Nos. 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, D/B/A NETCHOICE, *et al.*,

Respondents.

NETCHOICE, LLC, D/B/A NETCHOICE, *et al.*,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* ENGINE ADVOCACY IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization dedicated to bridging the gap between startups and policymakers. Engine works with government officials and a community of thousands of high-technology, growth-oriented startups across the nation to support innovation and entrepreneurship through research, policy analysis, and advocacy. Engine's community of startups includes small- and medium-sized companies that are building alternatives to larger, incumbent social media websites. Engine and its community of entrepreneurs, supporters, and donors seek to protect the opportunities that exist for startups and their users thanks to the robust protections provided by the First Amendment and Section 230 (47 U.S.C. § 230).

Engine submits this amicus brief to explain how this case may have an impact far beyond the largest Internet companies. While policymakers often focus on large, incumbent social media companies, content moderation laws can affect companies of all sizes. The Court's decision may impact a range of burgeoning online businesses that curate user-generated content, including, among others, social media websites, video and photo sharing applications, reviews and rating websites, discussion forums,

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. None of the parties or their counsel, nor any other person or entity other than *amicus curiae*, made a financial contribution intended to fund the preparation or submission of this brief.

crowdsourcing services, online marketplaces, gaming applications, educational forums, job boards, and dating websites. Engine urges this Court to hold unconstitutional the burdensome state content moderation laws that could undermine free expression and innovation online.

SUMMARY OF ARGUMENT

The Florida and Texas laws—and others that may follow—may have severe consequences for diverse Internet businesses and the free expression of Internet users. As a threshold issue, these laws may affect a more widespread set of smaller and independent companies than might appear at first blush. Limiting provisions in the laws are arbitrary, and, in practice, may fail to contain the law's impact to the largest companies. Startups that seek to become established companies may be forced to consider and to comply with these laws.

The content moderation restrictions in these laws may hinder the ability of startups that curate user-generated content to moderate that content on their services. This is in direct conflict with this Court's longstanding First Amendment precedent, permitting private entities to choose what information to present—or not—in exercising their editorial discretion. This also creates real, practical problems: content moderation is a business necessity for many small and growing companies. It allows them to remove material that may be harmful, unsavory, irrelevant, junk, or in conflict with their business strategy. Content moderation also allows startups to build distinct businesses: many websites

want to display or recommend only a certain kind of content (say, a website dedicated to fishing that only wants fishing content), and their users do not expect, or want, to see anything else.

These laws also impose onerous and costly reporting and appeal requirements on companies that curate user-generated content. While smaller startups may not be required to comply with these provisions at the outset, they may be forced to consider them when outlining their plans for growth and seeking investments. Without the resources of major Internet companies, these requirements will likely be unduly burdensome and too costly for many startups and mid-sized companies. In fact, some founders may choose to direct their energy, funding, and ideas in a different direction altogether. Investors too may be unlikely to fund startups where significant funding may be spent complying with a patchwork of state moderation and transparency laws.

The Florida and Texas laws, in effect, may discourage socially beneficial startups from launching and developing into successful companies, which will be a significant loss for competition, innovation, and speech on the Internet. The laws may also lead to a different kind of Internet: a messier and less useful one with fewer startups creating new kinds of online communities where users can listen, speak, and be heard.

ARGUMENT

I. THE FLORIDA AND TEXAS LAWS MAY HAVE SEVERE CONSEQUENCES FOR ONLINE INNOVATION AND FREE EXPRESSION.

A. These laws may impact all kinds of companies, including startups.

As a threshold issue, the Florida and Texas laws may appear to affect only the largest Internet companies, but in fact they are likely to impact all kinds of companies of all sizes and at all stages of life, including small- and medium-sized Internet businesses that curate user-generated content. An entrepreneur who wants to develop a community focused on a particular issue, such as a parenting forum or a dating application, may be deterred if it is clear she must abandon her business model as soon as it achieves significant success. For the same reason, she may have difficulty finding investors.

While the laws apply to "social media platforms," each defines such websites so broadly as to include all kinds of companies. The Florida law defines "social media platform" as "any information service, system, Internet search engine, or access software provider" that "enables computer access by multiple users," operates a legal entity, and does business in Florida.[2] Meanwhile, the Texas law defines "social media platform" as "an Internet website or application that is open to the public,

[2] Fla. Stat. § 501.2041(1)(g).

allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images."[3] These broad definitions capture all kinds of online businesses that curate user-generated content, including, among others, video and photo sharing applications, reviews websites, discussion forums, crowdsourcing portals, online marketplaces, gaming websites, educational forums, job boards, and dating applications.[4]

While the laws also appear to include constraints on what kinds of companies must comply based on revenue or users, limiting provisions in the laws are arbitrary, and, in practice, may fail to contain the law's impact to the largest companies. The Florida law applies to "social media platform[s]" with "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants globally."[5] Meanwhile, the Texas law applies to "social media platform[s] that functionally ha[ve] more than 50 million active users in the United States in a calendar month."[6]

These constraints are meaningless, in effect, for growing businesses for two reasons. ***First***, it is

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[3] Tex. Bus. & Com. Code § 120.001(1). The law excludes Internet service providers, electronic mail services, and online services dedicated to "news, sports, entertainment, or other information or content that is not user generated." *Id.*

[4] *See* Daphne Keller, *Platform Transparency and the First Amendment*, 1 J. Free Speech L. 1, 35 (2023).

[5] Fla. Stat. § 501.2041(1)(g)(4).

[6] Tex. Bus. & Com. Code § 120.002(b).

difficult to track unique users reliably and consistently. The laws do not explain what "monthly individual platform participants" and "active users" mean. Many companies, particularly smaller ones, do not track "monthly active users."[7] While some business models favor tracking users (like ad-dependent ones), other kinds of companies (like paid subscription ones) may have no business-related reason to do so at all. Moreover, more accurate tracking may require businesses to invest in tracking technologies and change features of their services. The laws also disfavor businesses that want to offer users more privacy choices.

Even for services that do track monthly active users, the metric does not have one meaning and can be artificially inflated or deflated.[8] Practically, it is not easy for businesses to count users: Users may visit a website many times in one month and from multiple devices (e.g., mobile, tablet, and web). Spam or fraudulent traffic—rather than visits from real people—can also artificially inflate metrics. The numbers can also fluctuate month to month: some months a company may be covered by these laws, and

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[7] *Platform Transparency: Understanding the Impact of Social Media: Hearing before the Subcomm. on Privacy, Technology, and the Law*, 117 Cong. (2022) (Statement of Daphne Keller, Appendix 1) ("User counts are notoriously unreliable, and different companies may define the metric differently.").

[8] Kurt Wagner, *The 'Monthly Active User' Metric Should Be Retired. But What Takes Its Place?"* Vox (Feb. 9, 2015), https://www.vox.com/2015/2/9/11558810/the-monthly-active-user-metric-should-be-retired-but-what-takes-its (explaining that monthly active user estimates are "not a great indicator for how big a social network actually is").

others the same company may not be.

Second, the Florida and Texas laws may impact small and medium-sized businesses, even if they can safely determine that these constraints currently do not apply to them. After all, startups may start small, but they intend to grow into bigger companies—and they can do so very quickly and, at times, unexpectedly.[9] Startup founders that aspire to have a sizeable company may, therefore, consider the legal obligations that might affect their business down the road. In fact, it is not practical for a startup to launch and grow with one idea, and then need to radically rethink its business model or operations once it hits an arbitrary threshold. Rather, startups (and investors who fund the early growth and development of many online businesses) may consider the laws and any potential roadblocks to the growth of their business before launching those businesses.

Meanwhile, most private companies do not regularly report these numbers, and there is no industry standard for how to do so. It is therefore unclear how these thresholds will be enforced, if at all.

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[9] *See, e.g.*, Krystal Hu, *ChatGPT sets record for fastest-growing user base – analyst note*, Reuters (Feb. 2, 2023), https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/ ("ChatGPT, the popular chatbot from OpenAI, is estimated to have reached 100 million monthly active users in January, *just two months* after launch, making it the fastest-growing consumer application in history."); Pallavi Rao, *How Long It Took for Popular Apps to Reach 100 Million Users*, Visual Capitalist (July 13, 2023), https://www.visualcapitalist.com/threads-100-million-users/ (noting Internet services can takes anywhere from days to several years to reach 100 million users).

And, for businesses that launch and are sued by private litigants, these constraints do not ease the cost and burden of such suits. Rather, requirements based on revenue and users are dependent on messy fact questions, making such suits near impossible to resolve on a motion to dismiss.[10] The arbitrary nature of these laws thus create real and expensive risks for websites that curate user-generated content.

This Court's decision will impact future state laws that seek to shape how online services moderate content. Other state laws may have lower user or revenue constraints, or no such constraints at all. Engine's community of startups—as well as their investors—seek to ensure that the First Amendment continues to protect startups' editorial discretion in moderating content on websites to keep them safe, healthy, and relevant for users.

B. The content moderation restrictions in these laws may impede the First Amendment rights of startups to choose what content to display and curate on their websites.

The First Amendment protects the discretion of websites to choose what content to display, curate, and recommend. This Court has long recognized that private entities unequivocally have a right to exercise editorial discretion: they can choose whether to

[10] Furthermore, even absent a lawsuit, reporting user numbers can come with real financial implications: such information may be highly sensitive for a growing company and affect its ability to attract investment.

display certain expression or promote it.[11] This longstanding principle is no different when applied to companies exercising editorial functions online.[12] When companies "choose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First Amendment-protected activity."[13]

The Florida and Texas laws may impede Internet companies' ability to choose what content to

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[11] *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding a statute providing politicians with a right to reply violated First Amendment because "of its intrusion into the function of editors"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (recognizing cable operations have "editorial discretion"); *Ark Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (recognizing programming decisions that "often involve the compilation of the speech of third parties" constitute "communicative acts"); *see also, e.g., 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."); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." (quotations omitted)).

[12] *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) ("All manner of speech—from 'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word'—qualify for the First Amendment's protections; no less can hold true when it comes to speech . . . conveyed over the Internet"); *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("[N]o basis for qualifying the level of First Amendment scrutiny that should be applied" to speech on the "Internet").

[13] *Netchoice, LLC et al. v. Attorney General, Florida*, 34 F.4th 1196, 1213 (11th Cir. 2022).

display on their services. For example, the Florida law requires websites to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform."[14] It also specifically prohibits websites from "us[ing] post-prioritization or [a] shadow banning algorithm for content and material posted by or about a user who is known by the social media platform" to be a political candidate during a campaign season.[15] Similarly, an Internet company cannot "take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."[16]

Meanwhile, the Texas law prohibits "censor[ship of] 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.[17] Censoring includes "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against."[18]

While the laws do not prohibit all moderation, their restriction mandating what kind of information

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[14] Fla. Stat. § 501.2041(2)(b).

[15] *Id.* at § 501.2041(2)(h).

[16] *Id.* at § 501.2041(2)(i).

[17] Tex. Civ. Prac. & Rem. Code § 143A.002(a).

[18] *Id.* § 143A.001(1).

Internet companies must display impedes their editorial discretion, makes each moderation decision more fraught, and likely creates services that are less desirable for users. For growing companies, the laws also create uncertainty and thus a chilling effect on both moderation and curation.

This is a problem because content moderation is a business necessity for many Internet companies: users do not want to use a service filled with spam, violence, hatred, irrelevant content, or illegal activity.[19] For example, Internet users may not want to see political speech that cannot be removed in a non-political forum like an educational or dating website. And Internet users also may not want to see content with a strong viewpoint, say, animal rights posts on a cooking site or online marketplace for leather goods. Business owners have a right to decide what kind of website, application, or service their company will be—and what kind of speech they will promote.[20]

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[19] Content moderation can take many forms. Some websites allow users to flag unsavory content. Others remove content, such as spam, illegal activity, copyright violations, irrelevant content, or content that otherwise does not comply with a company's standards. Some will have acceptable use policies or community guidelines tailored to the website's specific audience and business model. Others might limit who can join a community or restrict permitted topics for discussion. Meanwhile, some websites promote certain content, such as by making the most useful information most easily accessible and making less useful information less prominent.

[20] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) ("[W]hen a private entity provides a forum for

In fact, small- and medium-sized companies regularly moderate content to keep users safe, remove unsavory content, and protect their brand.[21] For example, a dating app in Engine's community moderates content to ensure that the environment is safe for women.[22] A crowdsourcing event website moderates content to limit spam, scams, unlawful content, and content that violates its standards.[23] An audio-based social media website seeks to automatically detect audio clips that are not family friendly.[24] Like others, these startups see moderation

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speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum.").

[21] Engine Advocacy, *Startups, Content Moderation, & Section 230*, at 2 (2021), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/Startups%2C+Content+Moderation%2C+and+Section+230+2021.pdf.

[22] *See* Lex Samuels, *Interview with Heather Hopkins on "Creating a Safer and More Transparent Dating Experience,"* Engine Advocacy, (Oct. 20, 2023), https://www.engine.is/news/startupseverywhere-losangeles-calif-hulah ("Content moderation plays a pivotal role in my [dating] platform . . . In the dating space, a significant issue is abusers and sexual predators [that] exploit these platforms to find their next victims.")

[23] *See* Hong Zhuang, *Interview with Andrew Prystai on "Reimagining the Online Event Management Experience*," Engine Advocacy (October 29, 2021), https://www.engine.is/news/startupseverywhere-omaha-ne-eventvesta.

[24] *See* Edward Graham, *Interview with Derek Omori on "A Platform to Create and Share Audio Clips with Online Users*," Engine Advocacy (February 21, 2020),

as an important tool for running their businesses—and exercises of editorial discretion that are protected under this Court's First Amendment precedent.

C. The individualized notice and appeal requirements in the laws may be unduly burdensome and costly for smaller companies.

The Florida and Texas laws may unconstitutionally and unfairly burden smaller companies' First Amendment rights through their onerous notice and appeal requirements.[25] The Florida law requires social media platforms to "notify[] the user who posted or attempted to post the content or material" the platforms intend to remove.[26] The notice must "[b]e in writing," "delivered . . . in 7 days," "include a thorough rationale explaining the reason that the social media platform" removed content or the user, and "include a precise and thorough explanation of how the social media platform became aware of the censored content or material."[27]

Similarly, the Texas law requires, among other things, that websites provide "concurrently with the removal" a notice to the user whose content was removed an explanation of "the reason the content

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https://www.engine.is/news/startupseverywhere-salt-lake-city-utah.

[25] *See* Pets. Br. at 46-53 (No. 22-555).

[26] Fla. Stat. § 501.2041(2)(d)(1).

[27] *Id.* § 501.2041(3) (emphasis added).

was removed."[28] And the law goes even further: it also requires that the user be allowed "to appeal the decision to remove the content to the platform" and that she receive a written explanation of the outcome.[29] In addition, "[i]f a social media platform receives a user complaint" about content removal, "the social media platform shall, not later than the 14th day," "review the content," "determine whether [it] adheres to the platform's acceptable use policy," "take appropriate steps," and "notify the user regarding the "steps taken."[30]

1. Startups cannot afford the costs required to comply with these onerous requirements.

Startup founders must design their products, develop internal tools, hire employees, and draft business plans in anticipation of obligations that will arise as their businesses grow.[31] For small and fast-growing companies, the states' disclosure provisions, including the notice and appeal obligations, would be

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[28] Tex. Bus. & Com. Code § 120.103(a)(1).

[29] *Id.* § 120.103(a)(2)-(3).

[30] This brief focuses on the notice and appeal provisions of the Florida and Texas laws, but other transparency requirements in the laws impose similar burdens on the editorial decisions of Internet companies.

[31] Engine has found that the average seed-stage startup has about $55,000 per month to spend to cover all of its costs. *See* Engine Advocacy, *The State of the Startup Ecosystem*, 17 (April 2021), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/The+State+of+the+Startup+Ecosystem.pdf.

overwhelmingly costly and burdensome.

The notice requirements would require companies to track every piece of content that is considered for removal and draft the required explanatory notices, within one week, to the user to show why the content was removed. Moreover, the Texas law's requirement that the notice be concurrent to removal might often be impossible: some content, such as a post disclosing the home address of a harassment target or the address of her children's school, is harmful and needs to be removed immediately, whereas drafting an explanatory notice and sending it to a user would take some time.

Similarly, the appeals requirements would not be possible for many small- and medium-sized, fast-growing businesses. In effect, they would require companies to track every piece of content, every decision to moderate and the reasons for doing so, provide individualized explanations for removed or moderated content, and create and maintain an appeals infrastructure. In addition to requiring companies to track moderation decisions, companies would also need to employ additional moderators to review appeals.

Every step in the notice and appeals processes compels companies to speak (in explaining the editorial basis for each decision or the resolution of each appeal) or engage in unwanted editorial activity (in re-reviewing appealed decisions). Texas's law appears to require even further disclosures, through a system for users to "track" the status of appeals, as well as the website's handling of any notifications

alleging that content is unlawful.[32] This compelled speech about editorial decisions is highly relevant for First Amendment purposes. So, too, is the risk that websites will simply change their editorial policies or permit less speech in the first place to avoid or simplify these costly processes.[33]

This is also simply not practical for most startups.[34] As one founder of a startup that curates user content puts it, "[a]s a startup, you are grinding for every dollar."[35] Startups do not have the resources—time, money, or labor—to develop detailed policies, draft notices, and maintain appeal practices. Every minute that a startup needs to spend thinking about whether to remove a post is time that it could spend building products. "It takes a lot of time and effort to raise money," the founder explains. "And when that funding comes through the door we want to focus it on creating value for our customers and

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[32] Tex. Bus. & Com. Code § 120.101.

[33] *See* Keller*, supra* note 4, at 30-39 (explaining how operational burden of disclosure obligations will likely cause websites to change underlying editorial policies).

[34] *See, e.g.*, *id.* at 34, 37 (explaining that YouTube currently provides notice and appeal options for approximately 9 million videos each quarter, but that number would increase "by 100 times" "to over a billion each quarter" under Texas law).

[35]Ian Rutledge, *Interview with Brandon Winfield on "Creating Space to Share Accessibility Challenges, Plan Travel Confidently,"* Engine Advocacy (April 29, 2022), https://www.engine.is/news/startupseverywhere-atlanta-ga-iaccesslife.

find[ing] new ways to bring in revenue."[36]

2. Startups may be forced to leave states with burdensome requirements.

Fragmented state laws already pose challenges for startups seeking to gain a foothold in every state.[37] These laws make that situation worse. And, if the Florida and Texas provisions are upheld, other laws in other states will undoubtedly follow.

While large Internet companies may have the resources to comply with certain notice and appeal requirements, startups have small teams with small budgets. The problem is particularly acute if the company must track and comply with different requirements in each state. Under the laws at issue here, a website operating in Texas, for example, is permitted to skip notifying a user about content moderation if the violation "relates to an ongoing law enforcement investigation."[38] But, in Florida, it could

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[36] *Id.*

[37] For example, "[a] patchwork of privacy laws [currently] creates confusion and duplicative costs for startups." Engine Advocacy, *Privacy Patchwork Problem: Costs, Burdens, and Barriers Encountered by Startups*, 4 (Mar. 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6414a45f5001941e519492ff/1679074400513/Privacy+Patchwork+Problem+Report.pdf. In fact, "[t]he rapidly shifting landscape of state privacy laws makes compliance difficult for startups and leads them to spend considerable time and resources navigating these disparate, complex frameworks." *Id.*

[38] Tex. Bus. & Com. Code § 120.103(b)(2).

not do so unless the user's post was obscene.[39] Tracking state-by-state variation at this level of detail would be hard enough with just two state laws, and tremendously complex with fifty.

One founder explains that his startup has "not expanded into certain states like California . . . because of the resources required to handle [state-specific laws like the] California Consumer Privacy Act (CCPA) compliance, which is something that [his team has] to think about every time [they] look at entering a state that has its own, unique privacy compliance requirements."[40] "When it comes to these kinds of legal and policy issues," he adds, "uniform frameworks that work across the country like Section 230 are very useful."[41]

To build a successful and lean company on a bootstrap budget, startups need clear, consistent, and uniform laws. They also need to have confidence that the laws upon which they build their businesses will not change. Permitting content moderation restrictions and transparency requirements to chip away at the First Amendment rights of private entities will undermine that needed certainty.

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[39] Fla. Stat. § 501.2041(4).

[40] Zhuang, *supra* note 23.

[41] *Id.*

3. Startups may not be able to raise capital for new Internet websites, further entrenching current large social media incumbents.

Much like startups themselves, investors too like legal predictability—clear, consistent, uniform state laws—underpinning the business models of startups in which they intend to invest.[42] And a poor legal environment can have a "more negative impact" on investing "than either a weak economy or an increased competitive environment."[43]

Section 230—a law that provides intermediary liability protection from lawsuits based on user-generated content—provides one clear example. "By providing certainty around legal exposure and protecting platforms from open-ended liability for wrongs committed by others, Section 230 helps new services that are seeking to attract investors and to operate at a smaller scale."[44] "And it is the legal certainty for new entrants provided by Section 230 that makes it possible for new competitors to enter

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[42] *See* Matthew C. LeMerle et al., *The Impact of Internet Regulation on Early Stage Investment*, Fifth Era, 5, 20 (Nov. 2014).

[43] *See id.* at 20 ("77% [of investors surveyed] in the U.S. said they are uncomfortable investing in an area with an ambiguous regulatory framework.").

[44] Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, Cato Institute, 5 (Jan. 31, 2022).

the market and attract investment."[45]

Unlike Section 230, the Florida and Texas laws would only create uncertainty. Indeed, it is extremely hard to know what many of the laws' requirements even mean, or what compliance would entail. This may make investing in Internet websites less desirable. Investors would also be less inclined to invest in a startup that may need to change its business model once it beats the odds and succeeds. Startups cannot easily restructure how they operate or what kind of content they display or recommend simply because they cross an arbitrary threshold.

Content moderation restrictions and transparency laws may thus "stifle investment in [the Internet services] sector and lock-in Facebook, Google, TikTok, etc. as the only platforms able to support user generated content," one founder explains. "Investors in early-stage tech companies only want to invest into companies that are devoting the majority of their time to serving customers versus the risk that their funds will be spent satisfying government red tape."

D. These laws may lead to a less useful Internet and fewer socially beneficial startups.

The content moderation restrictions and transparency requirements will have a similar effect: the laws may lead to a less useful Internet and fewer

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[45] *Id.* at 2.

socially beneficial startups.

The laws may lead to a less curated and, thus, less useful Internet. If companies are forced to comply with content moderation restrictions and transparency requirements, websites that comply may very well be overrun with undesirable and useless content—like spam exploiting loopholes in the law. Moreover, instead of seeing a helpfully curated feed, users could see messy webpages without recommendations, organization, or filtering. And instead of having niche websites or startups focused on certain issues, users might find websites begin to blend together. The same viral hate speech, political ads, or spam, for example, might flood a variety of websites, pushing out posts from family, friends, and colleagues that users actually wish to see. Advertisers too may be less willing to pay for advertising—a primary source of revenue for many Internet companies—where their ads may be showcased next to unsavory or irrelevant speech.[46]

The laws may also encourage companies to, indirectly, suppress lawful speech. For example, a company may restrict who can join the service at the outset, ban users more swiftly, or deactivate comments and other features to avoid potential liability from moderation decisions.[47] And a website

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[46] *See* Pets. Br. at 6-7 (No. 22-555).

[47] Both the Florida and Texas laws provide private rights of action and attorney general enforcement mechanisms. *See* Tex. Civ. Prac. & Rem. Code § 143A.008 (via Texas Attorney General); *id.* § 143A.007 (via private right of action); Fla. St. § 501.2041(5)-(8) (via department investigation and private right of action). For example, the Florida law provides that an

might even prohibit entire topics from discussion in an attempt to avoid possible or perceived liability under the Texas law's viewpoint neutrality rule. A company that appears to be choosing among different content may believe it is more at risk than one that decides to strictly limit what can be shared at all.

Finally, if startups are forced to carry content they might otherwise not, or to account for notice and appeal provisions that might cut into their bottom line, some founders may choose to direct their energy, funding, and ideas in a different direction altogether. Fewer websites encouraging speech and conversation might launch, which would only reinforce and favor large social media incumbents with the resources to meet the laws' requirements.

In effect, in a world in which it is cheaper and safer to feature as little content as possible, that is precisely the path some companies may take, which would hurt Internet users in the end. Or startup founders and investors may choose not to launch speech-promoting websites at all. The ability to moderate content thus promotes the First Amendment's aims by encouraging a diversity of digital spaces and speakers to flourish.

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individual can seek "[u]p to $100,000 in statutory damages" for any notice that is insufficiently "thorough." Fla. St. § 501.2041(6)(a).

CONCLUSION

For the reasons set forth above, Engine respectfully urges this Court, as to the issues under review, to reverse the decision of the Fifth Circuit and to affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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