No. 22-277 and 22-555

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH AND FIFTH CIRCUITS

BRIEF OF *AMICUS CURIAE* THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF PETITIONERS IN 22-277 AND RESPONDENT IN 22-555

HARMEET K. DHILLON
MARK TRAMMELL
JOSH DIXON
ERIC SELL
CENTER FOR AMERICAN LIBERTY
1311 South Main Street, Suite 207
Mount Airy, MD 21771

RANDALL W. MILLER
Counsel of Record
MUNSCH HARDT KOPF & HARR, PC
500 North Akard Street, Suite 4000
Dallas, TX 75201
(214) 855-7500
rwmiller@munsch.com

Counsel for Amicus Curiae

326975

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Cited Authorities

Page

Page

Statutes and Other Authorities

Cited Authorities

Page

INTEREST OF THE AMICUS CURIAE

The Center for American Liberty ("CAL") is a nonprofit law firm dedicated to protecting civil liberties and enforcing constitutional limitations on government power. CAL represents litigants in courts across the country and has an interest in ensuring the application of the correct legal standard in First Amendment cases.[1]

CAL also represents individuals in matters involving censorship and social media freedoms of speech. For example, CAL is counsel of record for the plaintiff in *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023). *O'Handley* involves a First Amendment challenge to a California censorship statute that required Twitter (now X) to remove the plaintiff's comments regarding California's elections as "misinformation." CAL is familiar with the constitutional questions at issue in *NetChoice* and seeks to advance greater protections for individual social media use.

SUMMARY OF THE ARGUMENT

When social media platforms ("Platforms") collaborate with the government to restrict user content based on the viewpoint being expressed, the Platforms' censorship may be fairly attributable to the state. As a result, Platforms are properly treated as state actors when they serve as

1. Amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel contributed money intended to fund the preparation or submission of this brief.

agents of the state or closely work with the government to moderate user content on their sites based on the government's preferences. As state actors, Platforms cast off their First Amendment rights in exchange for the constitutional restraints placed on the government.

Both Texas's House Bill 20 ("H.B. 20") and Florida's Senate Bill 7072 ("S.B. 7072") pass the facial challenges that the Platforms bring. The statutes restrict Platforms' censorship of protected speech and promote content neutrality. Because the user content on social media websites is not the Platforms' speech, the Platforms cannot demonstrate that the statutes chill protected speech. And because Platforms routinely collaborate with the government when engaging in content moderation—activity that divests them of their First Amendment rights—they cannot demonstrate that the statutes are substantially overbroad. Since the Platforms cannot prevail on facial challenges, they must bring as-applied challenges to address any alleged constitutional harm.

ARGUMENT

I. PLATFORMS ARE NOT PROTECTED BY THE FIRST AMENDMENT WHEN THEY ACT IN CONCERT WITH THE GOVERNMENT TO CENSOR SPEECH.

When Platforms coordinate with the government to exclude user content based on the view expressed by the user, Platforms become state actors subject to constitutional scrutiny.

A. State Actors Are Not Entitled To First Amendment Protection.

"A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring). "This fundamental limitation on the scope of the constitutional guarantees preserves an area of individual freedom by limiting the reach of [the] law" while "permit[ting] citizens to structure their private relations as they choose subject only to the constraint of statutory or decisional law." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991). These constitutional constraints naturally extend to state actors, especially in the First Amendment context. *See Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) ("The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.").

The principle that the government is prohibited from regulating the content or message of speech "should be and is obvious to everyone." *Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191, 1196 (9th Cir. 1998). The Framers intended the First Amendment to protect against "silence coerced by law" that "discourage[s] thought, hope and imagination" by penalizing the message of speech. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964) (quoting *Whitney v. California*, 274 U.S. 375, 375–76 (1927) (Brandeis, J., concurring)).

"[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966). Otherwise, a state would be free to evade constitutional limitations simply by "contracting out" its functions to a private entity. *West v. Atkins*, 487 U.S. 42, 56 & n.14 (1988). Doing so would "leave its citizens with no means for vindication of those rights" when denied by a "private" actor. *Id.*

State actors violate the First Amendment by denying a person access to express their viewpoint "solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985). A private company transforms into a state actor subject to the Constitution when its actions are "fairly attributable" to the state. *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937 (1982). Stated differently, when "the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution," the private entity is treated as a state actor that is constrained by—not protected by—the First Amendment. Erwin Chemerinsky, Constitutional Law: Principles and Policies 573 (6th ed., 2019).

B. Platforms Are State Actors When They Act In Concert With The Government To Censor Protected Speech.

Platforms acting in concert with the Government to censor protected speech is a quintessential example of conduct that transforms private entities into state actors. As state actors, Platforms no longer enjoy First

Amendment protection themselves; rather, they are subject to the First Amendment constraints—just like any other state actor.

Unfortunately, this Court's "cases deciding when private action might be deemed that of the state have not been a model of consistency." *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting). For instance, the *Lugar* Court recognized four separate tests to evaluate when a private entity should be treated as a state actor: (1) the public function test, (2) the state compulsion test, (3) the nexus test, and (4) the joint action test. *Lugar*, 457 U.S. at 939. At the heart of each of these tests, there must be "'something more' which would convert the private party into a state actor" than merely everyday action by a Platform. *Id.* The Court declined to evaluate "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry". *Id.* Whether separate or just interchangeable descriptions of characterizing the same analysis, the joint action and nexus tests best capture the relevant facts when Platforms partner with the government. *See, e.g., Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003) (treating the joint action and nexus tests interchangeably); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999) (same); *Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 4 (1st Cir. 2008) (same).

Regardless of whether the Court employs the joint action test or nexus test, the result is the same: when Platforms act in concert with a government official, government agency, or other governmental entity, the joint conduct between the government and the Platforms

should be "treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). When the Platforms act as state actors, they trade their First Amendment protections as private entities for the limits that the Constitution places on the government when it tries to curb protected speech. *See Denver Area Educ. Television Consortium v. FCC,* 518 U.S. 727, 738 (1996) (plurality op.) (noting that classifying cable operators as state actors "could itself interfere with their freedom to speak" because state actors are subject to—and not protected by—the First Amendment); *Columbia Broad. Sys. Inc., v. Democratic Nat. Comm.*, 412 U.S. 94, 139 (1973) ("To hold that broadcaster[s are state actors] would . . . strip [them] of their own First Amendment rights.") (Stewart, J., concurring); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 396 (D. Conn. 1985) ("[A] state actor does not have a First Amendment right of free expression, at least in those situations in which such a right would conflict with the First Amendment rights of citizens."); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); *Evans*, 382 U.S. at 299 ("[W]here a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State.").

1. The Joint Action Test Shows Platforms Engage In State Action When They Censor Content At The Request Of The Government.

When the state partners with a Platform to conduct certain activities, such as censoring protected speech, the Platform's conduct is transformed into state action.

"Under this Court's cases, a private entity can qualify as a state actor . . . when the government acts jointly with the private entity." *Halleck,* 139 S. Ct. at 1928 (citing *Lugar*, 457 U.S. at 941–42). When "[t]he State has so far insinuated itself into a position of interdependence with [the private company] that it must be recognized as a joint participant in the challenged activity," it is only fair to afford Platforms the same liability to the Constitution as the government. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

It is a "well-accepted principle that a private party's joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party responsible as a governmental actor." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941) (using the language of nexus but applying the joint action test). The joint action test does not require private persons to act under the color of law to conspire with the state; "[i]t is enough that he is a willful participant in joint activity with the State or its agents." *Lugar*, 457 U.S. at 941 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)). Much like the nexus test, some circuits rely on the elements of civil conspiracy to prove willful joint action because a requirement to prove conspiracy is the meeting of the minds. *See, e.g., Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1126 (10th Cir. 2000) ("[O]ne way to prove willful joint action is to demonstrate that the public and private actors engaged in a conspiracy.").

But even under the conspiracy standard, an agreement between the Platforms and government to limit protected speech shows that the subsequent censorship is state action because the government and Platform knowingly

agreed to curb user content. This type of censorship violates the First Amendment rights of the persons censored because the Platform's censorship is directly attributable to the state.

2. The Nexus Test Reveals The State's Significant Influence Over Platforms That Agree To Censor Content Based On Government Preferences.

Whether approached through the lens of *Brentwood* or *Blum*, the nexus test shows state action when the state's influence over any Platform is significant enough to convince Platforms to cut user content based on a message's viewpoint. *See O'Handley*, 62 F.4th at 1157–58 (delineating between the two approaches).

First, the *Brentwood* approach asks whether a Platform's "nominally private character . . . is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood Acad.*, 531 U.S. at 289. Actions by Platforms should be treated as state action "if[] there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295 (internal quotation omitted). When Platforms work closely with government actors to censor user speech based on content that the government disapproves of, that clearly demonstrates the close nexus that merits treating Platforms as the state itself.

Second, this Court has interpreted the "coercive" test as an overlapping approach to the nexus test. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Generally, this implies that a government agency has threatened some adverse action to coerce a private party into action. *Id.* The threat must be beyond the pale of a mere attempt to convince and enter into the realm of coercion. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700, 717 (2d Cir. 2022), *cert. denied and granted in part* (reviewing factors between convincing and coercing). "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004. A clear example of state action would be a Platform's agreement with the government to censor specific user viewpoints expressed on the Platform as a result of the government threatening an investigation, regulatory action, or other form of punishment for failing to remove the objectionable content.[2]

Under either approach, the nexus test reveals the "symbiotic relationship" between Platforms and the state when there is a coordinated effort to censor protected speech. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 175 (1972). For instance, when the state intimately relies on a Platform to disseminate and censor information for the government, it transforms a business transaction into a cooperative relationship necessary to control the dissemination of information through messaging and censorship. *See, e.g. Jatoi v. Hurst-Euless-Bedford Hosp.*

2. The same is true when the government provides "significant encouragement" to the Platform to censor protected speech. *Blum*, 457 U.S. at 1004.

Auth., 807 F.2d 1214, 1221 (5th Cir. 1987) *cert. denied*, 484 U.S. 1010 (1988) (concluding that a hospital authority dependent on a private company to operate public hospital collections had a sufficient nexus); *Milo v. Cushin Mun. Hosp.*, 861 F.2d 1194, 1196–97 (10th Cir. 1988) (finding that a private company who managed a public trust hospital had a sufficient nexus).

When Platforms act in concert with the government to remove specific user content from their sites, they are acting as state actors, not private entities. *See Evans*, 382 U.S. at 299 ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."); *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021) (holding the president's private Twitter account was not protected by the First Amendment when used for government purposes); *Wickersham v. City of Columbia*, 481 F.3d 591, 600 (8th Cir. 2007) (suggesting a private actor may "forfeit[] some of its right[s] to deliver its own message unimpeded by others when it assumes the role of state actor"). As a result, Platforms forfeit their First Amendment protections and are treated like the state itself when they act as a conduit for government censorship of protected speech.

II. THE PLATFORMS CANNOT SUSTAIN A FACIAL CHALLENGE TO THE UNDERLYING STATUTES.

A First Amendment facial challenge "means a claim that the law is invalid *in toto*." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.5 (1982) (cleaned up). The Platforms cannot prevail on a facial challenge to either the Texas law or the Florida law. NetChoice Pet. Br. at 35 n.7. Namely, neither statute is substantially overbroad because there are multiple scenarios where each law may be validly applied and neither law chills protected speech.

A. The State Statutes Are Not Substantially Overbroad Because They Do Not Chill Protected Speech.

The overbreadth doctrine exists "to prevent the chilling of future protected expression." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 387 (6th Cir. 2001) (internal citation omitted). The state statutes "do[] not chill *speech*; instead, [they] chill *censorship*." *Netchoice, LLC v. Paxton*, 49 F.4th 439, 450 (5th Cir. 2022). Because Platforms do not function like newspapers that exercise editorial decision-making authority to curate a distinct message, but are instead akin to cable operators that permit private channels to air the messages they wish, a social media user's speech is not the speech of the Platform itself. *See Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 654–57 (1994) (distinguishing between cable operators that carry broadcasts without regard to the third-party content and newspapers that exercise editorial control

over their content). Moreover, because Platforms lose their First Amendment rights when they collaborate with the government, they cannot demonstrate that the statutes implicate their First Amendment rights in those situations. *See, e.g., Missouri v. Biden*, 83 F.4th 350, 381–89 (5th Cir. 2023), *cert. granted sub nom. Murthy v. Missouri*, 144 S. Ct. 7 (2023) (holding coordination between the government and social media companies to censor protected speech violated the First Amendment).

"To show overbreadth, [the Platforms] must establish that [the state statutes] encompass[] a *substantial* number of unconstitutional applications 'judged in relation to the statute[s'] plainly legitimate sweep.'" *Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018). These applications "must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023); *see also Osborne v. Ohio,* 495 U.S. 103, 112 (1990) ("[T]he scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well. . . ."). As shown by the overbreadth analysis, neither the Texas statute nor the Florida statute qualify as substantially overbroad.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, 474 (2010) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). "If the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep,' then society's interest in free expression outweighs its

interest in the statute's lawful applications, and a court will hold the law facially invalid." *Hansen*, 599 U.S. at 770. But the Court has limited overbreadth findings to "substantially overbroad" statutes. When evaluating "substantiality" the Court should look to whether "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionality proscribable conduct." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 964 (1984) (cleaned up).

The Platforms took issue with Section 7 of the Texas law, which in pertinent part states the following:

> **CENSORSHIP PROHIBITED.**
>
> (a) A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:
>
> (1) the viewpoint of the user or another person;
>
> (2) the viewpoint represented in the user's expression or another person's expression; or
>
> (3) a user's geographic location in this state or any part of this state.

Tex. H.B. 20, § 143A.002.

Likewise, the Florida statute S.B. 7072 (codified as Fla. Stat. §§ 106.072, 501.2041) contains provisions that the Platforms dislike:

> A social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate. A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections.

S.B. 7072, codified FLA. STAT. § 106.072(2).

> A social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation of this paragraph. . . .

S.B. 7072, codified FLA. STAT. § 501.2041(j); *see NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. Netchoice, LLC,* 216 L. Ed. 2d 1313 (Sept. 29, 2023), *and cert. denied sub nom. NetChoice, LLC v. Moody,* 144 S. Ct. 69 (2023) (reviewing S.B. 7072 for all parts, injunction affirmed in part and reversed in part).

Here, the state statutes apply to one group—the Platforms. They are narrowly tailored to address unregulated censorship of individual expression exercised by the Platforms. Placing this tailored limit on censorship for the purpose of promoting the expression and ideas of millions who post content to the Platforms shows that any potential overbreadth is not substantial when viewed "in relation to the statute[s'] plainly legitimate sweep" protecting the viewpoint of millions of Platform users. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). And because the Platforms regularly coordinate with the government in performing these activities, there are no First Amendment implications in those situations. *See, e.g., Missouri*, 83 F.4th at 359–66 (discussing at length the federal government's coordination with Platforms to censor protected speech). Even if there is "some possibly impermissible application" to the Platforms, the statutes also permissibly regulate business actions, namely, curbing content restriction based on viewpoint. *Munson*, 467 U.S. at 964.

Moreover, the rationale for overbreadth challenges, protecting individuals from chilling speech, is not applicable here. H.B. 20 and S.B. 7072 *promote* "the free exchange of ideas." *Williams*, 553 U.S. at 292. Comparatively, any alleged chilling of the Platforms' ability to regulate content is minimal when viewed against the preservation of First Amendment liberties for millions of monthly active users. While the Platforms have argued that H.B. 20 and S.B. 7072 should be facially invalid because they prohibit the Platforms from censoring pro-nazi messages, terrorist propaganda, and Holocaust denials, the Fifth Circuit properly rebuked this fictional scenario:

> Far from justifying pre-enforcement facial invalidation, the Platforms' obsession with terrorists and Nazis proves the opposite. The Supreme Court has instructed that "in determining whether a law is facially invalid," we should avoid "speculating about hypothetical or imaginary cases." Overbreadth doctrine has a "tendency . . . to summon forth an endless stream of fanciful hypotheticals," and this case is no exception. But it's improper to exercise the Article III judicial power based on "hypothetical cases thus imagined."

Paxton, 49 F.4th at 452 (cleaned up) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008); *Williams*, 553 U.S. at 301; *and United States v. Raines*, 362 U.S. 17, 22 (1960)).

By their text, the statutes pervasively promote viewpoint neutrality by encouraging more speech, rather than censorship, as the response to different viewpoints. Neutrality has the effect of forcing a Platform to host content that it otherwise would not choose to host; but this content is a third-party user's speech, not speech of the Platform itself. *Turner Broad. Sys., Inc.*, 512 U.S. at 654–57 (concluding that law requiring local television stations to carry specific broadcasts is viewpoint neutral and constitutional, in part because there was "little risk" that viewers would confuse the broadcasted content as the cable operator's speech).

So-called "must-carry" laws do not force operators of media outlets to speak or respond to messages they carry. *See id.* at 655. Platforms may disclaim users' viewpoint

if they choose to do so—although, there is little risk that content posted by millions of social media users would be confused as a Platform's speech—and the Court has erred on the side of access when the protected speech of the user would "not likely be identified with those of the owner." *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 87 (1980). Platforms are even further insulated from their users' viewpoints by statute. *See* 47 U.S.C. § 230; *NetChoice*, 49 F.4th at 448 ("Platforms are not 'speaking' when they host other people's speech" as "reinforced by 47 U.S.C. § 230").

"The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner Broad. Sys., Inc.*, 512 U.S. at 657. The state statutes seek to keep open "the free flow of information and ideas" on what has become "critical pathway[s] of communication," the Platforms. *Id.*

On their face, H.B. 20 and S.B. 7072 easily survive an overbreadth challenge. Any hypotheticals that the Platforms can conjure up about the unconstitutionality of the statutes fall far short of the heavy burden they must prove to show the laws are facially invalid.

B. The Platforms May Only Bring An As-Applied Challenge.

Statutes that are not overbroad are subject to the traditional burden of proving a facial challenge—an almost insurmountable task. Because they "often rest on

speculation" "[f]acial challenges are disfavored" by courts. *Wash. State Grange*, 552 U.S. at 450. This Court should continue to heed the principle of judicial restraint by declining to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 450 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Instead, the Platforms should be required to bring as-applied challenges to demonstrate how the statutes allegedly infringe on each Platform's constitutional rights.

The Platforms are unable to show "that no application of the statute[s] could be constitutional." *Sabri v. United States*, 541 U.S. 600, 609 (2004). And absent a few extreme cases not applicable here, this Court has declined to "extend an invitation to bring overbreadth claims." *Id.* at 610. Because neither the Florida statute nor Texas statute are overbroad and each law has instances where it may be lawfully applied, the Platforms must pursue as-applied challenges. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) ("Having found that the plaintiff could not raise a facial challenge, the Court remanded for consideration of an as-applied challenge.").

In addition, this Court has held state statutes protecting First Amendment free speech carry greater weight than an individual's non-absolute property rights. *PruneYard,* 447 U.S. at 83–87. Even in consideration of emerging technologies, the Constitution permits laws that prohibit censorship. *See FCC v. Pacifica Found.*, 438 U.S. 726, 749–51 (1978) (finding Telecommunications Act prohibiting FCC censorship facially constitutional). In other areas, the state may constitutionally prevent private businesses from acting. *See, e.g., Heart of Atlanta Motel*

v. United States, 379 U.S. 241, 257–58 (1964) (finding the statute constitutional when it prohibited private parties from discriminating based on race); *and Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 148 (2005) (Thomas, J., concurring) (finding the statute constitutional when it prohibited a private party from discriminating based on disability).

When considering the merits of the Platforms' arguments, the Court should be leery of expanding facial invalidity jurisprudence when there are clear instances that the statutes at hand are constitutional. First Amendment free speech is a fundamental principle stemming from our Constitution, sometimes even at the expense of other constitutional freedoms. H.B. 20 and S.B. 7072 are no exception, particularly when they serve to protect the speech of tens of millions social media users by curbing the Platforms' ability to limit protected speech. The state statutes are not facially invalid.

CONCLUSION

State Actors do not enjoy First Amendment protections bestowed upon private individuals. When Platforms join with the government to carry out a common purpose that results in censorship of protected speech, Platforms waive their First Amendment protections and are subject to constitutional constraints just like any other government actor.

The facial challenges to the Texas and Florida statutes cannot succeed because each law has clear applications in valid contexts and does not chill protected speech. If the Platforms want to challenge these laws, they must bring as-applied challenges. The Court should decline the Platforms' invitation to expand the use of facial invalidation simply because the Platforms disagree with the state laws at issue.

Respectfully submitted,

HARMEET K. DHILLON
MARK TRAMMELL
JOSH DIXON
ERIC SELL
CENTER FOR AMERICAN LIBERTY
1311 South Main Street, Suite 207
Mount Airy, MD 21771

RANDALL W. MILLER
Counsel of Record
MUNSCH HARDT KOPF & HARR, PC
500 North Akard Street, Suite 4000
Dallas, TX 75201
(214) 855-7500
rwmiller@munsch.com

Counsel for Amicus Curiae

January 23, 2024