Nos. 22-277 and 22-555

In The Supreme Court of the United States

ASHLEY MOODY, in her official capacity as Attorney General of Florida, et al.,

Petitioners,

v.

NETCHOICE, LLC; and Computer & Communications Industry Association,

Respondents,

NETCHOICE, LLC; and Computer & Communications Industry Association,

Petitioners,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth And Eleventh Circuits

BRIEF OF AMICUS CURIAE MEDIA LAW RESOURCE CENTER, INC., IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Introduction 3

II. Content moderation is essential for the proper functioning of the online marketplace of ideas 4

III. The public's First Amendment interest in content moderation by social media platforms overlaps but is separate from the First Amendment's protection for any message expressed thereby 9

IV. The right of the public to a functioning online marketplace of ideas takes precedence over any individual's interest in reaching the audience built by a private media company 11

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Associated Press v. U.S., 326 U.S. 1 (1945) 13

Berisha v. Lawson, 594 U.S. ___, 141 S. Ct. 2424 (2021) 10

CBS, Inc. v. FCC, 453 U.S. 367 (1981) 13

Columbia Broad. Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973) 6, 12

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) 13

NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022) 9

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 10, 11

Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367 (1969) 13-17

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) 10, 11

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 15-18

Zauderer v. Office of Disc. Counsel, 471 U.S. 626 (1985) 12

STATUTES

Fla. Stat. § 501.2041(1)(b) 7

Fla. Stat. § 501.2041(1)(e) 7

Fla. Stat. § 501.2041(1)(f) 7

TABLE OF AUTHORITIES—Continued

Page

Fla. Stat. §§ 501.2041(2)(h, j) 4

Tex. Civ. Prac. & Rem. Code § 143A.001(1).....6

Tex. Civ. Prac. & Rem. Code § 143A.002 4

OTHER AUTHORITIES

Dixon, S., *Media usage in an online minute 2022*, STATISTA (Oct. 4, 2022) 5

Gomez-Rodriguez, M., Gummadi, K. & Schölkopf, B., *Quantifying Information Overload in Social Media and its Impact on Social Contagions*, 8(1) PROCEEDINGS OF THE EIGHTH INT'L AAAI CONF. ON WEBLOGS AND SOCIAL MEDIA 170 (2014) 5, 7

Gunaratne, C., Rand, W. & Garibay, I., *Inferring mechanisms of response prioritization on social media under information overload*, 11 SCIENTIFIC REPORTS Art. No. 1346 (2021) 7, 8

Huddleston, J., *Competition and Content Moderation*, CATO INSTITUTE (Jan. 31, 2022) 8

Meiklejohn, A., FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Brothers 1948) 12

Rozenshtein, A., *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3. J. OF FREE SPEECH L. 217 (2023).....8

INTEREST OF AMICUS CURIAE[1]

Media Law Resource Center, Inc., ("MLRC") is a 501(c)(6) non-profit membership organization for media organizations and attorneys who advocate for media and First Amendment rights, including those working in law firm and in-house practice as well as those in academia, at non-profit organizations, and in other settings. MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment. Today, MLRC is supported by leading publishers, broadcasters, and cable programmers, technology companies, media and professional trade associations, and media insurance professionals in America and around the world. The views expressed in this brief are those of MLRC and do not necessarily reflect the views of any of its individual or organizational members.

SUMMARY OF ARGUMENT

The cases at bar directly implicate the public interest in a functional online marketplace of ideas, and the role of content moderation in preserving that marketplace. By elevating the private interests of

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amicus curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

individuals in expanding their audiences over the interests of the public in workable social media platforms, Texas and Florida have violated not only the First Amendment right of the platforms as speakers but also the rights of the public.

The exercise of editorial discretion over content that is amplified via mass media is not a necessary evil resulting from the limited bandwidth of particular technologies. Rather, it is an essential element of the marketplace of ideas. Editorial discretion is another name for the process by which messages of lesser value have traditionally been winnowed out as ideas compete for greater audiences. By these means, the public is not overwhelmed by an incomprehensible flood of messages including disinformation, misinformation, and irrelevancies. Editorial discretion is particularly important in the online marketplace of ideas, where no human being could hope to comprehend—let alone process and evaluate—the vast number of messages that propagate across social media without assistance. By removing that assistance, Texas and Florida would create chaos rather than public discourse.

Media companies express themselves through their exercise of editorial discretion, and that expression is protected by the First Amendment. However, the constitutional value of that function in the context of mass media does not require that the public understand a media company to be conveying any particular message, because the public's First Amendment interest in a functional medium of communication is itself enabled by content moderation. Non-media cases in

which the Court has focused on whether the public would derive a message from a refusal to host content are therefore inapposite.

Although Texas and Florida assert that they are championing the First Amendment rights of individual users, individual speakers' interests in reaching the audience built by a private media company are subordinated to the public's interest in a functional marketplace of ideas. On the few occasions in which this Court has upheld a government requirement that a media company carry a limited range of content, there have been specific technological limitations not present here, and the Court has found that the public's interest, not the interest of individual speakers, is the primary consideration. In fact, the Court's analysis in those cases points to the opposite result in the cases at bar.

ARGUMENT

I. Introduction

These cases raise the fundamental issue of who, if anyone, has the right (and the responsibility) under the First Amendment to decide which messages are worthy of amplification to a mass audience. Online platforms have exercised that role from their outset, much as mass media outlets have made choices as to which information to publish throughout our history. Texas and Florida, however, believe that it is their role to decide which messages are worthy of amplification,

and have passed laws declaring, in the case of Texas, that all viewpoints are equally entitled to mass dissemination (Tex. Civ. Prac. & Rem. Code § 143A.002) or, in the case of Florida, that all messages from certain sources or on certain topics are so entitled (Fla. Stat. §§ 501.2041(2)(h, j)).

In this dispute, the public's interest in the proper functioning of the online marketplace of ideas, and the role of content moderation in protecting that interest, are critical. To that end, the MLRC writes to call the Court's attention to three points: (1) content moderation ensures functioning of the online marketplace of ideas for the benefit of the public and promotes information quality over misinformation; (2) the First Amendment value of content moderation to the public is related to, but not dependent upon, the constitutional protection for the message that a platform conveys via its editorial choices; and (3) the public interest in maintaining a functional online marketplace of ideas takes precedence, under the First Amendment, over individuals' personal interests in reaching the audience built by a private media company.

II. Content moderation is essential for the proper functioning of the online marketplace of ideas

Editorial discretion is more than a necessary evil demanded by the technical limitations of various media of communication. It is true that there are only so many pages in a newspaper or hours in a broadcast

day, and so choices must be made; it might seem, therefore, that in the absence of these limitations it would make sense to carry every message to every listener. However, an even greater limitation is the inability of any individual to make sense of the sheer amount of information that would be available if these practical constraints did *not* exist.

The advent of social media has made plain the issue, with content posted at a rate during April 2022 of more than 2.4 million Snaps, more than 1.6 million Facebook posts, more than 347,000 tweets, more than 65,000 Instagram pictures, and more than 500 hours of YouTube videos *per minute*. Dixon, S., *Media usage in an online minute 2022*, STATISTA (Oct. 4, 2022), https://perma.cc/2MS9-BC7A (last visited Nov. 28, 2023). No individual user could hope to pick specific information out of a raw feed on any of these services, much less weigh and evaluate these messages against one another. Rather, information overload on social media leads users to seek methods to filter their information intake. *See* Gomez-Rodriguez, M., Gummadi, K. & Schölkopf, B., *Quantifying Information Overload in Social Media and its Impact on Social Contagions*, 8(1) PROCEEDINGS OF THE EIGHTH INT'L AAAI CONF. ON WEBLOGS AND SOCIAL MEDIA 170, 175 (2014), https://perma.cc/Z7AA-Z6EN (last visited Nov. 28, 2023) (data suggest that "overloaded users cannot keep up with the amount of incoming information and either look for tweets directly in other user's [*sic*] profiles or use tools to sort their incoming tweets").

In this environment, a functional marketplace of ideas depends on intermediaries' content moderation. This is not a flaw; rather, the winnowing of messages of lesser quality in the course of the competition for ever greater audiences is the marketplace of ideas at work. *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 124 (1973) (rejecting "the Court of Appeals' view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material."). While social media platforms allow for a dramatically expanded range of information to be shared, like the traditional press they exercise their discretion to moderate information quality in order to reduce potential harm and enhance the utility of the messages that they amplify to a mass audience.

The alternative envisioned by Texas and Florida is chaos. The states have acted anticompetitively in the marketplace of ideas by compelling the amplification of messages that otherwise would not have earned a mass audience (at least, on certain platforms). Their laws threaten not only removal of harmful material, but also search, recommendation, prioritization, contextualization, and a wide variety of other tools that platforms routinely use to organize content and to protect users. *See* Tex. Civ. Prac. & Rem. Code § 143A.001(1) ("'Censor' means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal

access or visibility to, or otherwise discriminate against expression."); Fla. Stat. § 501.2041(1)(b) ("'Censor' includes any action . . . to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform."); Fla. Stat. § 501.2041(1)(e) ("'Post-prioritization' means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results."); Fla. Stat. § 501.2041(1)(f) ("'Shadow ban' means action . . . through any means, . . . to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform.").

But a drowning person cannot drink. With intermediaries forbidden to undertake the necessary step of moderation for information quality, users would be lost; the winners in the modern marketplace of ideas would be not those whose ideas have the most merit, but those who can shout the loudest and most frequently. *See Quantifying Information Overload* at 177-78 (under conditions of information overload, number of exposures to particular information required for user to adopt idea increases); Gunaratne, C., Rand, W. & Garibay, I., *Inferring mechanisms of response prioritization on social media under information overload*, 11 SCIENTIFIC REPORTS Art. No. 1346,

10 (2021), https://doi.org/10.1038/s41598-020-79897-5 (last visited Nov. 28, 2023) (under conditions of information overload, recency of posts is most important factor driving response prioritization).

This by itself would thwart First Amendment principles, even without the threat of discretionary enforcement of laws like those at issue aimed at advancing favored viewpoints that government officials perceive to be underrepresented.[2] Users cannot sort

[2] This is not to disregard concerns over how social media companies exercise their discretion. The tools of mass media, whether a printing press or a server farm, grant great power. But social media companies—like other media organizations—are open to public criticism and subject to the forces of market competition. Social media sites can and do compete by offering different content moderation environments, competition which is enabled by the First Amendment and also by Section 230 of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996). *See* Huddleston, J., *Competition and Content Moderation*, CATO INSTITUTE (Jan. 31, 2022), https://www.cato.org/policy-analysis/competition-content-moderation (last visited Nov. 28, 2023) ("The freedom to adopt content moderation policies tailored to their specific business model, their advertisers, and their target customer base allows new platforms to please internet users who are not being served by traditional media."). Thus, the risks of speech being silenced entirely are minimized. Moreover, distributed social media technologies such as the "Fediverse" allow anyone who is interested to set their own content moderation rules. *See* Rozenshtein, A., *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3. J. OF FREE SPEECH L. 217, 228 (2023), https://perma.cc/VU76-SULN (last visited Nov. 28, 2023) ("[T]he biggest benefit of a decentralized moderation model is its embrace of content-moderation subsidiarity: Each community can choose its own content-moderation standards according to its own needs and values, while at the same time recognizing and respecting other communities' content-moderation choices."). That includes the governments of

disinformation from truth or compare viewpoints when information is conveyed by a firehose. Speakers cannot depend on the quality of their speech to persuade when they are being shouted down on all sides. This Court should not countenance laws that purport to advance freedom of speech while undermining public discourse.

III. The public's First Amendment interest in content moderation by social media platforms overlaps but is separate from the First Amendment's protection for any message expressed thereby

Misunderstanding the nature of the public interest at stake, Texas and Florida have framed this dispute as balancing the right of individuals to express themselves against the allegedly inchoate and impliedly disposable messages that platforms might convey through their editorial decisions. The Fifth Circuit was led astray by that argument, finding that "[i]f a [p]latform censors a user's post, the expressive quality of that censorship arises only from the [p]latform's *speech* (whether on an individualized basis or in its terms of service) stating the [p]latform chose to censor the speech and explaining how the censorship expresses the [p]latform's views." *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 461 (5th Cir. 2022).

Texas and Florida, should they wish to open their own social media platforms without the content moderation to which they object.

The MLRC disagrees with the Fifth Circuit's conclusion even with the issue framed in this manner. Social media companies (like other media organizations) may express their own opinions through their editorial choices, which expression is protected by the First Amendment. With every content moderation decision, social media platforms indicate their view that certain messages are appropriate for amplification and others are not. The MLRC agrees with The Reporters Committee for Freedom of the Press, which has argued before this Court that the Texas and Florida laws unconstitutionally interfere with such expression.

But the public receives the benefit of a moderated medium of communication regardless of whether they understand the operator to be expressing anything by its decisions. If in our "new media world . . . the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth," *see Berisha v. Lawson*, 594 U.S. ___, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting), efforts to reverse this trend by those who manage online platforms have clear First Amendment value. Thus, cases such as *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), or *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), are inapposite. While the Court in those cases raised the question of whether the public would perceive a message in a refusal to host particular content by a shopping mall and law schools, respectively (*PruneYard* at

87; *Rumsfeld* at 66), neither case involved media of mass communication or the structural benefits that flow to the public from editorial management.[3]

The Fifth Circuit therefore made a categorical error when it suggested that the First Amendment value of editorial discretion on social media is dependent on whether the platform conveys some specific message of its own. The Constitution's protection for the platforms' editorial choices and the right of the public to the essential benefits of content moderation overlap; analysis of each right supports the same result in these cases. However, those principles should be considered separately.

IV. The right of the public to a functioning online marketplace of ideas takes precedence over any individual's interest in reaching the audience built by a private media company

Correctly framed, these cases present the question of whether the First Amendment permits a state to intervene in the marketplace of ideas in order to elevate the interests of individual speakers over not only platforms' interest in controlling their messages but also the public's interest in functional media of

[3] The MLRC also agrees with its fellow amici who argue that the public routinely perceives a message in the editorial decisions of media organizations (including social media sites), and that *PruneYard* and *Rumsfeld* are distinguishable on that basis as well.

communication. To state the question properly is to make its answer obvious.

To be sure, the marketplace of ideas is premised on a multiplicity of viewpoints and so the interest of an individual speaker in sharing their views frequently aligns with the public's interest. However, while the individual speaker's interest is protected under the First Amendment, such a personal interest can be required to give way to support the public interest in receiving information. *See*, *e.g.*, *Columbia Broad. Sys.*, 412 U.S. at 122 ("[T]he question before us is whether the various interests in free expression of the public, the broadcaster, and the individuals require broadcasters to sell commercial time to persons wishing to discuss controversial issues. In resolving that issue it must constantly be kept in mind that the interest of the public is our foremost concern."); *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 651 (1985) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."); *cf.* Meiklejohn, A., FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 63 (Harper & Brothers 1948) (The First Amendment "has no concern about the 'needs of many men to express their opinions.' It provides, not for many men, but for all men. . . . It cares for the public need. And since that wider interest includes all the narrower ones insofar as they can be reconciled, it is prior to them all.").

The Texas and Florida laws flip these principles on their head, compelling platforms to serve individuals' desire to speak to a mass audience, despite the platforms' judgment that such speech does not serve their listeners' interests. But recognizing the constitutional value of editorial discretion, which by its very nature means that some messages will not be amplified, dictates that the state may not override those judgments—and certainly not in as widespread and reckless a fashion as the states here have attempted. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974), *quoting Associated Press v. U.S.*, 326 U.S. 1, 20 n.18 (1945) ("The clear implication has been that any such a compulsion to publish that which '"reason" tells [publishers] should not be published' is unconstitutional.").

The Court has never upheld a government intervention to compel a private media organization to amplify content of the scope now attempted by Texas and Florida. *See CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) ("[T]he Court has never approved a *general* right of access to the media."). On those few occasions when the Court has approved a narrowly defined range of compelled carriage in the context of specific technologies, it determined that the compulsion served the public interest, and not merely the speakers' interests. Indeed, the logic of those cases dictates the opposite result here.

For example, in *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367 (1969), the Court considered whether the Federal Communications Commission's fairness

doctrine violated the First Amendment. In particular, the petitioner challenged requirements that licensed broadcasters provide: (1) an opportunity for the subject of personal attacks to respond, in the context of a controversial issue of public importance; and (2) an opportunity for legally qualified political candidates to respond to a political editorial in which the licensee endorses a different candidate. *Id.* at 373-75. Because the available spectrum for broadcast signals is finite, the Court recognized that Congress was required to allocate portions of that spectrum to a finite group of broadcasters in order to prevent signal interference:

> When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality.

Id. at 387-88. Under these restricted conditions, the Court found that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends of the First Amendment," and that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be

constitutionally abridged either by Congress or the FCC." *Id.* at 390. Because it found that the narrow categories of compelled carriage under the FCC's fairness doctrine served the public interest, the Court held that they did not offend the First Amendment; however, the Court did not address whether other or broader forms of compelled carriage would be permissible. *Id*. at 396.

Of course, the Internet does not suffer from the same technological limitations as broadcast, and social media operators are not licensed by the government to use a limited public good such as broadcast frequencies; as discussed above, there are ample channels for speakers online. But the Court's concern over a medium of communication devolving into cacophony remains relevant, as does its recognition of a "collective right to have the medium function consistently with the ends of the First Amendment." The difference here is that government action is itself the threat: Texas and Florida have ignored the fact that the amplification of content via mass media differs from face-to-face communication, while it is content moderation that keeps social media from becoming an unintelligible babble of misinformation and irrelevancies.

Later, in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), the Court considered the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, which require cable system operators to carry signals of a specified number of local broadcast television stations. The Court's analysis started from the premise that both the

Speech and Press Clauses of the First Amendment protect the programming choices of cable operators:

> Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. . . . Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats.

Turner at 636 (internal citations and quotation marks omitted). The Court rejected the government's argument that it should apply the same relaxed First Amendment standard as applied to broadcast in cases such as *Red Lion*, finding that "[t]he broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium." *Id.* at 638-39. Nor was the government's "mere assertion of dysfunction or failure in a speech market, without more, . . . sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media." *Id.* at 640.

Applying those standards, the Court found that the Act was content-neutral: "Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all

Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content." *Id.* at 649. The Court also found that the government should have greater leeway in light of the unique situation that each home typically has only one cable provider: "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch. . . . The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id*. at 656-57. For these reasons, the Court applied intermediate scrutiny. *Id.* at 661-62.

Just as with *Red Lion*, the same considerations that drove the Court's decision in *Turner* compel a different result in these cases. Unlike the Act at issue in *Turner*, the Texas and Florida laws expressly promote subject matter and viewpoints that the platforms choose not to amplify. Meanwhile, the Court's concern that a "pathway of communication" be operated consistently with First Amendment principles dictates that strict scrutiny be applied to the state laws at issue. Unlike the cable systems of the 1990s, no social media platform operator can prevent users from accessing speech through other platforms; but eliminating platforms' ability to make content moderation

choices will inevitably impair users' ability to receive and to process information.[4]

The public's First Amendment interest in the operation of social media sites depends on moderation by platforms. The states would bar platforms from fulfilling this function in order to benefit certain speakers. But speakers' interests are subordinate to the public interest, and everyone—speakers and listeners alike—would be poorly served by an online marketplace of ideas that is reduced to chaos.

CONCLUSION

For the foregoing reasons, the MLRC respectfully urges this Court to reverse the decision of the Fifth Circuit, and to affirm the decision of the Eleventh

[4] The Court in *Turner* also rejected as a basis for applying strict scrutiny the argument that compelled carriage of local broadcast interfered with cable systems' own messaging, finding that subscribers do not typically attribute the content selected by individual channels to their cable providers, and the providers therefore do not, to the public's detriment, alter their speech on controversial matters. *Turner* at 655-56. Cable providers stand in a different relationship than social media platforms to the content they carry, because cable systems typically make choices at the channel level rather than the level of specific messages. Thus, the connection in the public's mind between television content and the cable system's viewpoint is more attenuated. In any event, the interference with the operation of social media sites with which the MLRC is concerned is not limited to indirect influence on content moderation choices; rather, it involves the wholesale upending of the online marketplace of ideas.

Circuit as to the issues on which the Court has granted review.[5]

Respectfully submitted,

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[5] The MLRC agrees with The Reporters Committee for Freedom of the Press on its analysis of the disclosure mandates of the Texas and Florida laws, and to avoid repetition does not restate those arguments here.