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, DBA NETCHOICE, ET AL.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., PETITIONERS

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

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

BRIEF FOR THE ANTI-DEFAMATION LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

STEVEN M. FREEMAN*
LAUREN T. KRAPF
ANABELLE M. TOREK
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
(212) 885-7700
sfreeman@adl.org
**Counsel of Record*

Counsel for *Amicus Curiae*

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STATEMENT OF INTEREST[1]

The Anti-Defamation League ("ADL") submits this *amicus curiae* brief in support of no party. Founded in 1913 in response to an escalating climate of antisemitism and bigotry, ADL's timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment to all. ADL continues to fight all forms of bigotry and hate with the same vigor and passion, and it is often the first call when acts of antisemitism occur. A recognized leader in fighting hate and harassment online, exposing extremism across the ideological spectrum, and delivering anti-bias education, ADL's ultimate goal is a world in which no group or individual suffers from bias, discrimination, or hate.

Combating online hate and harassment is central to the pursuit of ADL's mission. Since the early days of dial-up, ADL has been devoting resources and attention to the issue of online hate. Today, ADL brings decades of experience and expertise to the fight against hate online.

The ADL Center for Tech and Society ("CTS") works across four key areas—policy, research, advocacy, and incident response—to generate advocacy-focused solutions that make digital spaces safer and more equitable for everyone, especially members of minority and marginalized communities.

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, and no counsel or party, nor any person or entity other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

For years, CTS has researched how social media platforms amplify hate and harassment online. CTS also has deep experience researching the consequences of that amplification, including the radicalization of users and the escalation of online hate into offline violence. CTS engages directly and regularly with major social media platforms to push for policy, enforcement, and product changes around content moderation, making a measurable impact in fighting online hate. Similarly, the ADL Center on Extremism ("COE") examines the ways extremists across the ideological spectrum exploit the online ecosystem to spread their messages, recruit adherents, finance hate, and commit acts of violence against members of minority and marginalized communities.

ADL believes the state statutes at issue in these cases unconstitutionally deprive social media platforms of the content-moderation tools they urgently need to help stop the proliferation of hate and harassment online. Without such tools, social media platforms will be ill-equipped to halt the aforementioned escalation of online hate into offline violence, posing a grave threat to the safety and well-being of all, especially the most vulnerable. ADL respectfully asks this Court to make clear that states cannot, through the type of content-moderation restrictions at issue here, prohibit social media companies from taking the steps necessary to promote user safety and mitigate the risk of violence stemming from online hate and radicalization.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases concern two state statutes enacted in 2021 to regulate large social media platforms like Facebook, Instagram, and X (formerly Twitter): Ch. 2021-32, Laws of Fla. ("S.B. 7072"), and 2021 Tex. Gen. Laws 3904 ("H.B. 20"). The details of the two laws differ, but, as relevant here, each law includes (1) provisions restricting the platforms' content-moderation practices; and (2) individualized-explanation provisions requiring platforms to explain particular content-moderation decisions to affected users.

Florida enacted S.B. 7072 in May 2021. The law regulates "[s]ocial media platform[s]" that have "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants." Fla. Stat. § 501.2041(1)(g)(4) (2022). S.B. 7072 restricts certain forms of content moderation that it refers to as "censoring," "shadow banning," and "deplatforming." The law defines "[c]ensor" to "include[] any action taken" to "restrict, edit, alter" or "post an addendum to any content or material posted by a user." *Id.* § 501.2041(1)(b). A "[s]hadow ban" is an action "to limit or eliminate the exposure of a user or content or material posted by a user." *Id.* § 501.2041(1)(f). "Deplatform[ing]" means banning a user or deleting her posts for "more than 14 days." *Id.* § 501.2041(1)(c).

S.B. 7072 imposes two sets of requirements on covered platforms:

1. *Content-moderation restrictions.* S.B. 7072 prohibits platforms from engaging in defined types of content moderation. It proscribes censoring, deplatforming, or shadow banning a "journalistic enterprise[2] based on the content of" its posts, Fla. Stat. § 501.2041(2)(j); prohibits platforms from "willfully deplatform[ing] a candidate" for public office, *id.* § 106.072(2); and restricts platforms from moderating content "by or about" a political candidate. *Id.* § 501.2041(2)(h). S.B. 7072 also provides that a platform must "apply censorship, deplatforming, and shadow banning standards in a consistent manner." Fla. Stat. § 501.2041(2)(b).

2. *Individualized-explanation requirement.* S.B. 7072 requires platforms to provide individualized explanations to users whenever they remove or alter user posts. Fla. Stat. § 501.2041(2)(d)(1). The platforms must deliver notice within seven days of removing or altering a post and the notice must contain "a thorough rationale" for the action and an explanation of how the platform "became aware" of the post. *Id.* § 501.2041(3).

Texas's H.B. 20 regulates social-media platforms that have "more than 50 million active users in the United States in a calendar month." Tex. Bus. & Com. Code Ann. § 120.002(b). Although H.B. 20 differs in some details from Florida's law, the

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[2] "Journalistic enterprise" is defined as any publisher doing business in Florida with a certain specified audience reach. *See* Fla. Stat. § 501.2041(d)(1)–(4).

provisions at issue here fall into the same two categories:

1. *Content-moderation restrictions*. With certain exceptions, H.B. 20 prohibits "censor[ing] 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 [Texas]." Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a); *see id.* § 143A.006 (exceptions). The law defines "[c]ensor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against." *Id.* § 143A.001(1).

2. *Individualized-explanation requirement.* H.B. 20 requires that "concurrently with the removal" of user content, the platform shall "notify the user" and "explain the reason the content was removed." Tex. Bus. & Com. Code Ann. § 120.103(a)(1). H.B. 20 goes further than S.B. 7072, requiring platforms to "allow the user to appeal the decision to remove the content to the platform," *id.* § 120.103(a)(2), and compelling platforms to address those appeals within 14 days. *Id.* § 120.104.

These laws strike at the heart of First Amendment freedoms this Court has long guaranteed: the freedom from state confiscation and cooptation of (physical or digital) communications media to deliver the state's preferred messages; or, more simply, the freedom to choose what to say and what *not* to say. The social media companies

represented by NetChoice, as reflected in their content-moderation policies and public representations, have chosen not to platform hateful, harassing speech that dehumanizes its targets; breeds offline violence and terror; and excludes the most vulnerable Americans from full participation in public discourse—no matter whether such hate is "by or about" a political candidate, nor whether it comes from a sufficiently large "journalistic enterprise." Under the Constitution, Florida and Texas cannot force these social media companies to make a different choice. Private actors choose what messages they wish to disseminate, as well as what messages they do not. The government cannot make that choice for them.

A contrary holding would invite dire consequences. There is a well established and growing body of research linking online hate to offline violence, both at the individual and group levels. Disabling social media platforms from combating and containing online hate and harassment is certain to increase the amount of offline violence perpetrated against members of minority and marginalized communities. Even hate that stays online can cause harm: every day, Americans face exclusion from online spaces merely for existing as ethnic, religious, or other minorities, deeply chilling their participation in public discourse and depriving them of full citizenship. Moreover, spreading online hate can have significant commercial consequences for platforms that choose to do so, as advertisers flee from spaces in which their brands appear side-by-side with Nazi iconography, for example. While

governments can and should do more to hold social media platforms accountable for breeding hate and violence, S.B. 7072 and H.B. 20 strike precisely the wrong balance, and go well beyond what the Constitution permits. Even were that not the case, S.B. 7072 and H.B. 20 would still fall under Section 230 of the Communications Decency Act.

ARGUMENT

I. The First Amendment Prohibits States from Requiring Social Media Platforms to Allow Content Which "Reason Tells Them Should Not Be" Allowed.

This Court has long held it to be a bedrock principle of the First Amendment that no government may "compel" private actors "to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945). The Court has repeatedly reaffirmed that principle. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Turner Broad. Sys. Inc. v. Fed. Commc'ns Comm.*, 512 U.S. 622 (1994) ["*TBS*"]; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm. of Cal.*, 475 U.S. 1 (1986) ["*PG&E*"]; *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). It applies with full force in these cases: Florida and Texas cannot compel social media companies—which are "indisputably 'private actors' with First Amendment rights," *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022)—to carry hate and harassment that reason, morality, and business judgment tell them should not be permitted on their platforms.

Social media platforms' own policies and guidelines make unmistakably clear that hate and harassment have no place there. For example, Meta (the owner of the Facebook and Instagram platforms), "[i]n an effort to prevent and disrupt real-world harm," disallows "organizations or individuals that proclaim a violent mission" on its platforms,[3] as well as "hate speech": "violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, [and] cursing and calls for exclusion or segregation" that are directed against "people—rather than concepts or institutions— on the basis of what we call protected characteristics," such as race, religion, and ethnicity.[4] X (formerly Twitter), being "committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized,"[5] prohibits the promotion of "violent and hateful entities"[6] and the targeting of "individuals or groups with abuse based on their

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[3] Meta, *Dangerous Organizations and Individuals* (Dec. 6, 2023), https://transparency.fb.com/policies/community-standards/dangerous-individuals-organizations/ (last visited Dec. 6, 2023).

[4] Meta, *Hate Speech* (Dec. 6, 2023), https://transparency.fb.com/policies/community-standards/hate-speech/ (last visited Dec. 6, 2023).

[5] Twitter, *Hateful Conduct* (Apr. 2023), https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Dec. 6, 2023).

[6] Twitter, *Violent and Hateful Entities Policy* (Apr. 2023), https://help.twitter.com/en/rules-and-policies/violent-entities (last visited Dec. 6, 2023).

perceived membership in a protected category."[7] While such policies are of course "only as good as their enforcement"[8]—which may fall far short of the level necessary to protect the platforms' users[9]—well established First Amendment law prohibits Florida and Texas from supplanting the platforms' judgment as to what should or should not appear there with the states' own.

Start with *Tornillo*. That case involved Florida's "right of reply" statute, which provided that, "if a candidate for nomination or election [was] assailed regarding his personal character or official record by any newspaper, the candidate ha[d] the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may [have made] to the newspaper's charges." 418 U.S. at 244. Without applying the Court's tiers-of-scrutiny framework, the Court concluded that the Florida statute could not survive the Miami Herald's First Amendment challenge. The "government-enforced access" to the pages of Florida's newspapers extended by the law to political candidates ran headlong into the fundamental principle of free expression that "no

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[7] Twitter, *Hateful Conduct* (Apr. 2023), https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Dec. 6, 2023).

[8] ADL, *How Platforms Rate on Hate* (Feb. 2022), https://www.adl.org/sites/default/files/pdfs/2022-05/How%20Platforms%20Rate%20on%20Hate%202022_OHI_V10.pdf (last visited Dec. 6, 2023).

[9] *See* ADL, *Twitter Not Enforcing Its Policies on Antisemetic Content* (Mar. 9, 2023), https://www.adl.org/resources/blog/twitter-not-enforcing-its-policies-antisemitic-content (last visited Dec. 6, 2023).

government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." *Id.* at 254, 255–56 (citation omitted). And, just as surely as "a statute or regulation forbidding [the Herald] to publish specified matter," the right-of-reply statute "constituted [a] compulsion"—namely, a compulsion "to print that which [the Herald] would not otherwise print," or that which "'reason' tells [it] should not be published." *Id.* at 256. Among other concerns, the Court observed that, rather than risk application of the statute and its penalties, newspaper editors "might well conclude that the safe course [was] to avoid controversy" altogether and decline to publish material that would trigger the statute. *Id.* at 257. Public discourse would thereby be impoverished. *See id.*

In *PG&E*, the Court confronted the same statutory compulsion to speak in the context of a utility-bill insert. *See* 475 U.S. at 5–7. California's utility regulator had required PG&E, a utility company, to turn over the "extra space" in its monthly bills to a consumer advocacy group called TURN to do with as it pleased, *id.* at 5, including the expression of views antagonistic to the utility and with which the utility disagreed. *See id.* at 12–15. Again, without applying the Court's tiers-of-scrutiny framework, while observing that California's rule was "not content neutral," *id.* at 13, the Court held the rule impermissibly burdened the utility's "own expression" by requiring it to communicate messages with which it disagreed or by requiring it to appear to endorse TURN's messages. *Id.* "For corporations as

for individuals, the choice to speak includes within it the choice of what not to say." *Id.* at 16.

In *TBS*, the Court again confronted an enforced-access rule in the context of cable operators. There, the FCC required cable operators "to carry the signals of a specified number of local broadcast television stations." 512 U.S. at 630. While the Court ultimately remanded the case for a resolution of certain genuine disputes of material fact on the proper application of intermediate scrutiny, *see id.* at 668, the Court made clear that the operators' decision about what channels (and thus what *speech*) to carry was a choice protected by the First Amendment. *See id.* at 636–37.

Finally, in *Hurley*, the Court confronted an enforced-access rule in the context of Massachusetts's application of its public accommodations law to Boston's St. Patrick's Day parade. *See* 515 U.S. at 561–62. The Court held that a "requirement to admit a parade contingent expressing a message not of the private organizers' own choosing" was prohibited by the First Amendment. *Id.* at 566. "[W]hatever the ultimate level of scrutiny" to be applied (an issue the *Hurley* Court did not decide), *id.* at 577, when a public accommodations law like Massachusetts' was applied to "expressive activity," its effect was "to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.* at 578. But such an effect was "merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.*

Taken together, the teaching of *Tornillo*, *TBS*, *PG&E*, and *Hurley* is clear: no matter whether strict or intermediate scrutiny applies to the statutory provisions at issue here, the First Amendment forbids the states' effort to compel private entities, like social media companies, to platform material they deem hateful, dangerous, or otherwise harmful. Just as surely as a law forbidding social media companies from engaging in certain speech,[10] these laws "constitute[] [a] compulsion"—namely, a compulsion to carry "that which [covered platforms] would not otherwise" carry, and that which "'reason' tells [them] should not be" allowed on their platforms. *Tornillo*, 418 U.S. at 256. Under Florida's law, for example, a social media platform would be required to maintain the status and reach of an account belonging to a school board candidate who advocates for genocide. *See* Fla. Stat. § 106.072(2). A platform would be required to carry on equal terms with all other content the most odious and most noxious views about any political candidate. *See id.* § 501.2041(2)(h). And a platform could not take any action *at all* against a "journalistic enterprise" which, for example, acted as a conduit for one of this country's adversaries to spread misinformation, disinformation, and social dissolution "based on" the fact that the enterprise was transmitting such

[10] Indeed, in one respect, Florida's is precisely such a law: its definition of prohibited "censoring" includes actions taken to "post an addendum to any content or material posted by a user." Fla. Stat. § 501.2041(1)(b). Thus, for example, a social media platform could not even post its *own* corrective disclosure to a post denying the Holocaust made by a "journalistic enterprise."

messages. *See id.* § 501.2041(2)(j). Under Texas's law, a social media platform flatly could not engage in any content moderation at all, with certain limited exceptions for direct incitement, sexual exploitation of children, and other similarly circumscribed categories of content. *See* Tex. Civ. Prac. & Rem. Code Ann. § 143A.006. Such a sweeping requirement goes well beyond the targeted appropriation of column space in *Turnillo* or the "extra space" in *PG&E*'s utility bills; it simply expropriates social media platforms of their speakers' autonomy wholesale.

As in *Tornillo*, social media companies faced with the application of these state statutes might decline to platform salutary, beneficial material altogether. For example, faced with Florida's "consistent application" requirement, *see* Fla. Stat. § 501.2041(2)(b), social media platforms might choose to prohibit *all* posts relating to racial equality, knowing that, if they remove posts advocating for intolerance and discrimination, they might also have to remove posts supporting racial equity and advocating for racial justice. Similarly, they might choose to prohibit *all* posts relating to what form of government is desirable, knowing that, if they remove posts advocating for fascism or totalitarianism, they might also have to remove posts advocating for democracy and free government. Likewise, faced with Texas's prohibition on viewpoint-based "censorship," *see* Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a), platforms could not remove Holocaust denial material without removing Holocaust education material; could not remove anti-American material without removing pro-American

material; and could not remove material advocating for self-harm without removing material advocating against it—and accordingly might opt to prohibit all posts on the Holocaust, America, or self-harm altogether. That is a ready way to impoverish our public discourse.

II. Online Hate and Harassment Are Serious Threats to Americans' Safety and Well-Being, Especially Members of Historically Marginalized and Minority Communities.

A. Online Hate and Harassment Foment Small- and Large-Scale Offline Violence.

While the relationship between speech and action is an ancient subject of debate, *see, e.g.*, Gorgias, "Encomium on Helen," *Ancilla to the Pre-Socratic Philosophers* 131–33 (Kathleen Freeman, ed., 1948), modern social science demonstrates with increasing forcefulness that online hate and harassment propagated on social media platforms rarely stay online. To the contrary, recent research (as well as recent experience) shows a clear connection between online hate and offline violence.

The link between defamatory attacks online and offline harassment or violence is not a difficult one to substantiate.[11] Researchers have found that

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[11] *Confronting White Supremacy- The Evolution of Anti-Democratic Extremism and the Continued Threat to Democracy Before H. Subcomm. on Civil Rights & Civil*

"anti-refugee sentiment on Facebook predicts crimes against refugees in otherwise similar municipalities with higher social media usage," and suggest that social media can act as a propagation mechanism for violent crimes by enabling the spread of extreme viewpoints."[12] Others have found that, since 2016, counties with higher X/Twitter usage have seen a correspondingly higher rate of anti-Muslim hate crimes, and that xenophobic social media posts of national leaders lead to "hate crimes *on the following days*."[13] Still more research demonstrates a close connection between race-, ethnicity-, and national-origin-based online hate and hate crimes in 100 U.S. cities.[14]

Take the example of a single website: Stormfront, now defunct, but long "the most popular Internet meeting place for anti-Semites, neo-Nazis,

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Liberties, 117th Cong. (2022) (written testimony of the ADL), *available at* https://www.govinfo.gov/content/pkg/CHRG-117hhrg50155/pdf/CHRG-117hhrg50155.pdf (last visited Dec. 6, 2023).

[12] Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082972 (last visited Dec. 6, 2023).

[13] Karsten Müller & Carlo Schwarz, *From Hasghtag to Hate Crime* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149103 (emphasis added) (last visited Dec. 6, 2023).

[14] Kunal Relia et al., *Race, Ethnicity and National Origin-based Discrimination in Social Media and Hate Crimes Across 100 U.S. Cities* (2019), https://arxiv.org/pdf/1902.00119.pdf (last visited Dec. 6, 2023).

and other white supremacists."[15] Its logo became "so universal among white supremacists" that it lost its association with the website and served instead "as a generic hate symbol" for all white supremacists.[16] From its inception, Stormfront "served as a veritable supermarket of online hate."[17] More than merely an online forum, it encouraged and facilitated moving online hate offline. "From the safety and anonymity of home," Stormfront users could "simply observe, take it one step further and interact with others, or even spearhead the planning of a gathering or campaign."[18] Indeed, Stormfront users "often organize[d]" offline activities.[19] The consequences were fatal. Stormfront was identified as the "murder capital of the Internet" in 2014 by anti-hate watchdog Southern Poverty Law Center ("SPLC").[20] In just five years from 2009 to 2014, the SPLC found that Stormfront members committed "nearly 100 bias-related homicides,"[21] vividly illustrating how its users could move from passive consumption of hate content to violence against ethnic, religious, and

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[15] ADL, *Don Black / Stormfront* (2021), https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Don-Black.pdf (last visited Dec. 6, 2023).

[16] ADL, *Stormfront* (2023), https://www.adl.org/resources/hate-symbol/stormfront (last visited Dec. 6, 2023).

[17] ADL, *Don Black: White Pride World Wide* (2001), https://web.archive.org/web/20060615230625/https:/www.adl.org/poisoning_web/black.asp (last visited Dec. 6, 2023).

[18] *Don Black / Stormfront*, *supra*, note 15.

[19] *Id.*

[20] SPLC, *White Homocide Worldwide* (Apr. 1, 2014), https://www.splcenter.org/20140331/white-homicide-worldwide (last visited Dec. 6, 2023).

[21] *Id.*

other minorities.[22] The "murder capital of the Internet" would still be indoctrinating its users into murderous hatred—had its (private) domain name registrar not revoked its domain name in 2017 "following complaints that it promotes hatred and is linked to dozens of murders.[23]

The problem of online hate is exacerbated by its recent rapid growth. In 2023, ADL found that "online hate and harassment rose sharply for both adults and teens aged 13–17 in the past 12 months."[24] More than half of Americans in 2023 (relative to 40 percent in 2022) reported experiencing online hate or harassment.[25] Fully 76 percent of transgender Americans have experienced online hate and harassment, 51 percent in the last year alone.[26] In 2022, Asian Americans reported the largest increase in online harassment ever, from 21 percent in 2021 to 39 percent in 2022, mirroring an increase in violent and fatal attacks offline, often against Asian American women. After the 2020 murder of George Floyd, ADL reported that anti-Black posts on Facebook quadrupled, and the number of white

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[22] *Id.*

[23] James Reeves, *Oldest white supremacist site, stormfront.org, shut down*, AP (Aug. 28, 2017), https://www.usatoday.com/story/tech/news/2017/08/28/oldest-white-supremacist-site-shut-down/608981001/ (last visited Dec. 6, 2023).

[24] ADL, *Online Hate and Harassment: The American Experience 2023* (June 27, 2023), https://www.adl.org/resources/report/online-hate-and-harassment-american-experience-2023 (last visited Dec. 6, 2023).

[25] *Id.*

[26] *Id.*

supremacist propaganda incidents has nearly doubled to the highest number of incidents since ADL started tracking the phenomenon. And 2021 saw the largest number of antisemitic incidents since ADL began tracking in 1979, including a 167 percent increase year-on-year in incidents of assault and a 106 percent increase in incidents at non-Jewish K–12 schools.

These disturbing trends have only been amplified by the October 7 Hamas attack in Israel. The Global Project Against Hate and Extremism has observed a nearly 500 percent increase in antisemitic and Islamophobic content on fringe platforms like 4chan.[27] The surge in hate is observable on mainstream platforms as well. ADL has found a 28 percent week-on-week increase in antisemitism on Facebook following the October 7 attacks, and a staggering *919 percent* increase on X.[28] The results of this proliferation are as predictable as they are tragic: ADL has observed a *more than 300 percent increase* in antisemitic assaults, harassments, and other bias-driven encounters across the country since October 7.[29]

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[27] GPAHE, *4chan* (Oct. 12, 2023), https://globalextremism.org/post/violent-antisemitic-and-anti-muslim-hate-escalating-online-in-wake-of-hamas-attacks-on-israel/ (last visited Dec. 6, 2023).

[28] ADL, *Online Antisemitism Increased After Hamas Attack* (Nov. 9, 2023), https://www.adl.org/resources/blog/online-antisemitism-increased-after-hamas-attack (last visited Dec. 6, 2023).

[29] ADL, *ADL Records Dramatic Increase in U.S. Antisemitic Incidents Following Oct. 7 Hamas Massacre* (Oct.

The connection between online hate and offline violence is not limited to violence against individuals. The role played by social media generally, and by Facebook particularly, is well documented in the (Muslim) Rohingya genocide in (largely Buddhist) Myanmar. A U.N. fact-finding mission found "over 150 online public social media accounts, pages and groups that have regularly spread messages amounting to hate speech against Muslims in general or Rohingya in particular."[30] The mission also discussed reports suggesting that specific "outbreaks of violence" in Myanmar have been associated with specific "hate campaigns against Muslims and Rohingya" that circulated over social media and by other means.[31] The mission concluded that "the linkage between offline and online hate speech and physical world acts of discrimination and violence is more than circumstantial."[32] The Myanmar government itself appears to have acknowledged this conclusion when it blocked Facebook in Mandalay in an effort to contain violence there.[33]

Extremist violence is another way in which online hate translates to offline violence. ADL has noted that the internet, "and social media sites in

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24, 2023), https://www.adl.org/resources/press-release/adl-records-dramatic-increase-us-antisemitic-incidents-following-oct-7 (last visited Dec. 6, 2023).

[30] UN Human Rights Council, *International Fact-Finding Mission on Human Rights in Myanmar* 323 (2019), https://digitallibrary.un.org/record/1643079?ln=en (last visited Dec. 6, 2023).

[31] *Id.*

[32] *Id.* at 332.

[33] *Id.*

particular, remain a pivotal element of the modern radicalization process."[34] One of the men who participated in a plot to kidnap Michigan Governor Gretchen Whitmer joined the Wolverine Watchmen group that planned the attack after Facebook recommended he join. Another extremist plot, planned on Facebook by two men connected in a Boogaloo Facebook group, resulted in the death of a Department of Homeland Security Officer.[35]

Fringe platforms are also hotbeds of hate that have influenced hate-motivated offline violence. In October 2018, Robert Bowers entered Pittsburgh's Tree of Life synagogue and yelled, "All Jews Must Die" as he opened fire, killing eleven people and wounding six, many of them Holocaust survivors.[36] It was later discovered that Bowers had spent extensive time on Gab, a fringe platform known as a haven for extremists, and eventually posted his own

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[34] ADL, *The ISIS Impact on the Domestic Islamic Extremist Threat: Homegrown Islamic Extremism 2009-2015* (Mar. 11, 2016), *available at* https://www.adl.org/resources/report/isis-impact-domestic-islamic-extremist-threat-homegrown-islamic-extremism-2009 (last visited Dec. 6, 2023).

[35] Second Am. Compl., *Underwood Jacobs v. Meta Platforms*, No. 22-CV-005233 (Cal. Super. Ct. June 16, 2023), *available at* https://www.cohenmilstein.com/sites/default/files/Underwood%20Second%20Amd%20Complaint%2006.16.23.pdf (last visited Dec. 6, 2023).

[36] ADL, *Deadly Shooting at Pittsburgh Synagogue* (Oct. 27, 2018), https://www.adl.org/resources/blog/deadly-shooting-pittsburgh-synagogue (last visited Dec. 6, 2023); *see also Social Media Platforms and the Amplification of Domestic Extremism, supra, note 34.*

antisemitic, anti-democratic, anti-immigrant, and white supremacist views there.[37] Similar domestic terrorist attacks and acts of violent extremism in Charleston, Charlottesville, Poway, El Paso, and Buffalo[38] were all connected to gunmen radicalized on social media by communities of like-minded extremists. [39]

In short, the connection between increased online hate and offline harassment and violence is inescapable. While social media platforms can and must do more to effectively combat the spread of hate online—by curbing the algorithmic recommendation and halting the autocompletion of hate,[40] among

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[37] ADL, *Pittsburgh Synagogue Shooting, Three Years Later* (Oct. 28, 2021), https://www.adl.org/resources/blog/pittsburgh-synagogue-shooting-three-years-later-resources-adls-center-extremism (last visited Dec. 6, 2023).

[38] Jonah E. Bromwich, *Before Massacre Began, Suspect Invited Others to Review His Plan* (N.Y. Times, May 17, 2022), https://www.nytimes.com/2022/05/17/nyregion/buffalo-shooting-discord-chat-plans.html (last visited Dec. 6, 2023).

[39] Jonathan Oosting, *FBI Informant: Facebook led me to infiltrate plot to kidnap Gretchen Whitmer* Bridge Mich. (Mar. 5, 2021), https://www.bridgemi.com/michigan-government/fbi-informant-facebook-led-me-infiltrate-plot-kidnap-gretchen-whitmer (last visited Dec. 6, 2023).

[40] See ADL, *From Bad to Worse: Amplification and Auto-Generation of Hate* (Aug. 16, 2023), https://www.adl.org/resources/report/bad-worse-amplification-and-auto-generation-hate (last visited Dec. 6, 2023); ADL, *From Bad to Worse: Auto-generating and Autocompleting hate* (Aug. 2023), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.adl.org/sites/default/files/pdfs/2023-08/Research-Study-Two-Auto-

other ways—allowing S.B. 7072 and H.B. 20 to stand would effectively disarm platforms in two of the country's most populous states in the ongoing fight against online hate and harassment. Ordinary Americans, especially those in minority and marginalized communities, will pay the price.

B. Online Hate and Harassment Chill the Speech and Public Participation of Members of Minority and Historically Marginalized Communities.

Even when online hate and harassment do not translate directly into offline violence, their dissemination can deeply chill the speech of members of minority and historically marginalized communities against whom they are directed. Online hate thus functions not only to degrade and disparage the most vulnerable, but also to exclude them from full participation in public discourse, and thereby full citizenship.

For example, in 2023, 25 percent of Jewish people reported avoiding identifying themselves online as Jewish out of concern about violence and harassment.[41] In 2022, targets of online hate and harassment reported numerous harms flowing from the harassment, including depressive or suicidal thoughts (10 percent of men, 16 percent of women), taking steps to reduce safety risks such as moving

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generating-Autocompleting-Hate-v5.pdf (last visited Dec. 6, 2023).

[41] *The American Experience 2023*, *supra* note 24.

locations or avoiding locations (9 percent of men, 10 percent of women), and being impacted economically, including through withdrawing from platforms that may represent opportunities for income or professional development (11 percent of men, 7 percent of women).[42] On Twitch, a social media site devoted to live video streaming, "hate raids" on Black and LGBTQIA+ streamers can chase its victims off the platform.[43] Black women on X receive abusive tweets *every 30 seconds*.[44]

In light of the deluge of hate and harassment that is thrust on members of minority and marginalized communities simply for existing online, it is no surprise that many will attempt to conceal their identities, self-censor their views and opinions, or simply opt out of online discourse altogether. For targets of hate and harassment, going offline or limiting their social media use is not simply a choice—it is sometimes a necessary step to secure their safety and well-being. Thus, even when online hate does not cause physical violence, it catalyzes other harms through self-censorship and enforced exclusion. When social media platforms are unable

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[42] *Id.*

[43] *Cf.* Taylor Hatmaker, *Twitch sues two users for harassing streamers with hate raids*, Yahoo (Sept. 13, 2021), https://techcrunch.com/2021/09/13/twitch-hate-raids-lawsuits/ (last visited Dec. 6, 2023).

[44] Will Knight, *Female black journalists and politicians get sent an abusive tweet every 30 seconds*, MIT Tech. Rev. (Dec. 18, 2018), https://www.technologyreview.com/2018/12/18/138551/female-black-journalists-and-politicians-get-sent-an-abusive-tweet-every-30-seconds/ (last visited Dec. 6, 2023).

to moderate identity-based hate and harassment, vulnerable and historically marginalized communities pay the price. Because the toxicity in digital social spaces becomes unbearable, these individuals and communities are ultimately excluded from democratic engagement and public life.

C. Online Hate and Harassment Harm Social Media Platforms' Business.

Online hate and harassment are bad for business. Social media companies may face—and increasingly have faced—serious commercial consequences for permitting the propagation of online hate and harassment over their platforms. The largest and most prominent social media platforms, including Facebook, Instagram, TikTok, X, and Reddit, in general do not charge their users to access the platforms; rather, their business stands or falls on advertising revenue. And advertisers have grown increasingly unwilling to have their brand messaging displayed side-by-side with hate. Accordingly, social media platforms that are prohibited by the state from moderating views that the majority of American consumers and the businesses advertising to them find noxious and abhorrent are in effect subject to a state-sanctioned loss of advertising revenue. In short, in light of the demonstrated capacity of online hate and harassment to cause violence and other harms to its targets, companies reasonably calculate that consumer perception will be damaged if they allow their brands to be displayed next to, for example, overtly pro-Nazi content. Thus, Florida's and Texas's content-moderation prohibitions not only threaten the physical and mental safety of hate's targets, but

also the commercial viability of the platforms themselves and the reputations of the companies that advertise on them.

III. Within the Limits of the Constitution, State and Federal Governments Have an Important Role in Curbing Online Hate and Harassment.

Amicus ADL has long advocated that state and federal governments play an appropriate role, within the limits of the First Amendment and other constitutional guarantees, in protecting social media users from platforms' worst ills. Congress, for instance, has the authority to pass the transparency legislation necessary to equip social media users, and the public, with knowledge of how social media companies respond to reports of identity-based hate and harassment on their platforms. Similarly, government officials at all levels have the authority to increase funding for and training of law enforcement officers investigating hate and bias crimes. Third-party misconduct—in the forms of doxing (revealing the real-world identities and personal information of anonymous users online),[45] swatting (maliciously calling law enforcement on users online, with the intent of provoking violent confrontation or mental distress),[46] cyberstalking,[47]

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[45] ADL, *Backspace Hate*, https://www.adl.org/backspace-hate (last visited Dec. 6, 2023) (last visited Dec. 6, 2023).

[46] ADL, *What is Swatting* (Aug. 17, 2022), https://www.adl.org/resources/blog/what-swatting (last visited Dec. 6, 2023).

[47] *Backspace Hate*, *supra* note 45.

and image-based sexual abuse[48]—is currently inadequately penalized and under-enforced. Governments may also use the power of the purse to incentivize studies of and research into social media platforms' product design choices, and the impact those choices have on the physical and mental well-being of social media users.

All of this and more can and *should* be done to curb the spread of online hate. The federal government and the states are by no means powerless to address the social ills that social media has by turns caused or aggravated. While legislators will have to strike an appropriate balance of the competing interests at stake, S.B. 7072 and H.B. 20 strike precisely the wrong balance. If allowed to stand, they will deprive social media platforms of their constitutional rights to choose when and how to speak; deprive platforms' users of the modest safety gains that have been achieved so far; and deprive the public of vibrant and welcoming discursive spaces. Texas and Florida have not shown, and cannot show, any important governmental interests requiring this patent interference with private actors' First Amendment rights.

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[48] Dr. Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators* (Oct. 2021), https://cybercivilrights.org/wp-content/uploads/2021/10/Guide-for-Legislators-10.21.pdf (last visited Dec. 6, 2023).

IV. As Argued at the District and Circuit Court Levels, Florida's and Texas's Social Media Laws Also Impermissibly Contravene Section 230.

Even if S.B. 7072 and H.B. 20 are not struck down on First Amendment grounds, they should be preempted by Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 ("Section 230").

Section 230(c)(1) prevents "interactive computer services" (ICSs), such as social media platforms, from being treated as the publisher or speaker of content shared by their users. 47 U.S.C. § 230(c)(1). While Section 230 insulates ICSs from liability for harms arising from other users' content, it also contains a Good Samaritan provision, Section 230(c)(2), which empowers them to engage in voluntary efforts to restrict access to content that they deem to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2). Moreover, it clarifies that ICSs' ability to engage in these good faith moderation efforts extends to any such objectionable material, regardless of whether it is constitutionally protected. 47 U.S.C. § 230(c)(2). In order for social media platforms to engage in the good faith moderation efforts that 230(c)(2) actively encourages, they must have the ability to exercise editorial discretion. By stripping social media platforms of this discretion, which is essential to prevent the worst online harms, S.B. 7072 and H.B. 20 are antithetical to the necessary empowerment to address harmful content that Section 230 guarantees.

As mentioned *supra*, ample evidence demonstrates the clear relationship between online hate and extremism, and offline violence and terror. However, S.B. 7072 and H.B. 20 prevent platforms from restricting access to such content insofar as a user can argue that such a restriction is based on viewpoint. A vast majority of the hate, harassment, and extremism that it is amicus ADL's mission to combat reflects viewpoints that, per Florida and Texas' statutes, could no longer be removed from an online information ecosystem designed to amplify the most incendiary of messages. Antisemitic tropes, virulent racism, anti-LGBTQ+ (and particularly anti-trans) sentiment, conspiracy theories, and Holocaust denial would enjoy protection under these statutes, even though they are the very "excessively violent, harassing, or otherwise objectionable" material that Section 230 was designed to address. If upheld, S.B. 7072 and H.B. 20 will create a loophole by which bad actors can circumvent moderation for the most abhorrent forms of online content while social media companies are helpless to enforce their own terms of service.

While Section 230 preempts Florida's and Texas' inconsistent state statutes, as noted *supra,* the law is not without its inherent shortcomings. In deciding this case, the Court may want to urge Congress to consider statutory reform to update Section 230.

As it exists, Section 230 immunizes social media companies from liability for virtually any harm arising from content shared on their platforms. This immunity extends to tech companies with

alarming, all-encompassing broadness, despite the reality that platforms are often best positioned to prevent these harms from occurring in the first place. Amicus ADL has long recognized the faults of this overbroad, nearly absolute immunity and the ways in which it curtails access to redress for victims of severe online harms. In response, amicus ADL has called for Section 230 reform to limit this regime of impunity.[49]

Social media companies are certainly equipped to promote safety on the platforms that they own, design, develop, and profit from. Unfortunately, though, these companies historically have lacked the necessary legal, financial, policy, or regulatory incentives to do so, largely because of Section 230 and the sweeping immunity it bestows upon them.[50] Amicus ADL maintains that Section 230 protections should not summarily apply to situations in which social media platforms' own products, features, and tools amplify, recommend, and even auto-generate harmful content.[51] Updating Section 230 to better

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[49] ADL, *ADL Urges Supreme Court Interpretation of Section 230 to Protect Social Media Users form Harm* (Dec. 8, 2022), https://www.adl.org/resources/press-release/adl-urges-supreme-court-interpretation-section-230-protect-social-media (last visited Dec. 6, 2023).

[50] Mary Anne Franks & Danielle Citron, *The Internet As A Speech Machine and Other Myths Confounding Section 230 Reform*, Univ. Miami Sch. of Law Inst. Repository (2020) https://repository.law.miami.edu/cgi/viewcontent.cgi?article=2007&context=fac_articles (last visited Dec. 6, 2023).

[51] Brief of ADL as *Amicus Curiae* Supporting Neither Party, *Gonzalez v. Google*, No. 21-1333 (U.S. Dec. 7, 2022), https://www.adl.org/resources/amicus-brief/gonzalez-v-google-us-supreme-court-2022 (last visited Dec. 6, 2023); *see also* Brief

reflect the realities of today's internet could ensure that these companies play a more reasonable, diligent role in both combating unlawful harms that proliferate on and from their platforms, and preserving social media companies' codified ability to engage in the good faith moderation of content on their platforms.[52]

Thoughtful Section 230 reform is an important and necessary component of the fight against online hate. However, Section 230, even in its imperfect current form, should still be interpreted to protect social media platforms against these state laws, which prevent them from engaging in the moderation efforts essential to a functional and safe internet.

CONCLUSION

The Court should hold that S.B. 7072 and H.B. 20 unconstitutionally restrict covered social media platforms' speech. In the alternative, the Court should hold that S.B. 7072 and H.B. 20 are preempted by Section 230 of the Communications Decency Act.

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of ADL as *Amicus Curiae* Supporting Respondents, *Twitter, Inc. v. Taamneh*, No. 21-1496 (U.S. Jan. 18, 2023), https://www.adl.org/resources/amicus-brief/twitter-v-taamneh-us-supreme-court-2023 (last visited Dec. 6, 2023).

[52] *See* Yaël Eisenstat, Panel at the Eleventh Annual State of the Net Conference, *Section 230: How Will Lawmakers Seek To Reform It?* (Mar. 16, 2023), https://www.youtube.com/watch?v=2Pw5G3d31hA (last visited Dec. 6, 2023).

December 7, 2023

RESPECTFULLY SUBMITTED,

STEVEN M. FREEMAN*
LAUREN T. KRAPF
ANABELLE M. TOREK
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
(212) 885-7700
sfreeman@adl.org
**Counsel of Record*

Counsel for Amicus Curiae Anti-Defamation League