Nos. 22-277, 22-555

IN THE

Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,

Petitioners,

v.

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

Respondents.

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

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

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BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, IN SUPPORT OF RESPONDENTS IN 22-277 AND PETITIONERS IN 22-555

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENTS IN 22-277 AND PETITIONERS IN 22-555.[1]

INTEREST OF *AMICI CURIAE*

AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is necessary for an open and diverse society.

SUMMARY OF ARGUMENT

The Florida and Texas laws before the Court were intended to protect users from being silenced by the social media platforms through which they seek to communicate. But like the old adage about whose ox is being gored, the impulse to require a private party to host third party speech can feel very different depending on whose speech it is and who is being compelled.

With few notable exceptions, this Court has reliably protected private speakers from being

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were notified of *amicus'* intent to file this brief greater than ten days prior to the date to respond.

compelled to deliver messages they do not want to deliver. And that protection, while available to all, in recent years has benefited what might be characterized as conservative speakers against progressive initiatives to enforce conformity in speech and action. This robust legal protection combined with the advent of ever-expanding social media options has thrown open the gates to massive reciprocal communication from everyone who chooses to participate—especially speakers whose messages would have been throttled or simply ignored by powerful media gatekeepers in the past. That is not to say access is equal, fair, or consistent. But enforcing equality at the expense of freedom is a costly proposition. And, when it comes to speech, broad compulsive measures are a Rubicon we should be loath to cross.

The theory employed by the Fifth Circuit that censorship is a regulable activity distinct from speech may be attractive to some. After all, censorship is bad—at least when you agree with what the speaker is saying. But other attempts in other jurisdictions to define speech as commercial activity to allow the state to compel or prohibit speech plausibly could be just as attractive to their proponents and useful tools for those whose goals can be achieved through controlling others. Thus, we must be wary of regulating speech in pursuit of the Siren's song of otherwise compelling goals, such as equality.

ARGUMENT

I. THIS COURT'S PRECEDENT PROTECTING SPEAKERS FROM COMPELLED SPEECH PROVIDES NEARLY UNBROKEN PROTECTION TO DIVERSE VOICES.

This Court has almost uniformly rebuffed attempts to compel speech in the name of a never-ending string of assertedly important government interests. Recently, in *303 Creative, LLC v. Elenis*, for example, the Court held that Colorado could not rely on its public accommodations law[2] to compel a small business owner to deliver a message she did not believe. *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023). While Colorado's goal of promoting a marketplace that is open to all customers is an ostensibly laudable pursuit, good intentions cannot override a speaker's right to control her own speech. The Court properly and squarely rejected Colorado's effort to conflate speech with regulable commercial activity to bypass the First Amendment. *303 Creative* is particularly instructive here because the asserted governmental goal of ensuring market access for all speakers cuts across the cases; but that aspiration must yield when it may only be accomplished by

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[2] Under the statute's "Accommodation Clause," a public accommodation may not:

> directly or indirectly ... refuse ... to an individual or a group, because of ... sexual orientation ... the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation ....

Colo. Rev. Stat. § 24-34-601(2)(a).

quashing the rights of an intermediary speaker to decline to deliver a message.

Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court upheld the right of parade organizers to exclude a group imparting a message the organizers did not wish to convey. 515 U.S. 557, 559 (1995). The Court unanimously held that selecting participants and "combining multifarious voices" by the parade organizers was expressive, and that GLIB's "participation as a unit in the parade was equally expressive." *Id.* at 569. The First Amendment rights of the intermediary speaker prevailed over the statutory claim for participation.

Because the Court has permitted compelled disclosures in commercial transactions, governments naturally seek to exploit this limitation of First Amendment's protections. But the Court has seen through these attempts. In *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), for example, California required clinics that primarily serve pregnant women to display notices about the existence of state-provided services, including abortions along with a phone number to call; or to notify women that the clinic was not licensed to provide medical services. 138 S. Ct. 2361, 2365 (2018). The Ninth Circuit upheld the notices on the theory that compelling notice by licensed medical providers was "professional speech" and compelling speech by unlicensed providers was commercial disclosure subject to lesser protection. *Id.* at 2370–71. This Court rejected both theories. Regarding the notion of "professional speech"—*i.e.*, speech uttered within a professional relationship or based on expert

knowledge or judgment—the Court stated that it "has not recognized 'professional speech' as a separate category of speech," and speech does not lose its protection merely because it is uttered by professionals. *Id.* at 2371–72. Moreover, this "Court's precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Id. at* 2372. In *NIFLA*, the state could not satisfy that standard.

For some types of compelled speech, robust protection has been recognized only after a long and winding judicial road. In *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, for example, Janus challenged the constitutionality of compelled union dues where a public employee has declined to join the union and does not want to support its speech-based activity. 138 S. Ct. 2448, 2456 (2018). The Court agreed that compelled membership in and financial support for a public employee union violated the First Amendment, holding that "[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." *Janus,* 138 S. Ct. at 2463. This holding corrected the error in *Abood v. Detroit Board of Education*, which had allowed public employee unions to require nonmembers to pay an agency fee, *i.e.*, a portion of full union dues to cover expenditures attributable to the union's collective-bargaining activities. 431 U.S. 209, 235–236 (1977). Thus, after forty-one years, *Abood* was overruled and public sector employees were freed from a particular form of compelled speech. *Janus*, 138 S. Ct. at 2456. In doing

so, the Court reconciled a dichotomy it had created in deciding *Abood* the same year it recognized the general proposition that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

In these and many other decisions, the Court has repeatedly reinforced the First Amendment's protections against compelled speech. So much so that the rare cases in which the Court has permitted compelled speech are puzzling aberrations that serve only to create further mischief. *Pruneyard Shopping Center v. Robins*, for example, which may be the highwater mark for state power to compel private parties to host the speech of others,[3] has caused much confusion for a holding based on narrow facts with very little discussion of the First Amendment. 447 U.S. 74 (1980). *Pruneyard* was by and large a takings analysis, *Id.* at 82–85, but it has cast a long shadow as governments seek to exploit it as an exception to the general First Amendment rule and compel private entities to use their own property to host the speech of other private parties. *See, e.g.*, *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 607 (S.D.N.Y. 2020) (discussing *Pruneyard*: "Plaintiffs seek to have this Court plow new ground and hold that *Pruneyard* extends beyond California real property owners to website owners like Vimeo."). *Pruneyard* does not provide sound footing for such attempts, being an outlier that is at odds with

[3] *Amicus* has previously argued that the Court should reconsider *Pruneyard*. *See Amicus* Br. of AFPF 19, *Cedar Point v. Hassid*, No. 20-107 (filed January 5, 2021).

subsequent cases like *Hurley* as well as with prior decisions like *Miami Herald Publishing Co. v. Tornillo.* 418 U.S. 241 (1974) (holding unconstitutional a Florida statute placing affirmative duty upon newspapers to publish replies of political candidates whom they had criticized.).

Similarly, *CLS v Martinez*, stands alone as authorization by this Court for government to compel college students (or anyone for that matter) to sacrifice First Amendment protected freedom of association or assembly in exchange for the First Amendment protected activity of accessing a government speech forum, 561 U.S. 661 (2010). The result, contrary to all the Court's other precedents, is a decision permitting government to force speakers to forego the exercise of one First Amendment right (association) to exercise another (speech). *Contra. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) ("viewpoint discrimination, . . . is presumed impermissible when directed against speech otherwise within the forum's limitations"); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) ("to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions"); *Healy v. James*, 408 U.S. 169, 187–88 (1972) ("College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."). No other decision of the

Court before or since has so held[4] and the Court has issued numerous opinions that call the reasoning of *Martinez* into doubt.[5]

Despite outliers like *Pruneyard* and *Martinez,* the Court's sturdy and growing body of precedent protects speakers against government mandates to host the speech of others. This case presents the Court with the opportunity to further clarify that the First Amendment does not permit compelled speech and ensure that these outlier examples do not undermine the firm footing on which this protection stands.

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[4] Indeed, even where exercise of another constitutional right is not involved, lesser interests, such as receipt of a government benefit, cannot be conditioned on waiver of a First Amendment right. *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 210 (2003) (citing *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

[5] The Ninth Circuit recently distinguished *Martinez*'s "exceptionless policy" from this Court's holding in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (cleaned up) ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude") to hold that a school district could not withhold recognition from a student group that limited eligibility for its leadership positions for religious reasons when the district granted exceptions to the non-discrimination policy to non-religious groups. *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education*, 82 F.4th 664 (9th Cir. 2023).

II. RELABELING SPEECH AS ACTIVITY TO ALLOW REGULATION IS A DANGEROUS PURSUIT THIS COURT HAS NOT CONDONED.

Notwithstanding the robust caselaw protecting private parties from hosting the speech of others, a disturbing trend of characterizing speech as regulable activity to elide speech protections presents a trap limited only by the creativity of legislators and activists who seek to control which messages can or must be delivered.

303 Creative provides a case in point. There, commercial theories were employed to muddy the water on an indisputably speech-based case. Although the Tenth Circuit acknowledged that "creation of wedding websites is pure speech," strict scrutiny was deemed satisfied because the "commercial nature of Appellants' business . . . provide[s] Colorado with a state interest absent when regulating non-commercial activity." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1176, 1179 (10th Cir. 2021). Moreover, the court held the uniqueness of 303 Creative's services rendered them "inherently not fungible" making "this case . . . more similar to a monopoly [of one]." *Id.* at 1180. Through a simple change in labels, the rigorous protection of speech under strict scrutiny was sublimated to commercial theories.[6]

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[6] Likewise, *Masterpiece Cake Shop*, which made a trip to this Court in 2018, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), is still working its way through the Colorado state court system. The entire point of these two cases and others like them is to force unwilling speakers to deliver a message they do not want to deliver by characterizing artistic output as commercial "activity" to neuter First Amendment protection.

Similar attempts to embed speech management within commercial regulation have arisen in California in a variety of guises. California's AB-5 law[7], which has been brought to this Court on a couple of occasions, originated as at attempt to categorize Uber drivers and other similarly-situated contractors as employees by codifying the "ABC Test" set forth in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 40 (2018). *Olson v. California,* 62 F.4th 1206, 1210 (9th Cir. 2023). Under *Dynamex* "'a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor, unless the hiring entity' makes the requisite showing under the ABC test." 62 F.4th at 1211 (citing AB-5 § 2(a)(1); *Dynamex*, 416 P.3d at 40). This test had the effect of expanding the definition of employee to a broader range of workers, who had been deemed independent contractors under the prevailing multi-factor balancing test adopted in *S. G. Borello & Sons*.[8]

But, from the beginning, AB-5 exempted a wide array of workers, including:

> California licensed insurance businesses or individuals, physicians

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[7] California Assembly Bill 5, 2019 Cal. Stats. Ch. 296 (A.B. 5), as amended by California Assembly Bill 170, 2019 Cal. Stats. Ch. 415 (A.B. 170) and California Assembly Bill 2257, 2020 Cal. Stats. Ch. 38 (A.B. 2257, and collectively "AB-5", as amended).

[8] "Prior to *Dynamex*, California courts primarily determined whether a worker was an employee or an independent contractor by applying the multi-factor balancing test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989)." *Olson*, 62 F.4th at 1210, n.2 (citations omitted).

> and surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators and accountants; registered securities broker-dealers and investment advisers; direct sales salespersons; commercial fishermen working on American vessels for a limited period; marketers; human resources administrators; travel agents; graphic designers; grant writers; fine artists; payment processing agents; certain still photographers or photo journalists; freelance writers, editors, or cartoonists; certain licensed estheticians, electrogists, manicurists, barbers or cosmetologists; real estate licensees; repossession agents; contracting parties in business-to-business relationships; contractors and subcontractors; and referral agencies and their service providers.

Olson, 62 F.4th at 1211 (citing AB-5 § 2(a)(3)).

Shortly thereafter, AB-5 was amended to include exemptions for additional categories of workers:

> newspaper distributor working under contract with a newspaper publisher . . . and a newspaper carrier working under contract either with a newspaper publisher or newspaper distributor;

as well as exemptions for,

> recording artists; songwriters, lyricists, composers, and proofers; managers of

> recording artists; record producers and directors; musical engineers and mixers; vocalists; musicians engaged in the creation of sound recordings; photographers working on recording photo shoots, album covers, and other press and publicity purposes; and independent radio promoters.

Id. (citing AB 170 § 1(b)(7) and AB 2257 § 2).

In an ironic twist, Uber Technologies, Postmates, and individual drivers challenged the constitutionality of applying AB-5's burdens to Uber and Postmates while allowing a vast array of exemptions to relieve similar companies of those burdens, winning their equal protection claim because the law did not even satisfy rational basis review. *Olson*, 62 F.4th at 1210, 1220 ("We are persuaded that these allegations plausibly state a claim that the 'singling out' of Plaintiffs effectuated by A.B. 5, as amended, "fails to meet the relatively easy standard of rational basis review."). California continues to enforce the law against strictly speech-based activity even after the initial target escaped regulation.

Relatedly, California has unsuccessfully attempted to "designate the dissemination of misinformation or disinformation related to the SARS-CoV-2 coronavirus, or 'COVID-19,' as unprofessional conduct." Cal. Assembly Bill 2098 (2022). By categorizing disfavored speech as conduct, the bill would have authorized punishment of doctors who did not adopt the state's version of truth.

Fortunately, the law has been repealed. Cal. Senate Bill 815[9].

The impulse to rely on non-speech theories to regulate speech can be alluring, particularly where the regulation is issued in the name of justice. But this approach can lead to a dangerous misunderstanding of the law, which subordinates the superior protection of the First Amendment to an erroneously aggrandized lesser law in the name of perceived moral superiority or in pursuit of a world perfected through government control. *See, e.g.*, Daphne Keller, *Platform Transparency and the First Amendment*, Journal of Free Speech Law, at 8, 68 (Volume 4, Issue 1 (2023) (discussing the risk that "A ruling on platform transparency issues will likely be relevant for future cases in which businesses seek to 'weaponize' the First Amendment as a legal tool against the regulatory state.").

This temptation to innovate or disguise government efforts to compel or constrain speech through recasting the regulation as grounded in activity should be resisted.

III. ONLINE SPEECH PLATFORMS HAVE RADICALLY REDUCED TRADITIONAL GATEKEEPERS' POWER TO EXCLUDE SPEAKERS.

The government interests asserted in compelling speech on private social media platforms should be viewed against the backdrop of history. The existence of the platforms themselves, even with all of their many shortcomings, has quickly revolutionized free

[9] Signed into law Sept. 30, 2023.

speech—breaking the power of traditional media gatekeepers and allowing anyone to speak and to find an audience.

Historically, broad distribution of speech was limited to media with inherent space limitations, such as books, newspapers, pamphlets, radio, television, or theaters. The ability to grant or deny access to the means of distribution gave media gatekeepers power to control which messages could be shared to the broader public.

On rare occasions, access has been compelled by law, but such circumstances have been infrequent and narrow. Cable operators, for example, which "depend upon government permission and government facilities (streets, rights-of-way) to string the cable necessary for their services" *Denver Area Educ. Telecomms. Consortium*, 518 U.S. 727, 739 (1996), may be required to set aside channels for designated broadcast signals. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). But even recipients of government licenses, such as broadcasters, are not required to carry all speech on demand. *Denver Area Educ. Telecomms. Consortium,* 518 U.S. at 737 ("the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting.") (emphasis in original).

In the narrow instances where a duty to carry has been upheld, it has been justified on two grounds. First, that certain resources are limited in quantity and belong to the public, so no one has a right to

monopolize them. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101–02 (1973). Second, that in contexts with a long history of serving as a conduit for broadcast signals, "there appears little risk that . . . viewers would assume that the broadcast stations . . . convey ideas or messages endorsed by the cable operator." *Turner Broad. Sys.,* 512 U.S. at 655.

In addition to the traditional gatekeeper function, the method of communication was typically a one-to-many relationship, as in the case of a magazine article or television broadcast, which essentially prohibited two-way or multi-party communications or dialogue. This meant that to a large degree the public heard and read what was available to them, with public speaking chiefly controlled by a select few. Even before the advent of social media, this meant declining trust in traditional news media and perceptions of bias, especially among Republicans.[10]

Social media, of course, dramatically changed the power of these gatekeepers, allowing many-to-many discussions as well as direct communication with people who previously would have been unreachable. What was once an exclusive club of gatekeepers is now a host of millions.

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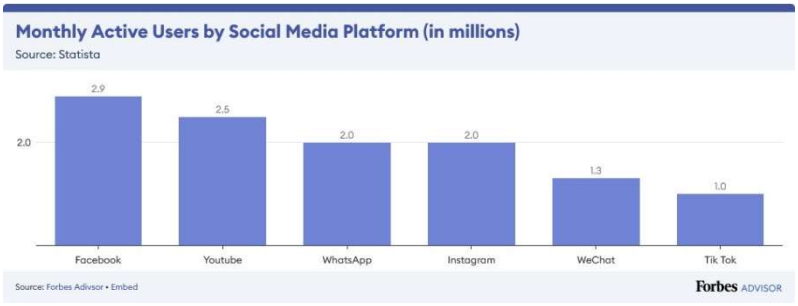
[10] Wikipedia, *Media bias in the United States*, https://en.wikipedia.org/wiki/Media_bias_in_the_United_States



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This case, of course, did not originate from a perceived lack of participants, but rather a perceived inequity in allowed participation; and, it may be an accurate observation that there is an imbalance in which messages are hosted. Nevertheless, broad participation across types of speakers should not be imperiled lightly when the gates of communication have been thrown open so broadly to encourage participation by so many speakers and listeners. For all the many faults of the dominant social media platforms, they have dramatically increased the opportunity for Americans (and people all over the globe) to speak to one another.

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[11] Belle Wong, *Top Social Media Statistics and Trends of 2023*, Forbes Advisor, Cassie Bottorff, ed. (May 18, 2023, https://www.forbes.com/advisor/business/social-media-statistics/

Demographic profiles and party identification of regular social media news consumers in the U.S.

% of each social media site's ***regular*** *news consumers who are ...*

	Facebook	YouTube	Twitter	Instagram	Reddit	TikTok	LinkedIn	Snapchat
Men	35%	56	56	36	67	30	54	40
Women	64%	43	43	63	31	68	44	59
Ages 18-29	23	27	43	44	44	52	25	63
30-49	41	40	38	37	47	34	46	32
50-64	22	22	14	13	8	12	20	3
65+	14	11	5	5	1	2	8	1
High school or less	41	37	25	33	26	42	18	50
Some college	31	35	31	36	33	40	24	35
College+	28	28	43	30	41	17	57	14
White	60	46	51	36	54	38	45	31
Black	11	16	14	20	7	18	18	21
Hispanic	20	24	22	33	21	34	20	37
Asian*	5	10	9	7	15	8	13	7
Rep/Lean Rep	44	41	30	33	23	32	41	32
Dem/Lean Dem	52	54	67	62	74	63	54	61

*Asian adults were interviewed in English only.
Note: Twitch and WhatsApp not shown due to small sample size. White, Black and Asian adults include those who report being only one race and are not Hispanic; Hispanics are of any race.
Source: Survey of U.S. adults conducted July 26-Aug. 8, 2021.
"News Consumption Across Social Media in 2021"

PEW RESEARCH CENTER

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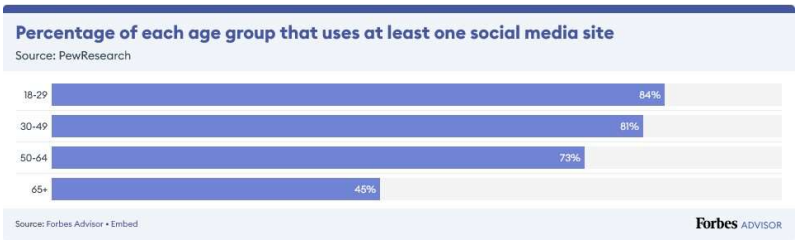

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In fact, the mirror image risk—and the one prohibited by the First Amendment—is that the government would impose its will on platforms to

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[12] Pew Research Center, *Social Media and News Fact Sheet*, https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/

[13] Belle Wong, *Top Social Media Statistics and Trends of 2023*, Forbes Advisor, Cassie Bottorff, ed. (May 18, 2023, https://www.forbes.com/advisor/business/social-media-statistics/

influence whether prospective speakers should be silenced.[14] Because compulsion and proscription are two sides of the same coin, allowing the government to compel speech opens the door to the power to proscribe speech. And, as the allegations in *Murthy v. Missouri*, indicate, government stands ever at the ready to coopt media platforms to shade the narrative to its own preference, whether by amplification or silencing. Without confidence that the Constitution would protect them, government overtures or threats would have real teeth.

IV. CONTENT MODERATION DECISIONS DO NOT PROPOSE A COMMERCIAL TRANSACTION AND *ZAUDERER* DOES NOT APPLY.

While constitutional protection against compelled speech is on at least as sound of footing under the First Amendment as prohibited speech, *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943) ("involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence"), *Zauderer* provided a narrow exception for "factual information in . . . advertising." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). In *Zauderer*, the Court distinguished Ohio's attempt "to prescribe what shall be orthodox in commercial advertising," from the prohibition in *Barnette* against prescribing "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," *Zauderer*, 471 U.S. at 651 (citing *Barnette*, 319 U.S., at 642), but applied

[14] The Court granted *certiorari* to review just such a charge. *See Murthy v. Missouri*, Case No. 23-411.

that distinction to "purely factual and uncontroversial information about the terms under which [the seller's] services will be available." *Zauderer*, 471 U.S. at 651.

The disclosure requirements here, while not quite prescribing orthodoxy in "politics, nationalism, religion," or "confess[ions] by word or act their faith," go well beyond "factual and uncontroversial information about the terms under which . . . services will be available" to reach explanations of how policy was applied to a specific factual situation. Much like the decisions of a court applying the law to a particular set of facts, such an application could fairly be deemed an "opinion," and thus falls squarely under *Barnette* not *Zauderer*.

The individualized explanation requirement of the Texas[15] and Florida[16] laws trigger notice mandates

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[15] REMOVAL OF CONTENT; EXCEPTIONS.

(a) Except as provided by Subsection

(b), if a social media platform removes content based on a violation of the platform's acceptable use policy under Section 120.052, the social media platform shall, concurrently with the removal:

(1) notify the user who provided the content of the removal and explain the reason the content was removed;

(2) allow the user to appeal the decision to remove the content to the platform; and

(3) provide written notice to the user who provided the content of:

(A) the determination requested under Subdivision (2); and regarding an appeal

(B) in the case of a reversal of the social media platform's decision to remove the content, the reason for the reversal.

Tex. Bus. & Com. Code § 120.103

[16] Unlawful acts and practices by social media platforms

(d) A social media platform may not censor or shadow ban a user's content or material or deplatform a user from the social media platform:

1. Without notifying the user who posted or attempted to post the content or material; or

2. In a way that violates this part.

…

(c) Include a thorough rationale explaining the reason that the social media platform censored the user.

(d) Include a precise and 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(2) & (3)

upon any removal of posted material, requiring written notice to the user of the removal and an explanation of why the material was removed. Each law indisputably compels the platforms to generate and publish their own messages. As content-based commands, strict scrutiny should apply. But the Eleventh and Fifth Circuits both held that it did not, expanding *Zauderer* to reach explanations of how an agreement was executed, rather than just the terms on which the service was offered in the first place. If this interpretation is allowed to stand, it would allow government to mandate explanations by sellers for any alleged deviation from a service contract.

The underlying precepts of *Zauderer* were far narrower: "commercial speech doctrine rests heavily on the common-sense distinction between speech proposing a commercial transaction and other varieties of speech," *Zauderer*, 471 U.S. at 637. Such speech may be regulated if it is "false, deceptive, or misleading, . . . or . . . proposes an illegal transaction." *Zauderer*, 471 U.S. at 638.

Here the mandated disclosures do not propose a commercial transaction. Rather, they explain *how* the platform applied the terms of service, not merely what those terms were, essentially compelling the platforms to justify what might be deemed fulfillment or breach of a contract, rather than formation of the contact with its relevant government interest of protecting against fraud.

This is an extraordinarily broad application of *Zauderer*, which has been stretched to include an "advertiser's legal status and the character of the assistance provided," *Milavetz, Gallop & Milavetz,*

P.A. v. U.S., 559 U.S. 229, 250 (2010);[17] used to uphold mandatory disclosure of country-of-origin information about meat products, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014); and compelled disclosure of risk of radio-frequency radiation exposure from carrying cell phones, *CTIA - The Wireless Ass'n v. City of Berkeley, California*, 928 F.3d 832, 838 (9th Cir. 2019); but not to require conflict minerals disclosures to be made on a reporting company's website and in its reports to the SEC, *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 522 (D.C. Cir. 2015) (disclosures did not deal with advertising or point of sale); or to require health warnings on advertisements for sugar-sweetened beverages ("SSBs"), *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019). These cases, while pushing the boundaries of *Zauderer*, retain the distinction between facts relevant to the point of sale, which *Zauderer* reached, and commerce-adjacent discussions, which it did not.

The Fifth and Eleventh Circuit both amplified the reach of *Zauderer*, by bypassing the point-of-sale limitation and instead compelling speech about disputes regarding how services were performed.

The Eleventh Circuit for example, characterized the mandated explanations as "content-neutral regulations" requiring "purely factual and uncontroversial information." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1227 (11th Cir. 2022). The

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[17] But see *Id.* at 255 (Thomas, J. concurring in part and concurring in the judgment) ("I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech.").

mandated explanations are not, of course, content neutral, applying as they do to specific content: a "thorough rationale explaining the reason that the social media platform censored the user." Fla. Stat. § 501.2041 (2)(d). Nor could they even be characterized as viewpoint neutral, requiring only explanations for material taken down, and not material left up. Likewise, were the take-downs undisputed, providing the rationale would be superfluous, making the mandated justification the opposite of uncontroversial in many, or even most, instances. The Fifth Circuit, skipped over this analysis because in that case there was no dispute whether the regulation "advances the State's interest in enabling users to make an informed choice regarding whether to use the platforms." *NetChoice, LLC. v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022). But the asserted state interest in "informed choices" is a difference in kind as well as degree beyond "the State's interest in preventing deception of consumers" recognized in *Zauderer*. *Zauderer* 471 U.S. at 651.

If the measure of government interest sufficient to compel speech is satisfied by speech that would enable users to make an informed choice, that is no limit at all. It would, for example, have allowed the compelled conflict minerals disclosures on reports to the SEC that were disallowed in *Nat'l Ass'n of Manufacturers*, 800 F.3d at 522. Which would likewise throw open the door to mandating ESG or climate disclosures to the SEC.[18] Nearly any message within a commercial

[18] Americans for Prosperity filed a comment in response to U.S. Security and Exchange Commission's (SEC) March 15 request for public input from Acting Chair Allison Herren Lee regarding

setting could be compelled as nearly any information would be informative to someone.

Moreover, to the extent the government can insert new terms into contracts requiring the seller to justify any alleged breach—even if that new rule were limited to speech-based services—that compulsion could up-end contractual relations and disputes in unforeseeable ways.

This Court should put the genie back in the bottle before it does real mischief and eschew the states invitation to apply *Zauderer* here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the 5th Circuit and affirm the decision of the 11th Circuit.

Respectfully submitted,

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climate change disclosures. Available at: https://www.sec.gov/comments/climate-disclosure/cll12-8914461-244714.pdf