibility of user content, including attaching labels to user content.[15] *See* Fla. Stat. § 501.2041(1)(b); Tex. Civ. Prac. & Rem. Code § 143A.001.

[15] The Florida law defines "[c]ensor" to "include[] any action taken" to "delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. Fla. Stat. § 501.2041(1)(b). The Texas law defines "censor" to mean "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. Although the Texas law's definition of "censor" does not expressly encompass attaching labels to user content, it restricts this activity because labeling content "den[ies] equal access or visibility to, or otherwise discriminate[s] against expression." *Id.*

The Court need not decide whether these must-carry provisions are content neutral or content based, because they fail even intermediate scrutiny. The States, relying on *Turner*, assert that they have a substantial interest in "'assuring that the public has access to a multiplicity of information sources.'" *Moody* Pet. 25–26 (quoting *Turner*, 512 U.S. at 663); *Paxton* Pet Opp. 26–28 (same). While this interest is, as *Turner* says, of the "highest order," it is not in itself sufficient to justify the must-carry provisions at issue here. 512 U.S. at 663. *Turner* makes clear that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Id*. at 664 (citation and internal quotation marks omitted); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000). It must show instead that the law would redress a specific harm. The government did so in *Turner* by showing that the must-carry provisions at issue there were designed to protect the survival of over-the-air broadcast television against the anticompetitive practices of cable operators. *Turner II*, 520 U.S. at 196–213. The States make no comparable showing here. *Moody* Pet. 25–26; *Paxton* Pet. Opp. 26–27.

Even if the must-carry provisions advanced a substantial interest, the States have failed to show that the provisions are narrowly tailored to that interest. Most significantly, as explained above, the States have failed to provide any justification at all for restricting the ability of platforms to attach labels to user speech. That restriction serves no legitimate governmental interest at all; it serves

only to silence the platforms and impoverish public discourse.

III. Florida's individualized-explanation provision is unconstitutional but Texas's corresponding provision is constitutional under *Zauderer*.

Whether the States' individualized-explanation provisions comply with the First Amendment should be assessed under *Zauderer*. *Zauderer* provides the appropriate framework here because it accounts both for the value to public discourse of compelled disclosures in the commercial context and also for the potential burden that disclosure requirements impose on the speech rights of those subject to them.

As *Zauderer* recognized, disclosures of "purely factual and uncontroversial information" about the terms under which goods and services are offered to the public promote the free flow of information relevant to democratic decision-making—the primary justification for the First Amendment's protection of commercial speech. *Zauderer*, 471 U.S. at 651. Importantly, however, *Zauderer*'s framework accounts not just for the value of commercial disclosures to the public but also for the potential burden that disclosure requirements impose on the speech of those subject to them. It is true that this Court has not yet had an opportunity to consider *Zauderer*'s application to disclosure requirements that relate to a company's expressive activities. But *Zauderer*'s framework is appropriate even with respect to such requirements because it contemplates that the government's burden of

justification will increase with the burden on expression. The more substantial the burden a disclosure requirement imposes on speech, the more substantial the governmental interest must be for the government to demonstrate that the burden is not "undue" or "unjustified."

A. Compelled commercial disclosures are governed by the *Zauderer* framework.

Under *Zauderer*, laws that compel the disclosure of "purely factual and uncontroversial information about the terms under which [a company's] services will be available" are evaluated less stringently than laws that compel the disclosure of other forms of speech. *Id.* ; *see also NIFLA*, 138 S. Ct. at 2372. Specifically, commercial disclosure requirements are constitutional under *Zauderer* unless they are unjustified or impose an undue burden on speech. *Id*. at 2372, 2378; *see also Zauderer*, 471 U.S. at 651.

Contrary to the platforms' claim, *Zauderer* extends to commercial disclosure mandates generally, not just those that "correct[] misleading advertising." NetChoice No. 22-555 Br. at 16–17; *see also id*. at 47–48; NetChoice No. 22-277 Br. at 39 n.6.

In *Zauderer* itself, the Court upheld a rule that required lawyers who advertised their services on a contingency-fee basis to disclose that clients could be required to pay fees and costs. *Zauderer*, 471 U.S. at 650–53. The Court emphasized that the disclosure requirement did "not attempt[] to prevent attorneys from conveying information to the public," but "only

required them to provide somewhat more information than they might otherwise be inclined to present"—"purely factual and uncontroversial information about the terms under which [their] services will be available." *Id. at* 650–51. The attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising [was] minimal," the Court reasoned, because the First Amendment's "protection [of] commercial speech is justified principally by the value to consumers of the information such speech provides." *Id.* (emphasis in original). The Court thus concluded that while "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, . . . an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

While *Zauderer* itself concerned a law intended to address consumer deception in commercial advertising, its reasoning applies more broadly. This Court has long presumed that *Zauderer* extends beyond this context. *NIFLA*, 138 S. Ct. at 2376 ("[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."); *Pacific Gas*, 475 U.S. at 16 n.12 ("The State, of course, has substantial leeway in determining appropriate disclosure requirements for business corporations." (citing *Zauderer*)); *see also 303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) ("[O]ur cases have held that that the government may sometimes 'requir[e] the

dissemination of purely factual and uncontroversial information,' particularly in the context of 'commercial advertising.'" (quoting *Hurley*, 515 U.S. at 573)). And every federal court of appeals to consider the question has recognized as much. *See, e.g., CTIA—The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 844 (9th Cir. 2019) (collecting cases).[16]

This conclusion is supported by *Zauderer* itself, which recognized that commercial disclosure requirements serve the principal justification for "[extending] First Amendment protection to commercial speech" in the first instance—"the value to consumers of the information such speech provides." 471 U.S. at 651; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (holding that "the free flow of commercial information is indispensable" to the "formation of intelligent opinions" about our economic system and, ultimately, to "public decisionmaking in a democracy"). Plainly, this rationale applies to any disclosure requirement that

[16] The D.C. Circuit initially read *Zauderer* more narrowly, but subsequently reversed course. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (*Zauderer* limited to consumer deception context), *overruled by Am. Meat Inst. v. U.S. Dep't of Agric.* (*AMI*), 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) ("The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception."); *Nat'l Ass'n of Mfrs. v. SEC* (*NAM*), 800 F.3d 518, 522–23 (D.C. Cir. 2015) (*Zauderer* limited to commercial advertising); *Am. Hosp. Ass'n v. Azar* (*AHA*), 983 F.3d 528, 541 (D.C. Cir. 2020) (explaining that, contrary to *NAM*, "our court has not so limited" *Zauderer*).

facilitates the free flow of accurate commercial information—not only to requirements that serve the government's interest in preventing consumer deception in commercial advertising. *See Nat'l Elec. Mfrs Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal").

Zauderer provides the proper framework for evaluating even commercial disclosure requirements that relate to expressive activity. Where it applies, *Zauderer*'s undue-burden test requires courts to determine whether a disclosure requirement imposes a burden that is "undue" or "unjustified"—that is, it calls for a sliding-scale consideration of free-speech benefits and burdens. The greater the burden on speech, the more the government must do to justify it. This framework properly accounts both for the value to public discourse of compelled disclosures in the commercial context and for the potential burden that disclosure requirements impose on speech.

B. Texas' individualized-explanation provision meets *Zauderer*'s threshold requirements.

Texas's individualized-explanation provision is subject to *Zauderer* scrutiny because it satisfies *Zauderer*'s threshold requirements. It requires the disclosure of information that is (i) factual and (ii) uncontroversial, and that (iii) relates to commercial

services provided to the public. The platforms do not claim otherwise. NetChoice No. 22-555 Br. at 16–17, 47–48; NetChoice No. 22-277 Br. at 39–40. Amicus takes no position on whether Florida's provision satisfies Zauderer's threshold requirements, because even if it did, it would fail Zauderer's undue-burden test, as explained further below.

Texas's provision requires platforms to notify users when their content is removed and to "explain the reason the content was removed." Tex. Bus. & Com. Code Ann. § 120.103(a)(1).[17] *Amicus* understands this text to require platforms to identify the provision within their terms of service upon which they relied in removing user content. And importantly, it is amicus's understanding that the platforms could comply with this requirement through automated means, without individualized human review.

Requiring a platform to notify users of the reason why their content was removed is to require the disclosure of "purely factual" information. All major platforms enter into contractual relationships with their users, in which the users agree to abide by terms of service, including acceptable use policies, and the platforms reserve the right to remove content that violates the terms. Requiring the platforms to notify users of the basis for the removal

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[17] The Texas provision also requires platforms to "allow the user to appeal." *Id.* This requirement should not be evaluated under *Zauderer* because it is not a compelled-disclosure requirement. *Amicus* does not address the constitutionality of this requirement in this brief.

of their content under these terms does not require the platforms to express an opinion. Rather, it requires the disclosure only of objective facts. *See Zauderer*, 471 U.S. at 651; *CTIA*, 928 F.3d at 846–48 (information is "purely factual" if it is "literally true" and not "misleading").[18]

NetChoice's *amici* argue that the States' laws require the disclosure of subjective information, in the form of the platforms' "editorial standards." RCFP & ACLU Amicus Br. at 26. But this is wrong with respect to at least Texas's law. That law is best understood to require the platforms to identify only the contractual provision on the basis of which they removed their customers' content. This is not so different from a law requiring an author's publisher to identify the contractual provision relied upon in terminating the author's book contract.

Texas's disclosure requirement is also "uncontroversial," because there can be no "dispute about [the] simple factual accuracy" of the information that must be disclosed, and because it does not require platforms to disseminate a "one-sided . . . message" to users. *AMI*, 760 F.3d at 27; *see also id.* at 35 (Kavanaugh J., concurring) (finding the "uncontroversial" requirement easily met where

[18] NetChoice contends that the disclosure provisions at issue here are "akin to requiring a newspaper to explain every decision not to publish any one of a million letters to the editor." NetChoice No. 22-555 Br. at 16–17. But newspapers do not codify their editorial standards in contractual agreements with those who submit letters to the editor. Nor do they ordinarily make editorial decisions by mechanical application of anything resembling terms of service.

the information was "factually straightforward, evenhanded, and readily understood"); *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022) (required warning was "controversial because it elevate[d] one side of a legitimately unresolved scientific debate about whether eating foods and drinks containing acrylamide increases the risk of cancer").

It is true that some grounds for the removal of content under a platform's acceptable-use policy "can be tied in some way to a controversial issue," *CTIA*, 928 F.3d at 845—for example, to hate speech, harassment, or misinformation. This does not, however, render the required disclosures "controversial." A factually true statement becomes controversial only if it requires a speaker to take sides in a debate and convey a message to which they are morally, religiously, or ideologically opposed. *NIFLA*, 138 S. Ct. at 2372; *see also Pacific Gas*, 475 U.S. at 15 n.12 (explaining that while states have "substantial leeway" to impose "appropriate information disclosure requirements" on businesses, nothing in *Zauderer* permits it them to "require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the [business]'s views"). In *NIFLA*, for example, California required clinics whose purpose was to oppose abortion to provide information about state-sponsored abortion services; in other words, it forced them to wade into a "heated political controversy" and convey a message "fundamentally at odds with [their] mission." *CTIA*, 928 F.3d at 845. Texas's disclosure requirement does no such thing.

Texas' disclosure requirement also relates to the terms on which platforms' services are offered. Indeed, it relates directly to the platforms' "terms of service"—that is, the contract users must agree to before they can post content. *See, e.g.*, *Darnaa, LLC v. Google, LLC*, 756 F. App'x 674, 675 (9th Cir. 2018).[19] In these contracts, the platforms agree to provide users with access to a range of features and applications, and, in return, users allow the platforms to collect personal data, grant platforms a worldwide license to publish their content, and agree to comply with the platforms' acceptable-use policies, which are usually incorporated by reference.[20] Disclosures relating to the terms of service are, by definition, "about the terms under which [the] services [at issue] will be available." *Zauderer*, 471 U.S. at 651.

C. Texas's individualized-explanation provision survives *Zauderer* scrutiny, but Florida's does not.

To survive *Zauderer* scrutiny, the individualized-explanation provisions must not be "unjustified or unduly burdensome." *Id*. As noted above, this test should apply on a sliding scale: The more the

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[19] For example, X Corp's terms of service state: "These Terms of Service . . . are part of . . . a legally binding contract governing your use of X." *X Terms of Service*, X, https://perma.cc/2S2L-VPA5.

[20] *See, e.g.*, *id.* (incorporating X Corp.'s rules and policies, including its acceptable-use policy, set forth at https://perma.cc/JMN2-EGN8).

burden, the more substantial the government must do to justify it. *See NIFLA*, 138 S. Ct. at 2377 (disclosure should extend "no broader than reasonably necessary"); *Zauderer*, 471 U.S. at 651 (holding that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest"). Indeed, this is precisely how some lower courts have applied *Zauderer*'s undue burden standard. *See, e.g.*, *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (holding health warning "unjustified and unduly burdensome" when "balanced against its likely burden on protected speech" (cleaned up)). It is also consistent with the platforms' interpretation of that standard. NetChoice No. 22-555 Br. at 52 (arguing that Texas "did not even try to demonstrate that its onerous disclosure rules are not unduly burdensome when balanced against any legitimate interests they purport to serve").

The States have offered little explanation for the individualized-explanation provisions, but for purposes of this brief *amicus* assumes that the States can show that the requirements are not "unjustified" because they serve the interest of platform users in understanding the enforcement of the platforms' terms. The question of whether the provisions impose an "undue burden," however, is more complicated. *Amicus* submits that, at least based on the record developed so far, Texas's provision survives *Zauderer* scrutiny but that Florida's does not.

Several important differences between the Florida and Texas provisions explain why Florida's provision unduly burdens speech but Texas's provision does not.

First, while the Texas provision requires platforms to notify users only when their content is "remove[d]," Tex. Bus. & Com. Code Ann. § 120.103(a)(1), the Florida provision requires platforms to notify users when their content is "censor[ed]," Fla. Stat. § 501.2041(2)(d)(1), which is defined broadly to encompass "any action taken" to "delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user." *Id.* § 501.2041(1)(b). In practical terms, the Florida provision requires notifications in hundreds of millions or even billions more instances per year than does the Texas provision.[21]

Second, while the Texas provision appears to require a limited notice "explain[ing] the reason the content was removed," Tex. Bus. & Com. Code Ann. § 120.103(a)(1), the Florida provision requires platforms to provide "a thorough rationale explaining the reason that the social media platform censored the user," as well as "a precise and

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[21] For example, from March to October 2020, Facebook alone added "warning labels" to 180 million pieces of content associated with the 2020 U.S. elections. Rachel Kraus, *Facebook labeled 180 million posts as 'false' since March. Election misinformation spread anyway*, Nov. 19, 2020, https://perma.cc/8HBA-CUWZ.

thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable." Fla. Stat. § 501.2041(3). While Texas's narrower notice requirement, properly construed, could be implemented through an automated response system, it is not at all clear that the same is true of Florida's requirement.

Third, the Florida law, unlike the Texas law, provides users with a private cause of action for damages if platforms violate the individualized-explanation provision. Fla. Stat. § 501.2041(6); Tex. Bus. & Com. Code Ann. § 120.103(b). Under Florida's law, users are entitled to statutory damages of up to $100,000 per violation, actual damages, and "[i]f aggravating factors are present, punitive damages." Fla. Stat. § 501.2041(6).

Florida's individualized-explanation provision is likely to chill the platforms' speech because it requires platforms to send detailed notices to users every time they take an action to make a user's content less visible, and because it imposes potentially massive damages liability for violating these requirements. *Moody* Pet. App. at 64a–65a ("a platform could be slapped with millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn't provide sufficiently 'thorough' explanations when removing posts"). There is at least a significant risk that platforms will feel compelled to alter their content moderation activities in order to mitigate the risk of

liability. The Eleventh Circuit was right to observe that "[i]t is substantially likely that this massive potential liability is 'unduly burdensome' and would 'chill[] protected speech'—platforms' exercise of editorial judgment—such that [the individualized-explanation provision] violates platforms' First Amendment rights." *Id.*

Texas's individualized-explanation provision, by contrast, appears to be far less onerous because, again, it applies only to the *removal* of content, does not require any particular level of detail, and is not backed by potentially enormous damages. And, again, given the automated way in which the major platforms identify content that violates their terms, it is *amicus*'s understanding that the platforms could comply with Texas's limited requirement in an automated fashion. Indeed, the platforms are already complying in an automated fashion with a similar disclosure requirement imposed by the European Union's Digital Services Act (DSA), and it is notable that they do not assert here that this requirement has had a chilling effect.[22] While the

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[22] *Article 17(1) of the DSA requires platforms to provide users across the EU with a "clear and specific statement of reasons" for removing, disabling access to, demoting, or otherwise restricting the visibility of their content." Article 17(1) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)*, https://perma.cc/2N37-3L4S. The European Commission has provided platforms with a standard list of specific but very basic reasons to use in notices to users, such as "hate speech" or "human trafficking." European Commission, *DSA Transparency Database, Explanation of the information held in*

platforms do assert that Texas's law will compel them to alter their content-moderation practices, they do not attribute this to the individualized-explanation requirement, which is the only disclosure provision at issue in this case, but rather to the combination of all of the disclosure requirements set out on Section 2 of Texas's law. NetChoice No. 22-555 Br. at 46–47, 52–53.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to hold that the must-carry provisions of the Florida and Texas laws, and the individualized-explanation provision of the Florida law, are unconstitutional, but that the individualized-explanation provision of the Texas law is constitutional under *Zauderer*.

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the DSA Transparency Database, Submission of clear and specific statements, ¶ 16, https://perma.cc/4VFK-YZQ3.

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December 7, 2023