

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.

NETCHOICE, LLC D/B/A NETCHOICE,
ET AL., PETITIONERS

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

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

**BRIEF FOR THE MARKETPLACE INDUSTRY ASSOCIATION,
ET AL., AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555**

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INTERESTS OF THE AMICI CURIAE

The Marketplace Industry Association (the “Association”); OfferUp Inc.; Etsy, Inc.; and eBay Inc. submit this brief as Amici Curiae in support of Respondents in No. 22-277 and Petitioners in No. 22-555.¹

¹ Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Amici want to protect their First Amendment rights to operate and curate online marketplaces that are welcoming to buyers and sellers, empower creative entrepreneurship, and ensure safe, user-friendly experiences. Misguided notions of “fairness” for expressive content with respect to private, online marketplaces are a direct threat to the First Amendment rights of marketplace owners who do not wish to host or tolerate expressive content that is contrary to their own expressive values and vision. For example, it ought to be fundamental to the First Amendment that a marketplace for handmade t-shirts and coffee mugs should not be forced by a state’s “free speech” regulations to carry “I ♥ Hitler” paraphernalia out of “fairness” to all viewpoints, or even to be forced to explain and justify—with individualized, case-specific reasons—why those views or products were taken down. This case should be that simple as a First Amendment matter.

The Association is the first and only trade association of technology-enabled marketplace platforms, also known as internet marketplaces, digital marketplaces, and app-based platforms. Its mission is to represent, educate, and advocate for the benefit of the digital marketplace industry, and to better serve those who exchange goods, services, and property through such marketplaces. An important function is representing the interests of its members before courts and legislatures throughout the country. To that end, the Association files amicus briefs in cases of concern to digital marketplace platforms operating in the United States. The Association’s members—which include a wide range of small and mid-sized companies that could not be characterized as “big tech”—are digital marketplaces whose platforms offer consumer-friendly services that require the ability to host, compile,

present, and curate information that is generated, uploaded, or shared by third-party users. The Association's members include Angie's List, BabyQuip, Care.com, Bambino, Hop Skip Drive, MeetCaregivers, and UShip, among others.

OfferUp Inc., is the largest mobile marketplace for local buyers and sellers in the U.S. OfferUp is changing the way people buy and sell in their communities by providing a uniquely simple and trusted experience on its iOS and Android apps. OfferUp's goal is to be the platform of choice for local commerce by connecting buyers and sellers through an interface that makes selling an item as easy as snapping a picture from a mobile device. OfferUp was founded in 2011 and has grown to serve local markets across the U.S., with more than 1 in 5 adults using OfferUp in 2022.

Etsy, Inc. provides a global online, peer-to-peer marketplace for the sale of handmade and unique goods, from hand-carved bowls to custom family portraits. The Etsy marketplace connects creative artisans and entrepreneurs with consumers looking for items that are a joyful expression of their tastes and values. By offering specialized tools and services to the over six million sellers who use its platform—80% of them women, and 82% businesses of one—Etsy serves as an on-ramp to entrepreneurship and economic empowerment for many people who might not have otherwise started a business.

eBay Inc. is one of the world's largest online marketplaces, with over 132 million active buyers globally and more than 1.9 billion items listed for sale, allowing practically anyone to buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate commu-

nity of individual buyers and sellers, as well as small businesses, whose collective impact on e-commerce is staggering.

Amici share a vested interest in preserving their First Amendment rights and their ability to moderate content on their websites effectively. Many of Amici's marketplaces have established rules for what types of products, comments, media, and reviews are acceptable, and enforce policies to (1) protect their users' safety, (2) offer high-quality, user-friendly services, and (3) foster their respective sites' values and community codes of conduct. Under the First Amendment, States cannot pass laws like Texas and Florida's to force online marketplaces to host content and expressive products that the owners do not wish to host.

SUMMARY OF ARGUMENT

Online marketplaces—and the countless small businesses and individuals who rely on them—depend upon their ability to engage in content moderation. Such moderation includes both limiting what kind of items are sold and surfaced to users on their platforms, as well as setting standards for how users interact with each other on the website. Doing so allows online marketplaces to foster the communities and sites they desire. Amici support entrepreneurs, care providers, and artisans, many of whom have created jobs from their homes that were unthinkable 30 years ago. These platforms should not be forced to choose between complying with onerous government regulations on the one hand, or letting their platforms become vehicles for unsafe, hateful, spammy, discriminatory, or offensive content that is contrary to their values and harmful to their users and their bottom lines on the other.

Laws like H.B. 20² and S.B. 7072³ deprive website owners of their right to moderate content and operate the kind of website that they believe in and that they hope will appeal to customers. The laws are also hopelessly unclear, both as to their scope of applicability and to what they actually require for compliance.⁴ Even though H.B. 20 and S.B. 7072 do not apply to most or all of the platforms that Amici represent, a ruling upholding those laws could pave the way for similar laws that sweep in scores of other platforms, including marketplaces. It would be difficult, if not impossible, for digital marketplaces (particularly small or emerging companies) to comply with such requirements even if they were crystal clear. And it would certainly be impracticable when compliance requires figuring out, for example, what constitutes a “consistent manner” of enforcing a platform’s content “standards,” Fla. Stat. § 501.2041(2)(b), or identifying the line when enforcing its policies crosses into “viewpoint” censorship, Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a). And even if workable solutions were found, such laws at the very least stifle innovation, raise the barrier to entry for new companies, and encourage abuse.

² The relevant provisions of H.B. 20 are codified at Tex. Bus. & Com. Code § 120.001–151 and Tex. Civ. Prac. & Rem. Code § 143A.001–08.

³ The relevant provisions of S.B. 7072 are codified at Fla. Stat. §§ 106.072 and 501.2041.

⁴ For instance, the Eleventh Circuit has acknowledged that S.B. 7072 is unclear as to its “sweep,” as well as in its substantive requirements that it “does not define.” *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1205–1206 (11th Cir. 2022).

ARGUMENT

A. Content moderation is crucial to online platforms and the diverse array of small businesses and sole proprietors who rely on them.

1. Amici provide a wide variety of digital marketplaces and app-based platforms transacting for a multitude of goods and services. In all, the Association's members have facilitated transactions for more than 300 million customers and have provided economic opportunities for more than 60 million workers.

Amici are a vibrant, valuable part of e-commerce and the American economy at large. Online marketplaces enable millions of small, diverse, and solo businesses to thrive. For some of the platforms, the majority of sellers are women, and a large percentage work from home or in rural communities.⁵ The ease and flexibility of online marketplaces also allows many people to use them as a way to pay for bills or everyday living expenses, or otherwise help make ends meet.⁶

2. Many marketplaces adopt and enforce specific rules governing the goods and services available on their platforms, as well as how users must conduct themselves on their websites, to promote and foster particular values.

⁵ See, e.g., 2022 ETSY FORM 10-K, https://s22.q4cdn.com/941741262/files/doc_financials/2022/q4/ETSY-12.31.2022-10K.pdf (last visited Dec. 5, 2023) (reporting that 80% of sellers are women, 82% are businesses of one, 95% operate out of their homes, and 25% live in rural areas).

⁶ OfferUp, RECOMMERCE REPORT 2023, <https://blog.offerup.com/recommerce-report-2023> (last visited Dec. 5, 2023) (“69% of shoppers have used money earned from reselling items to pay for bills or everyday living expenses, and 39% say reselling has helped them make ends meet.”).

For many marketplaces engaging in content moderation, they can also boast vast inventories and unique selections, create highly personalized experiences at a great value, and foster welcoming and safe online communities.

Most marketplaces have detailed sets of guidelines on what can be sold. For example, OfferUp has fifteen sets of external guidelines limiting the sale of items from “[a]dult & mature content” to “[w]ildlife & wildlife products,” based on potential “legal,” “health,” and “safety” concerns, along with a wide range of internal policies limiting content.⁷ Similarly, eBay has sixty-nine separate policies limiting or restricting the sale of various categories of products, ranging from “[a]dult items” to “[w]eapons.”⁸ And Etsy has a “Prohibited Items Policy” that covers eight categories of items.⁹ The policy, for example, “prohibit[s] pornography” and “place[s] restrictions on mature content so that people who are offended by this kind of material don’t have to see it.”¹⁰ It also bars items that discriminate against religion, support or commemorate current or historical hate groups—such as Nazis, misogy-

⁷ OfferUp, PROHIBITED ITEMS GUIDELINES, <https://help.offerup.com/hc/en-us/articles/360032329711-Prohibited-items-guidelines> (last visited Dec. 4, 2023).

⁸ eBay, PROHIBITED AND RESTRICTED ITEMS, <https://www.ebay.com/help/policies/prohibited-restricted-items/prohibited-restricted-items?id=4207> (last visited Dec. 4, 2023).

⁹ Etsy, PROHIBITED ITEMS POLICY, <https://www.etsy.com/legal/prohibited/#Q7> (last visited Dec. 4, 2023).

¹⁰ *Id.*

nist groups, or groups that advocate anti-gay, anti-immigrant, or Holocaust denial agendas—or that glorify human suffering or tragedies.¹¹

The ability of online marketplaces to exclude items from their platforms is important for marketplaces that want to foster a welcoming, safe, and productive environment. If these websites were brick-and-mortar establishments, there would be no question that they are free to determine for themselves the content of the goods offered on their shelves. The owners of “Christian bookstores” should be free to refuse to carry books that are inconsistent with “their religious beliefs.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 702, 717 (2014). And they should not be forced by the government to explain each refusal to carry such a book. So, too, for shopping malls that do not want adult-themed stores as tenants. The same result should apply to online marketplaces that do not wish to support certain messages or causes.

Excluding items from their platforms is also important to attracting users who agree with the website’s policies. If Etsy wants to feature the women of Gee’s Bend—a rural Black community of Alabama that is mostly descendants of slaves—who sell their quilts on the Etsy platform, it should not be forced to also host those selling Confederate memorabilia.¹²

¹¹ See Etsy, Inc. Declaration in Support of Plaintiff’s Motion for Preliminary Injunction ¶ 2, No. 21-cv-00220, *NetChoice, LLC v. Moody* (N.D. Fla. June 3, 2021), ECF No. 29-1 [hereinafter “Etsy Declaration”].

¹² Nora McGreevy, *Thanks to Etsy, You Can Now Purchase a Gee’s Bend Quilt Online for the First Time*, SMITHSONIAN MAGAZINE (Feb. 3, 2021), <https://www.smithsonianmag.com/smart->

Similarly, excluding items can be important to public safety. As evidenced by the recent pandemic, bad actors often target online marketplaces as a means to hawk fraudulent wares. Websites took steps to prevent the sale of everything from “fraudulent and blank COVID-19 vaccine cards,”¹³ to “counterfeit masks,”¹⁴ to “bogus cures and treatment.”¹⁵ Efforts to exclude these potentially harmful items may sweep up expressive content or otherwise be vulnerable to claims that they are viewpoint-based regulations.

Most online marketplaces also moderate how users of the website interact with each other. UrbanSitter—which enables families to procure childcare, backup care, pet sitting, senior care, and tutoring—specifies in its Terms of Service that users cannot transmit or communicate content that is “intended to harass” or that “engages in ... racism, bigotry, discrimination, [or] hatred.”¹⁶ OfferUp

news/first-time-you-can-purchase-gees-bend-quilt-online-180976911/.

¹³ Jaelyn Diaz, *Fake COVID Vaccine Cards Are Being Sold Online*, NPR (June 8, 2021), <https://www.npr.org/2021/06/08/1004264531/fake-covid-vaccine-cards-keep-getting-sold-online-using-one-is-a-crime>.

¹⁴ Andrew Jacobs, *Counterfeit Covid Masks Are Still Sold Everywhere, Despite Misleading Claims*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/11/30/health/covid-masks-counterfeit-fake.html>.

¹⁵ Rebecca Heilweil, *Coronavirus scammers are flooding social media with fake cures and tests*, VOX (Apr. 17, 2020), <https://www.vox.com/recode/2020/4/17/21221692/digital-black-market-covid-19-coronavirus-instagram-twitter-ebay>.

¹⁶ UrbanSitter, TERMS OF SERVICE, <https://www.urbansitter.com/terms-of-service> (last visited Dec. 5, 2023).

has “[c]ommunity guidelines” that help cultivate “an inclusive and respectful community.”¹⁷ Those guidelines prohibit, among other things, “[d]isrespectful behavior” and “[h]arassment.”¹⁸ “Disrespectful behavior” includes “[p]rofanity or hate speech,” as well as “[o]ffensive or vulgar listings, items, or messages.”¹⁹ And “Harassment” includes “[h]ateful, obscene, offensive, profane, racist, sexual or sexually suggestive, defamatory, or violent language.”²⁰ Given that many platforms’ goals are to facilitate face-to-face interactions with providers and users, including in intimate caregiver roles, the need to moderate content is obvious.

Online marketplaces also use rules to build their unique brands, distinguish themselves from other platforms, and target distinct buyers and sellers. To illustrate, for a seller to list an item on Etsy, it must meet Etsy’s Handmade Policy, Vintage Policy, or be a craft supply. Consumers looking for handmade, vintage, or craft supply items on Etsy expect to find relevant content, not mass-produced, commoditized inventories. And to protect this ecosystem, Etsy must be able to exclude the sorts of items it does not want on its site—and which buyers can find elsewhere.²¹

¹⁷ OfferUp, COMMUNITY GUIDELINES, <https://help.offerup.com/hc/en-us/articles/360031988352-Community-guidelines> (last visited Nov. 28, 2023).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Etsy Declaration ¶ 6.

Accordingly, to protect the safety and satisfaction of their users, many online marketplaces have policies limiting what can and cannot be posted on their websites. This is most clearly seen in the Association’s members who offer services for children, families, and seniors. For example, BabyQuip must carefully moderate the types of equipment being rented out to families on their vacations, to ensure parents are not using recalled cribs or car seats. And MeetCaregivers must be able to carefully vet and screen in-home caregivers who are sent to offer mobility and transfer services, assistance with hygiene, and even meal preparation and feeding to seniors. To protect the most vulnerable and guarantee effective services, marketplaces like these must be free to make removal and organizational decisions, unhindered by burdensome content moderation requirements. The laws at issue here threaten to chill the removal of potentially problematic listings that might otherwise threaten the safety of kids, families, and the elderly.

Finally, beyond excluding or removing content or users, marketplaces must be able to curate content for their customers. Marketplaces can do this through algorithms that seek to present the most relevant content to users, as well as through categories like “Editor’s Picks,” “Top Sellers,” or “Trending Now.” To moderate content and achieve the desired community experience, marketplaces may also use algorithms and machine learning to identify and remove unwanted content and user behavior from their platforms.²² Automated tools are thus crucial for

²² For example, eBay has “developed a ranking model to generate personalized recommendations that optimally ranks hundreds of candidate recommendations by considering a user’s shopping experience as well as platform performance objectives.” Yingji Pan, et al., *Evolving Recommendations: A Personalized User-Based Ranking Model*,

platforms hosting large numbers of sellers and listings, as well as for smaller platforms and startups seeking to grow.²³

In sum, content moderation directly helps online platforms express themselves, make value judgments about what viewpoints can be conveyed on their sites, effectuate their community standards, and uphold their unique assessment of what is safe, workable, user-friendly, and appealing to their target audiences.²⁴ Curation also necessarily prevents platforms from hosting objectionable items that would alienate consumers, businesses, investors, and marketing partners. And it allows e-commerce platforms that want to avoid political strife to do so, for example, by removing ratings or reviews that are pretexts for political diatribes. These sorts of display and curation

EBAY (Oct. 3, 2023), <https://innovation.ebayinc.com/tech/engineering/evolving-recommendations-a-personalized-user-based-ranking-model/#:~:text=We%20developed%20a%20ranking%20model,well%20as%20platform%20performance%20objectives>.

²³ Indeed, algorithms are crucial for smaller platforms because they can facilitate user-friendly displays that platforms with fewer resources, content moderators, and web designers could not otherwise handle.

²⁴ See Matthew Schruers, President, Computer & Communications Industry Association, Declaration in Support of Plaintiff’s Motion for Preliminary Injunction ¶ 19, *NetChoice, LLC v. Moody*, No. 21-cv-00220 (N.D. Fla. June 3, 2021), ECF No. 23 [hereinafter “CCIA Declaration”] (“Content moderation rules and enforcement actions reflect normative judgments about what will best foster the kind of environment that companies have promised to their users. Choices about whether to allow pornography, depictions of violence, or certain kinds of offensive language, for example, are all expressions of the service’s own preferences—important statements about the kind of online community it wishes to foster and what speech and speakers the company wishes to associate with or avoid.”).

decisions are all part of the expressive choices of marketplace owners and operators.

B. Laws like H.B. 20 and S.B. 7072 would create impossible compliance burdens for many.

1. These online marketplaces make millions of content moderation decisions every year. For example, in 2022, OfferUp removed more than 44 million listings. That same year, Etsy reviewed 36 million potential content violations which resulted in 1.9 million listings being removed for policy breaches,²⁵ and eBay used artificial intelligence tools to block approximately 295 million prohibited items from being listed and removed another 773,000 items because users flagged them using the “Report Item” functionality.²⁶

2. Limiting companies’ ability to control what is on their own platforms will dramatically alter the nature of their services and harm user experience. For example, if sellers can “opt out” of “post-prioritization” or if buyers can insist on sequential or chronological displays, *see, e.g.*, Fla. Stat. § 501.2041(2)(f)(2), digital marketplaces will be deprived of using algorithms to curate and organize items in a manner that is most helpful to prospective users, thereby severely undercutting the usefulness of marketplaces that cater to the buying and selling of millions of diverse goods.

²⁵ See Corinne Pavlovic, *Etsy’s 2022 Transparency Report and Trust & Safety Roadmap*, ETSY (Apr. 20, 2023), <https://www.etsy.com/news/etsys-2022-transparency-report-and-trust--safety-roadmap>.

²⁶ eBay, 2022 GLOBAL TRANSPARENCY REPORT at 4 (May 2023), <https://static.ebayinc.com/assets/Uploads/Documents/eBay-2022-Global-Transparency-Report.pdf>.

For example, unlike large retailers with mass-produced, commoditized inventories, sellers on Etsy specialize in unique and handmade goods—which can be hard to describe and even harder to find. Many buyers visit Etsy without knowing precisely what they are looking for or lacking the words to express it, using searches like “wedding gift” to find one-of-a-kind items. Given that there are over 100 million listings at any given time, Etsy’s algorithms are crucial to its ability to surface the right product, to the right buyer, at the right time. This helps both buyers and sellers by making it easier for people to browse, filter, and find products they want on Etsy.

Moreover, forcing online marketplaces to carry messages—and the users who say them—that contradict their policies and terms of service is harmful in its own right. It would be antithetical to the goals of Hop Skip Drive and MeetCaregivers if they were unable to block potential service providers with discriminatory views. They should not be forced to accept a potential driver of children who says he would be happy to drive anyone except Hispanic children or Jews, or a potential caregiver who offers in-home senior care for anyone unless they are Muslim.

3. The compliance burdens would be substantial, if not impossible, to meet—particularly for smaller businesses. Online marketplaces would need additional personnel and engineering teams to build a new set of tools to address these issues, which could be cost prohibitive. This would also mean taking away from innovation to improve customer experience and to focus on existing policies and the safety goals they serve. Indeed, such tools would have to facilitate perfect compliance with regulations requiring “consistent” moderation decisions, “individualized explanations,” and thorough appeals processes that only the largest companies (if any) could handle.

To illustrate these costs, consider the requirement that platforms apply their regulations in a “consistent” manner. Most platforms strive for consistency, but perfect consistency is impossible, particularly at scale. Florida’s statute does not define the term “consistent,” Fla. Stat. § 501.2041(2)(b), and it is entirely unclear how, for example, platforms will be able to consistently police the line between indecency and obscenity—a line members of this Court have said “may be indefinable.” *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Policing such lines simply cannot be done with precision or consistency *en masse* using automated tools, which means that a law layering on procedural burdens and sanctions for lack of consistency strikes at the very tools necessary for content moderation in general.²⁷ Moderation at scale would become impossible with \$100,000 in statutory damages per “inconsistent” enforcement decision, and that in turn creates the perverse incentive to avoid removing or moderating any content at all.²⁸

²⁷ As another example, the Florida law prohibits platforms from taking any moderation action against a user’s content or material unless the material is obscene as defined by Fla. Stat. § 847.001; however, content including threatening or intimidating messages, conspiracy theories, medical misinformation, Holocaust denial content, racial epithets, homophobia and transphobia, harassment and revenge porn, conspiracy theories, and cyberbullying may not fall under the Act’s coverage. NetChoice, LLC Declaration in Support of Plaintiff’s Motion for Pre-liminary Injunction, No. 21-00220, Dkt. 24 ¶ 16 & n.5 (N.D. Fla. June 3, 2021).

²⁸ See CCIA Declaration ¶ 33 (“S.B. 7072 makes no distinction between moderation decisions in terms of the application of the consistency requirement—whether temporary and permanent, whether a removal or a decision to make content less visible, or less readily searchable, or simply to append the service’s own commentary to a given piece of content—all of these decisions must be ‘consistent’ under S.B. 7072. Once any decision to moderate is made, every other

Further, online marketplaces need flexibility to craft policies and rules that adapt to evolving user content.²⁹ Depending on the nature of the user’s policy violation, the platform’s enforcement action could vary from removing an item from the marketplace, providing a seller with educational content, temporarily suspending an account, or permanently refusing service to a member.³⁰ But in a world where all decisions must be “consistent,” platform action could be attacked as an “inconsistent” enforcement decision even if justified relative to the risk presented.

Laws requiring individualized notice and explanations would hamstring platforms’ innovation and flexibility to address emerging issues and risks. Indeed, such requirements assume a static environment where nothing new appears that might require discretionary decision making. Florida’s law provides that, after removal action is taken, the platform must provide the user with a detailed notice in writing within seven days, offering a thorough rationale explaining the reason for the “censorship” and a “precise and thorough explanation of how the social media platform became aware” of the content that triggered its decision. Fla. Stat. § 501.2041(3). Such requirements would likely result in platforms sending millions of such notices per day, and, again, because the penalty for not sending such a notice is significant, platforms will either err on the side of preparing and sending a notice whenever content potentially could have been submitted by a

decision to moderate or not moderate might be challenged for inconsistency with the first decision....”).

²⁹ CCIA Declaration ¶¶ 24–25.

³⁰ Etsy, 2022 TRANSPARENCY REPORT at 3, https://storage.googleapis.com/etsy-extfiles-prod/Press/Etsy_2022_Transparency_Report.pdf?ref=news (last visited Dec. 6, 2023).

Florida resident (creating significant waste and inefficiencies) or choosing not to remove objectionable content at all.³¹

Such laws would therefore expose digital marketplaces to potential litigation over everyday decisions. And it goes without saying that smaller and emergent companies will be much less able to weather early and frivolous litigation. Indeed, these regulations—with statutory damages and vague definitions of how to avoid liability, *see* Fla. Stat. § 501.2041(6)(a)—will incentivize bad actors to bring cases and potentially expose these platforms to massive liability. Notably, the fact that Texas law does not allow for statutory damages does not mean there is no risk of liability. The litigation burden and cost of a potential attorney’s fee award is still sizable, the cost of defending even one frivolous claim can easily exceed a startup’s valuation, responding to demand letters can cost thousands in fees, and preserving discovery documents can also impose non-trivial costs for companies without the infrastructure to manage them.³² And the potential cumulative burden of serial or coordinated demands is a risk that most platforms cannot afford to take on.

Many smaller entities will simply not be able to implement the kinds of processes the laws impose, much less defend against the onslaught of litigation likely to follow even if there were thorough, expensive, well-crafted implementation. In the face of those burdens, the only option short of shutting down may be to give up on setting policies and moderating content.

³¹ CCIA Declaration ¶ 34.

³² Copia Institute Amicus Brief in Support of *NetChoice, LLC v. Paxton*, No. 21A720 (U.S. May 17, 2022).

4. Allowing States to regulate in this manner would also create a 50-state patchwork of laws, which would be extremely burdensome given that online platforms typically operate in all 50 States, making them especially vulnerable to the regulatory burden of varying state laws. That risk is clearly present here. S.B. 7072 applies only to those domiciled in Florida, Fla. Stat. § 501.2041(1)(h), and H.B. 20 applies to “censored” users who reside in Texas, do business in Texas, or share or receive expression in Texas, Tex. Civ. Prac. & Rem. Code § 143A.004(a)–(b). The statutes are thus triggered based on the particular users, rather than where the platform operates.

It would be effectively impossible to comply with procedures solely as to Floridians or Texans, while maintaining different content moderation procedures for users outside Florida or Texas.³³ A patchwork of laws is not a remote possibility; at least thirty other state legislatures have proposed similar content moderation bills—which could ultimately lead to a kaleidoscope of state laws potentially at odds with each other.³⁴ Because there is no practical or cost-effective way for many online marketplaces to cabin compliance to a specific jurisdiction’s rules, platforms would be forced to accommodate the most restrictive state’s rules.

³³ CCIA Declaration ¶ 31.

³⁴ See Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, *Am. Action Forum*, AM. ACTION FORUM (July 21, 2021), <https://www.americanactionforum.org/insight/examining-state-tech-policy-actions-in-2021/>; Michael Masnick, *State Legislators Are Demanding Websites Moderate Less AND Moderate More; Federal Law Prohibits Both*, *TECHDIRT* (Apr. 8, 2022), <https://www.techdirt.com/2022/04/08/state-legislators-are-demanding-websites-moderate-less-and-moderate-more-federal-law-prohibits-both/>.

5. The regulations at issue will also stifle innovation. Content moderation is affected by societal circumstances, ever-changing technologies and products, and adapting attitudes and values of the platforms and their users. For example, Stop Child Predators—a team made up of policy experts, law enforcement officers, community leaders, and parents with the goal to launch state and federal campaigns to inform lawmakers and the public about policy changes—has explained that Florida’s law would severely undercut platforms’ ability to respond to new threats to children’s online safety and to new methods of distributing or soliciting photos and videos of child sexual abuse, and would give child predators a roadmap to escape detection by disclosing in detail how algorithms and content moderation work on the websites.³⁵ This of course would be especially problematic for marketplaces like Hop Skip Drive, Bambino, and Care.com, which function almost exclusively to connect adults with children who need care.

And the requirement that platforms cannot change their content moderation policies for thirty days is wholly impractical; platforms must be able to make real-time responses to exigencies and unforeseeable circumstances. It would be impossible for Amici to articulate every possible enforcement decision in advance considering the ever-evolving risk environment, omnipresent evasion attempts by bad actors, and innumerable and constantly changing content posted on their websites every day.³⁶

³⁵ Stop Child Predators Declaration in Support of Plaintiff’s Motion for Preliminary Injunction ¶¶ 8-9, *NetChoice, LLC v. Moody*, No. 21-cv-00220 (N.D. Fla. June 3, 2021).

³⁶ CCIA Declaration ¶ 28.

6. Finally, these regulations will have significant anti-competitive effects. The more burdensome the compliance regime, the higher the barrier to entry and the more difficult it is for new companies to enter the marketplace. Marketing partners and investors alike are wary of potential reputational damage should they be linked with offensive content, and the uncertain legal environments created by these laws will further deter investment in new platforms. Making it difficult to attract partners, secure investors, and deploy innovative technologies will also make it harder to attract users and may ultimately—and ironically—lead to the entrenchment of the very “big tech oligarchs” that these laws “appear to target.” *NetChoice*, 34 F.4th at 1205.

* * *

Amici already seek to remove objectionable content, as they define it, in a reasoned, consistent and predictable manner, and take this responsibility seriously. And amici strive to organize and display their content in a way that delivers what they believe is the best experience for their users. But the sheer volume of content ensures that human reviewers and algorithms will not get it right 100% of the time. This becomes a problem if laws allow users to sue digital marketplaces merely for enforcing their website policies and will create perverse incentives to not prohibit or remove any objectionable content on their platforms.³⁷ Taken together, these compliance concerns go beyond being burdensome in “some administrative or operational sense.” *NetChoice, L.L.C. v. Paxton*, 49 F.4th

³⁷ Technology Network (“TechNet”) Declaration in Support of Plaintiff’s Motion for Preliminary Injunction ¶ 3, *NetChoice, LLC v. Moody*, No. 21-cv-00220 (N.D. Fl. June 3, 2021), ECF No. 28 (explaining that TechNet’s membership includes companies like Facebook, Amazon, eBay, and many others).

439, 486 n.36 (5th Cir. 2022). Rather, these burdens will drown out the marketplaces' messages, chill speech, and be practically impossible to satisfy.

C. The First Amendment protects the fundamental right of website owners to decide what to host and display.

The First Amendment, as applied to the States through the Fourteenth Amendment, protects private platforms' ability to moderate the content posted and disseminated on their platforms. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). The protections that principle provides are "enjoyed" equally "by business corporations generally and by ordinary people." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995). First Amendment protections include "the right to tailor [one's] speech," to "speak[] on one subject while remaining silent on another." *Id.* at 573–574. Indeed, "the choice of a speaker not to propound a particular point of view ... lie[s] beyond the government's power to control" because "the presentation of an edited compilation of speech generated by other persons ... fall squarely within the core of First Amendment security." *Id.* at 570, 575.

Amici's content moderation—deciding what can and cannot be sold on their platforms, how users may engage with each other, and what particular content is displayed on their websites—is how they choose "not to propound" or to be associated with "a particular point of view." *Id.* at 575. But that is precisely the kind of viewpoint-based speech that laws like Texas and Florida's seek to prohibit.

Amici can only provide their users the best of what the Internet has to offer in part *because* they declare through their policies what kind of platform they are operating, and then enforce those policies to create an environment that attracts particular users. If the government can mandate the end of Amici’s specific content moderation efforts and “require[] the utterance” of everyone else’s message, *Turner*, 512 U.S. at 641, their websites will be forced to host viewpoints and products with expressive messages that they do not wish to promote and have worked hard to eliminate, for the benefit of the users that Amici desire to serve. Amici simply want what Texas itself has requested from this Court: to express their viewpoint and only their viewpoint. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219–220 (2015) (holding that Texas did not have to use its own speech to honor the Confederacy); *see also Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a newspaper could choose what viewpoint to publish); *Hurley*, 515 U.S. at 573–575 (holding that parade organizers could “exclude a message” from the parade that they “did not like”).

The Internet is far from perfect. It is not all things to all people, but it may be the closest thing we have. It provides a place where almost everyone can see, hear, learn, and explore what they want to see, hear, learn, and explore. But that is only possible if speakers on the Internet—those who create websites and host content—retain their First Amendment right to choose what they want to present to the world *and* what they do not want to present. If Florida or Texas would like different content on the Internet, then they can start their own websites. But within the realm of protected viewpoints, the First Amendment does not permit States to dictate on pain of legal sanction what speakers must or must not say or allow to be said on their websites.

D. If States can regulate large-volume platforms, there is no obvious logical or principled stopping point for government content regulation of smaller platforms.

The fact that H.B. 20 and S.B. 7072 purport to be limited to large-volume platforms should not blind the Court to the risk such laws pose for smaller marketplaces. Many content moderation decisions could be characterized as actions that “discriminate against expression” or qualify as “viewpoint-based censorship” for purposes of H.B. 20, or that “censor” the “content or material posted by a user” for purposes of S.B. 7072.

Indeed, the Eleventh Circuit acknowledged that S.B. 7072 “may well sweep in other popular websites” beyond the major social media sites they purportedly target. *NetChoice*, 34 F.4th at 1205 (quoting Fla. Stat. § 501.2041(1)(g)). The definition of “social media platform[s]” could encompass certain online marketplaces because they (1) “provide or enable computer access by multiple users to an Internet platform, (2) operate as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity, (3) do business in the state, and (4) satisfy at least one of the following thresholds: annual gross revenues in excess of \$100 million, or at least 100 million monthly individual platform participants globally.” *See* Fla. Stat. § 501.2041(1)(g) (cleaned up). That reaches far more websites than “the ‘big tech oligarchs’” the law purports to target. *NetChoice*, 34 F.4th at 1224. Also, Florida’s statute would prohibit a website from taking action that involves restricting or inhibiting the publication of any content posted by a user who meets the definition of “journalistic enterprise,” *see* Fla. Stat. § 501.2041(2)(j), but the sweepingly broad and ill-defined term “journalistic enterprise” could force the

website to open its private service to any group that meets the minimum size or audience requirements, which could ultimately include groups or products it does not wish to support.³⁸

But even if the current laws do not reach Amici, the arguments from Texas and Florida plainly could justify new laws reaching smaller online marketplaces. If States can regulate sites like Meta and X, there is nothing to stop them from turning next to smaller platforms. This Court cannot write a “small platform” or “small business” exception into a First Amendment ruling. This Court has recognized that it is “bound by the First Amendment” and therefore must “decline to draw, and then redraw, constitutional lines based on the particular media or technology used.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 326 (2010). And limitations on private companies’ First Amendment rights cannot be justified based on “the size of the audience reached.” *Id.* at 339 (cleaned up). The First Amendment’s “text offers no foothold for excluding any category of speaker, from single individuals” to the largest social media corporations. *Id.* at 392–393 (Scalia, J., concurring). Just as “First Amendment rights” cannot “be confined to individuals,” they cannot be confined to online platforms that fall below a certain traffic threshold. *Id.* at 373 (Roberts, C.J., concurring). Consequently, upholding the laws at issue here will necessarily open the door for onerous regulations of smaller online platforms—including the marketplaces that Amici represent.

³⁸ Fla. Stat. § 501.204(l)(d)) (defining “journalistic enterprise” to include entities doing business in Florida that “[p]ublishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users” or “[p]ublishes 100 hours of audio or video available online with at least 100 million viewers annually”).

The danger to all platforms is that these laws set the foundation for state regulation and control of viewpoints on the Internet. That is and ought to be chilling for anyone who has a vision of a website that he or she wishes were on the Internet and seeks to craft what that site will and will not stand for.

CONCLUSION

Online marketplaces represent businesses with expressive viewpoints, and content moderation is central to manifesting those expressive choices and values. The First Amendment does not permit States to dictate what companies must or must not say or allow to be said on their websites—either through direct regulation or through abandonment of moderation to avoid impossible compliance burdens. That is not the type of Internet that Amici’s users want, and it is not a type of regulation the First Amendment allows.

Respectfully submitted,

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