Nos. 22-277, 22-555

In the Supreme Court of the United States

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

Petitioners,

v.

NETCHOICE, LLC; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Respondents.

NETCHOICE, LLC; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

Brief of Professors Richard L. Hasen, Brendan Nyhan, and Amy Wilentz as *Amici Curiae* Supporting Respondents in No. 22-277 and Petitioners in No. 22-555

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are a law professor, a political scientist, and a journalism professor keenly concerned about issues of speech and democracy in the United States.[2]

Richard L. Hasen is Professor of Law and Political Science at UCLA School of Law, where he directs the Safeguarding Democracy Project aimed at preserving free and fair elections in the United States. Hasen is an internationally recognized expert in election law, and author of many books on elections and election law including, most recently, *Cheap Speech: How Disinformation Poisons Our Politics—and How to Cure It* (Yale Univ. Press 2022).

From 2001-2010, he served (with Professor Daniel Hays Lowenstein) as founding co-editor of the quarterly peer-reviewed publication, *Election Law Journal*. He is the author of over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review* and *Supreme Court Review*. He was elected to The American Law Institute in 2009 and serves as Co-Reporter (with Professor

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[1] No party or its counsel had any role in authoring this brief and no one other than *Amici Curiae* and their counsel made any monetary contribution to fund the preparation or submission of this brief.

[2] *Amici* speak in their own capacities, and their views do not necessarily reflect those of their institutions or the Safeguarding Democracy Project.

Douglas Laycock) on the Institute's law reform project, Restatement (Third) of Torts: Remedies.

Brendan Nyhan is the James O. Freedman Presidential Professor in the Department of Government at Dartmouth College. He was elected to the American Academy of Arts and Sciences in 2023 and previously was named a Guggenheim Fellow by the Guggenheim Foundation, an Andrew Carnegie Fellow by the Carnegie Corporation of New York, and a Belfer Fellow by the Anti-Defamation League. Nyhan's research, which focuses on misperceptions about politics and health care, has been published in journals including *Nature*, *Science*, *Proceedings of the National Academy of Sciences*, *American Journal of Political Science*, *Journal of Politics*, *Nature Human Behaviour*, *Pediatrics*, and *Vaccine*.

Nyhan is also co-director of Bright Line Watch, a watchdog group that monitors the status of American democracy. He was previously a contributor to The Upshot at *The New York Times*, a media critic for *Columbia Journalism Review*, co-founder and co-editor of *Spinsanity*, a non-partisan watchdog of political spin that was syndicated in *Salon* and the *Philadelphia Inquirer*, and co-author of *All the President's Spin*, a *New York Times* bestseller that Amazon named one of the best political books of 2004. He is a member of the Safeguarding Democracy Project Advisory Board.

Amy Wilentz is a professor in the Literary Journalism Program at UC Irvine who has written frequently on the presidency and family of Donald Trump. She is a 2020 Guggenheim fellow and the winner of the National Book Critics Circle award

(memoir). She is also a member of the advisory board of the Safeguarding Democracy Project.

Wilentz is the former Jerusalem correspondent for *The New Yorker* magazine, and a long-time contributing editor at *The Nation*. Her work has also appeared in *The New York Times Magazine*, *Democracy: A Journal of Ideas*, *The New Republic*, *The Washington Post*, *Time* magazine, *The Los Angeles Times*, *The Spectator*, and the *London Review of Books*, among other publications. Her books include *The Rainy Season: Haiti Since Duvalier*, *Farewell, Fred Voodoo: A Letter From Haiti*, and *Martyrs' Crossing*, a novel set in Jerusalem.

SUMMARY OF THE ARGUMENT

Social media has greatly amplified the ability of average individuals to share and receive information, helping to further the kind of robust, wide-open debate that promotes First Amendment values of free speech and association. Gone are the days of speech scarcity when a few gatekeepers such as newspapers and television networks controlled the bulk of political speech. But the rise of "cheap speech"[3] also has had negative consequences, such as when social media platforms are used to harass,[4]

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[3] *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1819–33 (1995); Richard L. Hasen, *Cheap Speech: How Disinformation Poisons Our Politics—and How to Cure It* 19–22 (2022) (hereinafter Hasen, *Cheap Speech*).

[4] *Cyberbullying and Online Harms: Preventions and Interventions from Community to Campus* 3–4 (Helen Cowie & Carrie Anne Myers, eds. 2023).

spread obscene or violent images,[5] or commit financial fraud.[6] In response to dangers like these, platforms have engaged in content moderation, making decisions as private actors participating in the marketplace of ideas to remove or demote speech that, in their judgment, is objectionable or dangerous.[7]

Social media companies engaged in just such content moderation decisions in the leadup to, and in the aftermath of, the 2020 U.S. presidential election.[8] During that election, President Donald Trump, then a candidate for reelection running against Joe Biden, relentlessly used his social media account on Twitter (now known as "X"[9]) to spread

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[5] Danielle K. Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 347 (2014).

[6] "More than 95,000 people reported about $770 million in losses to fraud initiated on social media platforms in 2021." Emma Fletcher, *Social Media is a Gold Mine for Scammers in 2021*, Federal Trade Commission, Data Spotlight (Jan. 25, 2022), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/01/social-media-gold-mine-scammers-2021 [https://perma.cc/5UCK-QJP3].

[7] When the government pressures private entities such as platforms to speak or not to speak, this "jawboning" raises a different set of issues about the government violating the First Amendment. This Court will consider such issues in the recently-granted case, *Murthy v. Missouri*, No. 23-411.

[8] For details on the facts discussed in the next three paragraphs, *see* Part A, *infra*.

[9] We refer to the company as "Twitter" and the posts as "tweets" throughout this brief, as those were the names when the activities described in Part A occurred.

false claims that the election would be or was "rigged" or stolen through fraud, and to advocate for "wild" protests that inspired the January 6, 2021 violent attack on the United States Capitol as Congress was counting the Electoral College votes.

During the campaign and post-election period, these platforms labeled and fact-checked many of Trump's false and incendiary statements, and limited the sharing of some of his content; but after Trump failed to condemn (and even praised) the January 6 rioters, many major platforms, fearing additional violence fomented by the President, decided to remove or suspend Trump's social media accounts.

The platforms made voluntary decisions about labeling, factchecking, demoting, and deplatforming content that undermined election integrity, stoked violence, and raised the risk of election subversion. In so doing, the platforms participated in the open marketplace of ideas by exercising their sound editorial judgment in a socially responsible way to protect democracy. Even if certain moderation decisions were imperfect in hindsight, the platforms' efforts were vastly preferable to an alternative in which government fiat deprives platforms of the power to remove even dangerous speech.

These 2020 election-related content moderation decisions were not compelled by law—and some other platforms continued to permit and post incendiary election-related content even after January 6[10]—but they were laudable. Without such

[10] For example, in the aftermath of January 6 and the deplatforming of Trump by Facebook and Twitter, Trump

content moderation decisions, the post-election violence could have been far worse and U.S. democracy imperiled.

The platforms' editorial choices are fully protected by the First Amendment. Just as *The Wall Street Journal* newspaper has the First Amendment right to exercise editorial discretion and could not be compelled by law to share or remove a politician's op-ed, platforms have a First Amendment right to include, exclude, label, promote, or demote posts made on their services.

Florida's and Texas's social media laws, if allowed to stand, would thwart the ability of platforms to moderate social media posts that risk undermining U.S. democracy and fomenting violence. Texas compels platforms to disseminate speech the platforms might find objectionable or dangerous, prohibiting them from "censor[ing]" an expression of any viewpoint by means of "block[ing], ban[ning], remov[ing], deplatform[ing], demonetiz[ing], de-boost[ing], restrict[ing], deny[ing] equal access or visibility to, or otherwise discriminat[ing]."[11] Florida's convoluted law prohibits the "deplatforming" of known political candidates and "journalistic enterprises," and from

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supporters continued to share messages on platforms including Gab and Parler. Kate Conger, Mike Isaac, & Sheera Frenkel, *Twitter and Facebook Lock Trump's Accounts after Violence on Capitol Hill*, N.Y. Times, Jan. 6, 2021 (updated Feb. 14, 2023), https://www.nytimes.com/2021/01/06/technology/capitol-twitter-facebook-trump.html.

[11] Tex. Civ. Prac. & Remedies Code §§ 143A.001(1), 143A.002.

using algorithms to "shadow ban[]" users who post "about" a candidate.[12]

Even where platforms are permitted to take editorial actions, such as engaging in fact-checking, Florida mandates that such actions must be based on previously disclosed standards with "detailed definitions" that may not be updated more than once every 30 days.[13] Any such action must be followed up with individualized notice to the affected user, including a "thorough rationale" for the action and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision.[14] Under these sweepingly vague laws, broad swaths of dangerous election-related speech would be actually or effectively immune from moderation. And these burdensome laws inevitably will have a chilling effect.

Both Florida's and Texas's laws contain certain exceptions from their bar on content moderation, but those exceptions seemingly would not reach much of the speech that could foment election violence and set the stage for election subversion. As to the content arguably covered by these exceptions, neither Florida nor Texas can show that the exceptions are clear, workable in the real-time social media environment, and consistent with the

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[12] Fla. Stat. §§ 106.072(2), 501.2041(1)(c), (2)(h), (2)(j).

[13] *Id.* §§ 501.2041(2)(a), (c).

[14] *Id.* § 501.2041(3). Texas too has individualized disclosure requirements. Tex. Bus & Com. Code §§ 120.101-104; *id.* §§ 120.051(a), 120.053(a)(7). We focus in our brief on the Florida disclosure rules but the Texas disclosure rules raise similar concerns.

protections of the First Amendment. For example, Florida's limited exception for "obscene" speech would not permit moderation of dangerous and violent election-related speech, including speech that is unlawful under the standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). And Texas's allowance for moderation to prevent incitement of "criminal activity" or "specific threats" is limited to threats made "against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge," and does not even include threats against election officials or administrators.

Ultimately, NetChoice and the Computer & Communications Industry Association ("CCIA") are correct that Florida's and Texas's laws violate the First Amendment rights of platforms to exercise appropriate editorial judgment and act as responsible corporations.[15] In a free market, consumers need not read or subscribe to social media platforms whose content moderation decisions they do not like; they can turn to other platforms with policies and views more amenable to them. Platforms are not common carriers because they, like newspapers, produce coherent speech products and produce public-facing speech (unlike a telephone call or private telegram). And even common carriers cannot be barred from recommending some speech over others without violating their First Amendment rights.

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[15] Br. For Resp'ts in No. 22-277, 18-52 (Nov. 30, 2023); Br. For Pet'rs in No. 22-555, 18-53 (Nov. 30, 2023).

Further, Florida's and Texas's laws have an impermissible "anti-distortion" purpose under this Court's First Amendment precedents. This Court should not allow states to hijack the platforms, forcing them to equalize speech to include messages that could foment electoral violence and undermine democracy, simply because the states have objected to the platforms' exercise of editorial discretion.

ARGUMENT

Florida's and Texas's Social Media Laws, If Upheld, Would Increase the Risk of Political Violence and Election Subversion While Violating the First Amendment.

A. The 2020 Election Cycle Shows Social Media Exacerbates the Risk of Political Violence and Election Subversion. The Risk in 2020 Would Have Been Worse If Platforms Did Not Have the Freedom to Label, Remove, or Demote Dangerous Content.

The social media revolution has undeniably opened new channels of communication, empowering people to speak, share ideas, discuss political issues, and organize for collective action. These are positive developments for those who are committed to free speech and the open exchanges of ideas. But this technological revolution also has come with costs, as speech that harasses, defrauds, or otherwise harms individuals may flow as freely as speech about a child's accomplishments, a preferred presidential candidate, or a favorite television show.

One significant cost of this cheap speech revolution is the potential use of false claims and incendiary speech to spur election violence, undermine voter confidence in the fairness of the vote count, and disrupt the peaceful transition of presidential power.

Unfortunately, this concern is not hypothetical. Social media users and posts helped fuel the violent attack at the United States Capitol on January 6, 2021 and threatened the peaceful transition of presidential power. They also helped convince millions of voters, even today, that the 2020 election was stolen (it was not[16]) and that American elections are not secure (they are[17]).

But things could have been far worse if platforms such as Meta and Twitter did not act responsibly in moderating and removing dangerous electoral content, including the deplatforming of Trump right after the January 6 attack. These companies have a First Amendment right to include, exclude, demote,

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[16] John Danforth, Sen., et al., *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election* (July 2022), https://lostnotstolen.org/download/378; Christina A. Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, Associated Press (Dec. 14, 2021, 5:56 PM), https://bit.ly/3T6oG8Q; *see also Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 381 (3d Cir. 2020) (Bibas, J.) ("Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.").

[17] Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. Democracy 159, 159 (2021).

or promote such content, and they did the right thing. Even for those who disagreed with their content moderation efforts, such actions are simply part of the marketplace of ideas, including choices to promote or demote speech. Florida's and Texas's laws, however, if allowed to stand, would prevent such moderation and raise the risk of political violence and election subversion in the United States.

In the runup to the election, in the midst of the COVID-19 pandemic, the platforms faced difficult choices. Trump was constantly spreading false claims that the election would be stolen with mail-in ballots.[18] He also spread more general messages undermining the integrity of the election without basis. He shared his messages with his 84.6 million followers on Twitter[19] and with additional followers on other social media sites. His followers repeated and amplified his claims.

Recognizing that Trump's speech was creating the conditions to undermine the election and therefore democratic legitimacy, platforms tried different tactics. For example, they sometimes attached labels or linked Trump's posts to fact-checks in order to give context or show that Trump's claims were contested.[20] As to some of Trump's more

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[18] Hasen, *Cheap Speech*, at 2–3.

[19] *Id.* at 169 n.4.

[20] *Id.* at 7–8; Kate Conger & Davey Alba, *Twitter Refutes Inaccuracies in Trump's Tweets about Mail-In Voting*, N.Y. Times, May 26, 2020 (updated May 28, 2020), https://www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots.html [https://perma.cc/5ABC-6AJN];

egregious election-related posts, the platforms took steps to limit their spread.[21] For example, Twitter required viewers to affirmatively click to see the content of some of Trump's more extreme statements, and the messages could not be shared or liked.[22]

The situation deteriorated after the November 3, 2020 election, and worsened after news organizations called the election for Joe Biden on

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Craig Silverman & Ryan Mac, *Facebook Knows That Adding Labels to Trump's False Claims Does Little to Stop Their Spread*, BuzzFeed News (Nov. 16, 2020, 8:07 PM), https://www.buzzfeednews.com/article/craigsilverman/facebook-labels-trump-lies-do-not-stop-spread [https://perma.cc/3L2B-YHFG]; Donie O'Sullivan & Marshall Cohen, *Facebook Begins Labeling, but Not Fact-Checking, Posts from Trump and Biden*, CNN Business (July 21, 2020, 2:34 PM), https://www.cnn.com/2020/07/21/tech/facebook-label-trump-biden/index.html [https://perma.cc/3GD6-HAU4]; Ryan McCarthy, *"Outright Lies": Voting Misinformation Flourishes on Facebook*, ProPublica: Electionland (July 16, 2020, 5:00 AM), https://www.propublica.org/article/outright-lies-voting-misinformation-flourishes-on-facebook [https://perma.cc/YUC2-U36V].

[21] Zeve Sanderson et al., *Twitter Flagged Donald Trump's Tweets with Election Misinformation: They Continued to Spread Both on and Off the Platform*, Misinformation Review (Aug. 24, 2021), https://misinforeview.hks.harvard.edu/article/twitter-flagged-donald-trumps-tweets-with-election-misinformation-they-continued-to-spread-both-on-and-off-the-platform/ [https://perma.cc/WK9J-WQV9].

[22] *Id.*

November 7, 2020.[23] Trump went to Twitter over 400 times in the three following weeks to spread false and inflammatory messages that the election had been rigged.[24] For example, on November 27, 2020, Trump tweeted: "Biden can only enter the White House as President if he can prove that his ridiculous '80,000,000 votes' were not fraudulently or illegally obtained. When you see what happened in Detroit, Atlanta, Philadelphia & Milwaukee, massive voter fraud, he's got a big unsolvable problem!"[25] No evidence supported Trump's claims that the election was marred by widespread fraud. Yet Trump convinced millions of his followers that it was.[26]

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[23] William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/79U5-44T4]; Alex Hern, *Trump's Vote Fraud Claims Go Viral on Social Media Despite Curbs*, The Guardian (Nov. 10, 2020, 1:43 PM), https://www.theguardian.com/us-news/2020/nov/10/trumps-vote-claims-go-viral-on-social-media-despite-curbs [https://perma.cc/8458-PVJY].

[24] *See* Karen Yourish & Larry Buchanan, *Since Election Day, a Lot of Tweeting and Not Much Else for Trump*, N.Y. Times (Nov. 24, 2020), [https://perma.cc/LZN4-RUV2].

[25] A screenshot of this post is available at https://perma.cc/E2YV-HFJQ.

[26] *See* Jesse T. Clark & Charles Stewart III, *The Confidence Earthquake: Seismic Shifts in Trust in the 2020 Election*, at 5 (July 15, 2021), https://bit.ly/3COEgRP [https://perma.cc/UHH5-5E7H].

Trump's social media strategy went hand in hand with his attempt with others to overturn the 2020 election results through pressuring state election officials, elected officials, the Department of Justice, and his own vice president.[27] These activities have led to multiple investigations,[28] prosecutions,[29] and guilty pleas.[30]

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[27] *See* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 Harv. L. Rev. F. 265, 270-74 (2022) and the sources cited therein.

[28] Select Committee to Investigate the January 6th Attack on the U.S. Capitol, Final Report, H.R. 117–663 (2022), https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf [https://perma.cc/A7K7-S3SC]; Staff Report, Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, United States Senate Committee on Homeland Security and Governmental Affairs and Committee on Rules and Administration (2021), https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf [https://perma.cc/JH6W-F675].

[29] *See, e.g.*, Alan Feuer & Charlie Savage, *Trump Seeks Dismissal of Federal Election Case, Claiming Immunity*, N.Y. Times (Oct. 5, 2023), https://www.nytimes.com/2023/10/05/us/politics/trump-jan-6-case-dismissal.html.

[30] *See, e.g.*, Richard Fausset & Danny Hakim, *Jenna Ellis, Former Trump Lawyer, Pleads Guilty in Georgia Election Case*, N.Y. Times (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/jenna-ellis-guilty-trump-georgia.html (discussing guilty pleas of Kenneth Chesebro, Jenna Ellis, and Sidney Powell).

With Trump having lost over 60 post-election lawsuits,[31] including an original action filed in this Court by his ally Ken Paxton[32] (Respondent in the Texas case here), he shifted tactics to popular pressure, imploring Congress to reject Electoral College votes cast for Joe Biden. To that end, he used social media to invite his supporters to Washington D.C. for "wild" protests on January 6, 2021,[33] the date that Congress would count the Electoral College votes, as he continued, incessantly and falsely, to claim that the election was rigged and stolen. The platforms, as is their First Amendment right, left those posts up, even if it would have been more responsible to take them down.

[31] *See* Cummings et al., *supra* note 23.

[32] *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.).

[33] A screenshot of the post is available at: https://perma.cc/DY5W-WS8V. *See also* Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. Times, Jan. 6, 2021 (updated July 27, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html [https://perma.cc/UN5J-TY2K]. Trump further promoted the rally on social media in the days leading up to January 6. Hasen, *Cheap Speech*, at 10–11.

It was not just Trump's posts that raised the risk of electoral violence. Some Trump supporters used Facebook's "Groups" feature to organize for violent action in the Capitol. At one point the "Stop the Steal!" group advocating for election subversion grew to 320,000 users in less than one day until Facebook shut it down. A *Wall Street Journal* report revealed that "'enthusiastic calls for violence every day' filled one 58,000-member group" in the period around the election. Meta eventually stepped in to prevent these calls to band together for violent and illegal purposes.[34]

Finally, when the violent invasion of the Capitol occurred on January 6, leading to the death of four protesters and to injuries—some quite serious—of 140 law enforcement officers,[35] Trump did not take to social media to call immediately for the protestors to disperse. Instead, in the midst of the violent attack, he tweeted criticism of his vice president,

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[34] Jeff Horwitz, *Facebook Knew Calls for Violence Plagued 'Groups,' Now Plans Overhaul*, Wall St. J. (Jan. 31, 2021), https://www.wsj.com/articles/facebook-knew-calls-for-violence-plagued-groups-now-plans-overhaul-11612131374 [https://perma.cc/S8DC-H5JG]; *see also* Hasen, *Cheap Speech*, at 13.

[35] Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot,* N.Y. Times, Feb. 11, 2021 (updated July 12, 2021), https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html; Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. Times, Jan. 11, 2021 (updated Oct. 13, 2022), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html; Jan Wolfe, *Four Officers Who Responded to U.S. Capitol Attack Have Died by Suicide*, Reuters (Aug. 2, 2021, 11:19 PM), [https://perma.cc/TH7B-TXGD].

Mike Pence, who was then sheltering in a building in the basement of the Capitol, for not facilitating his efforts to subvert the results of the election.[36] Trump posted praise of the Capitol attackers, and then a short video while the violence was ongoing in which he told his supporters, falsely, that the election was "stolen from us" and that it was "a landslide election and everyone knows it, especially the other side."[37] He ended the video by expressing his love for the rioters and told them to "go home in peace."[38]

Many of Trump's supporters who illegally invaded the U.S. Capitol pointed to Trump's "be wild" social media messaging as their inspiration.[39]

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[36] Maggie Haberman & Jonathan Martin, *After the Speech: What Trump Did as the Capitol Was Attacked,* N.Y. Times (Feb. 13, 2021), https://www.nytimes.com/2021/02/13/us/politics/trump-capitol-riot.html [https://perma.cc/CXC2-82PV]; Hasen, *Cheap Speech*, at 14.

[37] Haberman & Martin, *supra* note 36.

[38] Hasen, *Cheap Speech* at 14.

[39] Rebecca Heilweil & Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, Vox (Jan. 8, 2021, 5:00 PM), https://www.vox.com/recode/22221285/trump-online-capitol-riot-far-right-parler-twitter-facebook; David Mack, Ryan Mac, & Ken Bensinger, *"If They Won't Hear Us, They Will Fear Us": How the Capitol Assault Was Planned on Facebook*, BuzzFeed News (Jan. 19, 2021, 10:14 AM), https://www.buzzfeednews.com/article/davidmack/how-us-capitol-insurrection-organized-facebook [https://perma.cc/LMT3-RFM3].

For example, in a December 2020 Facebook message that was quoted in the federal indictment of Kelly Meggs, a Capitol invader and the "self-described leader of the Florida chapter of the Oath Keepers," Meggs wrote: "Trump said It's gonna be wild!!!!!!! It's gonna be wild!!!!!!! He wants us to make it WILD that's what he's saying. He called us all to the Capitol and wants us to make it wild!!! Sir Yes Sir!!! Gentlemen we are heading to DC pack your s***!!" Meggs went on to state, "'[W]e will have at least 50–100 OK there.'"[40] Meggs was later tried and convicted of seditious conspiracy for his actions at the Capitol.[41]

Hours after the attack on the Capitol, the larger platforms exercised their First Amendment rights to deplatform Trump,[42] preventing him from posting at

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[40] Press Release, U.S. Dep't of Justice, Six Individuals Affiliated with the Oath Keepers Indicted by a Federal Grand Jury for Conspiracy to Obstruct Congress on Jan. 6, 2021 (Feb. 19, 2021), https://www.justice.gov/usao-dc/pr/six-individuals-affiliated-oath-keepers-indicted-federal-grand-jury-conspiracy-obstruct [https://perma.cc/YLV8-QMNV]; Hasen, *Cheap Speech*, at 12–13.

[41] Press Release, U.S. Dep't of Justice, Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to the U.S. Capitol Breach (May 25, 2023), https://www.justice.gov/opa/pr/court-sentences-two-oath-keepers-leaders-seditious-conspiracy-and-other-charges-related-us.

[42] *See* Hasen, *Cheap Speech*, at 15. A few years after being deplatformed, Trump was restored to Facebook, Instagram, and Twitter. Shannon Bond, *Elon Musk Allows Donald Trump Back on Twitter*, NPR (Nov. 19, 2022, 8:14 PM), https://www.npr.org/2022/11/19/1131351535/elon-musk-allows-donald-trump-back-on-twitter [https://perma.cc/4SYQ-K7JN];

a moment when he could have called for more post-election violence and further sought to disrupt the peaceful transition of power.

That choice appeared to help the stability of American democracy, and a peaceful transition to the Biden administration ensued.[43] Had Trump continued to have unfettered access to major platforms to spread his false claims and praise those who committed violence against the U.S. government, American democracy itself would have been in greater danger.

Nothing compelled the platforms to act responsibly and there is no guarantee that they will continue to do so in the future.[44] But the First Amendment leaves those decisions to the editorial discretion of the platforms, just as it leaves such

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Shannon Bond, *Meta Allows Donald Trump Back on Facebook and Instagram*, NPR (Jan. 25, 2023, 6:24 PM), https://www.npr.org/2023/01/25/1146961818/trump-meta-facebook-instagram-ban-ends [https://perma.cc/QLX5-PGKQ].

[43] On the declining reach of Trump's messages in the period following the January 6 attack, *see* Davey Alba, Ella Koeze, & Jacob Silver, *What Happened When Trump Was Banned on Social Media*, N.Y. Times (June 7, 2021), https://www.nytimes.com/interactive/2021/06/07/technology/trump-social-media-ban.html.

[44] Indeed, there is good reason to believe that the platforms will be far less likely to police dangerous election-related content in the future. Naomi Nix and Sarah Ellison, *Following Elon Musk's Lead, Big Tech is Surrendering to Disinformation*, Wash. Post (Aug. 25, 2023), https://www.washingtonpost.com/technology/2023/08/25/political-conspiracies-facebook-youtube-elon-musk/ [https://perma.cc/E2RV-JJ8C].

editorial decisions to newspapers, television and radio stations, and other websites.

B. Florida's and Texas's Social Media Laws Would Require Platforms to Carry and Not Moderate Content That Increases the Risk of Violence and Subverts Elections.

Many of the four types of reasonable and necessary content moderation efforts in which the platforms engaged in connection with 2020 election-related posts—labeling, fact-checking, demoting, and deplatforming—would violate either Florida's law or Texas's law, or both. Even if those laws did not explicitly ban all efforts at such election-related content moderation, their vague and burdensome notification and justification procedures could create a de facto ban given platforms' practical inability to comply, particularly during fast-paced news cycles (including election days and nights), and violent events such as the January 6 attack on the Capitol.

Both laws provide overly broad definitions of prohibited editorial actions. Texas's law compels platforms to disseminate objectionable speech, prohibiting platforms from "censor[ing]" an expression of any viewpoint by means of "block[ing], ban[ning], remov[ing], deplatform[ing], demonetiz[ing], de-boost[ing], restrict[ing], deny[ing] equal access or visibility to, or *otherwise discriminat*[*ing*]."[45] Similarly, Florida's law regulates "censor[ship]," which it defines as "any

[45] Tex. Civ. Prac. & Remedies Code §§ 143A.001(1), 143A.002 (emphasis added).

action taken . . . 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."[46]

Under these sweeping standards, laudable and proportionate efforts by platforms to label claims made by candidates and their supporters as disputed or false could be considered by Texas as a prohibited editorial act that "otherwise discriminate[s]" against their "viewpoint[s]."[47] And such editorial action is expressly defined as censorship under Florida's law.[48]

Though Florida's "consistency" requirement may not provide as facially stringent a prohibition on such actions as Texas, its onerous disclosure and notice requirements are likely to create a de facto ban on content moderation efforts around election-related posts. Any content moderation efforts (what the law labels as "censorship") must be based on "standards, including detailed definitions," disclosed by the platform to "each user," which may not be changed "more than once every 30 days."[49] Additionally, such standards for "censorship, deplatforming, and shadow banning" must be

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[46] Fla. Stat. § 501.2041(1)(b).

[47] Tex. Civ. Prac. & Remedies Code §§ 143A.001(1), 143A.002.

[48] Fla. Stat. § 501.2041(1)(b).

[49] *Id.* §§ 501.2041(2)(a), (c). Any such change triggers an additional disclosure. *Id.*

applied in a "consistent manner," a vague phrase never defined under the law.[50]

Even if applying properly disclosed standards in a consistent manner, a platform engaging in so-called "censorship"—such as adding an "addendum to any content"—must provide a detailed justification to the user for such action, including a "thorough rationale" for the action and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision.[51] Such onerous obligations of compelled speech would be difficult even in the best of times. But at times of heightened concern about, and volume of, election-related false, misleading, and incendiary speech—including in the heat of campaigns, voting, vote-counting, and certification—such burdensome obligations are likely to render platforms powerless to stanch the flow of dangerous election-related speech.

Likewise, Florida's bar on platforms' ability to provide an "addendum" to any content would prohibit fact-checking by the platform, thereby banning important clarifying speech on election-related matters such as poll access, election security, and acceptance of election results. Thus, for example, *any* individual, whether a politician or not, could post obvious falsehoods that may mislead voters, and any editorial intervention from the

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[50] *Id.* § 501.2041(2)(b).

[51] *Id.* § 501.2041(3).

platform would be considered unlawful censorship.[52] These already burdensome requirements are compounded by the fact that, under the law, platforms are barred entirely from deplatforming candidates and "journalistic enterprises," and from shadow banning users who even post "about" a political candidate.[53]

Further, under Florida's law, fact-checking is expressly prohibited where the user is a "journalistic enterprise," which is defined so broadly as to potentially bar the fact-checking of individual political blogs or popular YouTube channels, including those whose stock-in-trade may include disinformation.[54] Any politician or his or her

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[52] This is particularly problematic as sites that are not considered social media platforms, such as online newspapers, could conceivably fall within the law's definition of "social media platform," which includes "any information service" with either $100 million in annual revenue or 100 million monthly "platform participants." *Id.* § 501.2041(1)(g). By its plain language, this would include *The New York Times*, which averaged 145 million monthly visitors to nytimes.com in 2022 and had an operating profit of $202 million, raising questions about how such news sites might be liable under a statute seemingly not designed to regulate them. *See The New York Times Company 2022 Annual Report*, https://nytco-assets.nytimes.com/2023/03/The-New-York-Times-Company-2022-Annual-Report.pdf (Nov. 15, 2023).

Left unexplained is how Florida's law treats an entity that is both a social media platform and journalistic enterprise.

[53] *Id.* §§ 106.072(2); 501.2041(1)(c), (2)(h), (2)(j).

[54] A "journalistic enterprise" includes any Florida entity that publishes "in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users" or "100 hours of audio or video available online with at least

spokesperson communicating through such a defined "journalistic enterprise" would be similarly protected by proxy; for example, platforms would be powerless to fact-check or correct election-related falsehoods made by a politician on a cable news program and then posted on a social media platform. Texas's law similarly stymies such efforts at corrective counterspeech by its broad and vague prohibition on any act that "discriminates" against a post based on the "viewpoint" expressed, which could include election misinformation.[55]

The violent attack on the Capitol prompted several platforms to actively demote content that promoted the event as well as deplatform individuals, such as Trump, as an exercise of carefully considered editorial decision. Such actions taken to ensure the non-violent functioning of democratic processes and the peaceful transfer of power—not to mention on-platform civility—would not be possible under Florida's and Texas's laws. Texas's law is clear on this subject, prohibiting a social media platform from demoting or

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100 million viewers annually." *Id.* § 501.2041(1)(d). A platform "may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." *Id.* § 501.2041(2)(j).

[55] Tex. Civ. Prac. & Remedies Code §§ 143A.001(1), 143A.002; *see also U.S. v. Alvarez*, 567 U.S. 709 (2012) (plurality opn.) (recognizing counterspeech as a preferred means of dealing with false speech consistent with the First Amendment).

"deplatform[ing]" users or their content based on viewpoint expression.[56]

Similarly, Florida defines censorship as any act "to delete, regulate," or "inhibit the publication or republication of" any content, or any action "to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform."[57] Florida goes even further in this context by prohibiting the use of "post-prioritization or shadow banning algorithms for content and material *posted by or about . . . a [known] candidate*."[58] Any algorithmic attempt to demote or delete such statements made by—*or about*—Trump during the 2020 elections, advocating for his supporters to be "wild" at the Capitol or the massing of armed supporters at state capitols, and the boosting of those messages, would have been prohibited by Florida's law.

Florida's and Texas's laws also could have prevented platforms from moderating content such as those posts made during the 2016 presidential election for which Douglass Mackey was charged and convicted for depriving voters of their lawful right to vote. Mackey, deemed by MIT Media Lab to be the 107th most important influencer of the 2016 election cycle, was convicted for a false-flag

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[56] Defining prohibited censorship as including "deplatform[ing]," "de-boost[ing]," and "deny[ing] equal access or visibility to." *Id.* §§ 143A.001(1), 143A.002.

[57] Fla. Stat. § 501.2041(1)(b).

[58] *Id.* § 501.2041(2)(h) (emphasis added).

campaign on social media that encouraged supporters of presidential candidate Hillary Clinton to "vote" via text message or social media, including by posting notices stating "Avoid the Line. Vote from Home," "Text 'Hillary' to 59925," and "Vote for Hillary and be a part of history," resulting in at least 4,900 unique telephone numbers responding to that misleading entreaty.[59]

Similarly, Florida's and Texas's laws likely would stop any effort to moderate or remove deceptive social media campaigns akin to the 2018 effort led by "Democratic tech experts" to aid U.S. Senate candidate Doug Jones by falsely posing as conservative Alabamians who were discouraging votes for Republican Roy Moore.[60]

Finally, the deeply considered decisions to deplatform Trump in the wake of the violent January 6 attacks would have been impossible during the time in which he was considered to be a

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[59] *Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race* (Mar. 31, 2023), https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016 ("The fine print at the bottom of the deceptive image stated: 'Must be 18 or older to vote. One vote per person. Must be a legal citizen of the United States. Voting by text not available in Guam, Puerto Rico, Alaska or Hawaii. Paid for by Hillary For President 2016.' The tweet included the typed hashtag '#ImWithHer,' a slogan frequently used by Hillary Clinton.").

[60] Scott Shane and Alan Blinder, *Secret Experiment in Alabama Senate Race Imitated Russian Tactics*, N.Y. Times (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/alabama-senate-roy-jones-russia.html.

candidate for office. Florida's law expressly prohibits a platform from "willfully deplatform[ing]" a known "candidate for office" and requires restoration of access for a deplatformed candidate.[61]

C. Florida's and Texas's Social Media Laws Do Not Contain Clear, Workable, and Constitutional Exceptions That Would Allow Social Media Platforms to Exclude or Demote Dangerous Political Content Without Risking Liability.

Both Texas's and Florida's laws specify particular exceptions to their "censorship" limitations and contain carveouts for editorial discretion permitted by federal law. Seemingly none of these exceptions, however, would permit platforms to engage in the range of activity necessary to mitigate harm from destabilizing attacks on election integrity without exposing them to substantial risk of liability.

The Texas law permits content moderation,

- to "prevent[] the sexual exploitation of children and protect[] survivors of sexual abuse from ongoing harassment," provided the censored expression "is the subject of a referral or request from an organization";

- to curtail expression that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion,

[61] Fla. Stat. §§ 106.072(2); 501.2041(1)(c).

national origin or ancestry, age, sex, or status as a peace officer or judge"; or

- to limit "unlawful expression."[62]

For its part, Florida only permits the removal of content that is "obscene."[63]

Blocking, demoting, or limiting access to statements casting baseless aspersions on electoral results, which have fueled (and may in the future fuel) unprecedented violence and attacks on the democratic process, do not fall within these exceptions. For example, social media posts by those promoting or engaging in the January 6 insurrection were not obscene, did not involve sexual exploitation, and did not necessarily include a direct call to violence, much less a call to likely imminent violence that would be actionable under *Brandenburg*. To the contrary, this type of "reprehensible" or "false speech" falls squarely within content the States seek to protect and to insulate from platforms' content moderation efforts on the basis that users could decide for themselves if the ideas warrant consideration, irrespective of the possible consequences on the proper and safe administration of elections.[64]

Even calls for "wild" protests do not clearly fall within the exceptions because whether the rhetoric "directly" incites criminal activity or violence is at

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[62] Tex. Civ. Prac. & Remedies Code § 143A.006(a)(2)-(4).

[63] Fla. Stat. § 501.2041(4).

[64] Br. of Def.-Appellant, at *36, *NetChoice, LLC v. Paxton*, No. 21-51178, 2022 WL 717286, (5th Cir. Mar. 2, 2022).

least up for debate. Trump has renounced all responsibility for inciting the violent January 6 riots, and making a real-time editorial call to remove, deprioritize, or even comment on these statements would subject platforms to risks of litigation and substantial fines, damages, and attorneys' fees.[65] Indeed, in Florida, calls for violence or threats that fall short of criminal statements under *Brandenburg*, if made "by" a candidate, or in posts "about" a candidate or by a loosely defined journalistic enterprise, likely cannot be limited at all.[66]

The laws' carveouts for content moderation permitted under federal law offer little clarity, and do not necessarily reduce enforcement risks.[67] For example, Section 230 of the Communications Decency Act of 1996 provides that Internet service providers (including social media platforms) shall not be liable "on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy,

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[65] *See, e.g.*, Steve Holland & Andrea Shalal, *Trump Denies Any Responsibility for His Supporters' Congress Attack*, Reuters (Jan. 12, 2021), https://www.reuters.com/article/us-usa-trump-responsibility-idUSKBN29H26J; Fla. Stat. § 501.2041(5)-(7); *id.* § 106.072(3); Tex. Civ. Prac. & Remedies Code § 143A.007(b)(1); *id.* § 143A.008(b).

[66] Fla. Stat. § 501.2041(2)(h), (j); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 488-89 (5th Cir. 2022).

[67] Tex. Civ. Prac. & Remedies Code § 143A.006(a)(1); *see also id.* § 143A.004(d); *id.* § 143A.005; Fla. Stat. § 501.2041(9); *id.* § 106.072(5).

excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]"[68]

But unless Section 230's latitude for a platform to remove content that it "considers to be . . . otherwise objectionable" preempts these state laws—a question not presently before the Court—platforms remove dangerous election-related content at their peril, as Florida and Texas assert that Section 230 adds limited or no protections.

First, Section 230, as interpreted by the States, protects "good faith" removal of objectionable content.[69] Yet Florida's law explicitly provides that "[s]ocial media platforms that unfairly censor, shadow ban, deplatform, or apply post-prioritization algorithms to Florida candidates, Florida users, or Florida residents are not acting in good faith."[70]

Second, Section 230, according to Florida and Texas, would not extend exceptions far beyond removing "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" content because the meaning of the term "otherwise objectionable" is constrained by the preceding enumerated grounds.[71] Any Internet user's campaign to undermine an

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[68] 47 U.S.C. § 230(c)(2)(A).

[69] *Id.*

[70] S.B. 7072, Fla. Senate, 2021 Session, §1(7) (2021).

[71] Defs.' Opp. to Mtn. for Preliminary Injunction, 9-13, 16-17, *NetChoice, LLC v. Moody*, No. 4:21-cv-00220-RH-MAF, (N.D. Fl. June 21, 2021); Br. of Def.-Appellant, at *35, *NetChoice, LLC v. Paxton*, No. 21-51178, 2022 WL 717286, (5th Cir. Mar. 2, 2022).

election—including a politician's steadfast claim that cheating or fraud occurred, even in the face of all available evidence—does not fit squarely within the aforementioned Section 230 categories.

Finally, the States argue that Section 230 does not permit any additional content moderation because it only limits liability for damages; thus, they say, the States may even enjoin content moderation that Section 230 permits.[72] If this assertion is correct or even uncertain, platforms would moderate political content at their peril.

Thus, the statutory exceptions in the Florida and Texas state laws that purport to yield to federal law may not, as a practical matter, permit platforms to limit damaging lies about the election and mitigate the violent fallout without risking exposure to liability. At the very least, a law that would require platforms in real time to determine how to reconcile federal and state law on disputed issues before exercising editorial discretion is unconstitutionally vague and will have an impermissible chilling effect.

D. The First Amendment Forbids Eliminating Platforms' Editorial Discretion and Forcing Them to Have Their Property Used to Undermine Free Elections in the Name of Equalizing Speech.

No one could seriously contest the unconstitutionality of a law that would compel *The Wall Street Journal* to print on the front page of its newspaper each day Donald Trump's 400 post-

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[72] *Id.*

election tweets calling the 2020 election results into question or his January 6 messages advocating for election subversion. The conclusion that such a law would violate the First Amendment flows easily from *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and its progeny. The *Journal*, in exercising its speech rights, decides what content is worthy of inclusion, how the content is organized, and the general editorial direction of the newspaper. Those who do not like such editorial decisions are free to read other newspapers.

The same principles apply to the content moderation decisions of the platforms, for reasons fully described in NetChoice and CCIA's Briefs on the Merits[73] and in the Solicitor General's Brief for the United States as Amicus Curiae at the cert. stage, at pages 13-18. The state laws at issue here would have required Trump's content to be displayed, prominently and unmediated, by the platforms, even after the attack on the Capitol. They would deprive the platforms of the same speech rights to which the *Journal* is entitled.

Neither newspapers nor platforms (nor for that matter bookstores, television stations, or movie theaters) should be compelled by states give up their editorial discretion to those who would promote election subversion or support election-related violence. Instead, the corporations who run these entities have the right to edit and curate their content consistent with their discretion and with sound corporate responsibility.

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[73] Br. For Resp'ts in No. 22-277, 18-52 (Nov. 30, 2023), Br. For Pet'rs in No. 22-555, 18-53 (Nov. 30, 2023).

Rather than repeat the correct First Amendment arguments of NetChoice, CCIA, and the U.S., we briefly emphasize two points.

First, it is absurd to argue that the platforms are more like common carriers such as telephone companies subject to viewpoint antidiscrimination provisions than like *The Wall Street Journal*. As Professor Eugene Volokh, one of the originators of the common carrier analogy, explains, what separates entities such as newspapers from entities such as phone companies is whether they produce a "coherent speech product."[74] Those who do are entitled under the First Amendment to exercise editorial discretion.

Platforms surely do produce such coherent products, despite what Professor Volokh suggests.[75] Of course the public reasonably associates a controversial politician's speech with a platform's editorial message. People may be attracted to or repulsed by Trump's speech on a platform, but they will perceive that speech as part of the platform's overall message. (In contrast, no one perceives private text messages sent over AT&T's network as AT&T's speech.) People know that Truth Social, where Trump commonly posts, is different from a platform where people rarely, if ever, see posts from Trump or a platform marketed to Democrats

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[74] Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 404-05 (2021).

[75] *See* Hasen, *Cheap Speech*, at 126, 220–21 n.85.

organized around criticizing Trump.[76]

It should be no surprise that after Elon Musk took over Twitter and changed its moderation policies to make the platform's content less trustworthy and more incendiary, users and advertisers reevaluated the platform's strengths and weaknesses, with many choosing to leave.[77] Content moderation policies shape how the public perceives a platform's messages. Content moderation decisions—including Mr. Musk's, whether wise or not—*are* the exercise of editorial discretion. The public then decides which platforms to patronize, value, or devalue.

Even if the law treated platforms as common carriers for some purposes by requiring them to carry certain content, Professor Volokh writes that

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[76] *See* Br. of Amici Curiae Electronic Frontier Foundation and Protect Democracy, 6-9, *NetChoice, L.L.C. v. Att'y Gen.*, Case No. 21-12355, (11th Cir. Nov. 14, 2021) (discussing various ideologically focused social media platforms and their terms of use that disclose such leanings to users).

[77] Will Oremus et al., *A Year Later Musk's X is Tilting Right. And Sinking*, Wash. Post (Oct. 27, 2023), https://www.washingtonpost.com/technology/2023/10/27/elon-musk-twitter-x-anniversary; Steven Lee Myers, Stuart A. Thompson, and Tiffany Hsu, *The Consequences of Elon Musk's Ownership of X*, N.Y. Times (Oct. 27, 2023), https://www.nytimes.com/interactive/2023/10/27/technology/twitter-x-elon-musk-anniversary.html ("Now rebranded as X, the site has experienced a surge in racist, antisemitic and other hateful speech. Under Mr. Musk's watch, millions of people have been exposed to misinformation about climate change. Foreign governments and operatives — from Russia to China to Hamas — have spread divisive propaganda with little or no interference.").

"platforms retain the First Amendment right to choose what to include in . . . recommendations and what to exclude from them."[78] For reasons explained above, certain decisions to recommend some content over others would violate both Florida's and Texas's laws, rendering such laws unconstitutional even as applied to common carriers.

Second, Florida's and Texas's laws seek to equalize political speech in violation of this Court's First Amendment jurisprudence. In his amicus brief supporting cert. in the Florida litigation, Trump approvingly quoted Professor Volokh on an equalization rationale for treating platforms like common carriers: "Recent experience has fostered a widespread and growing concern that behemoth social media platforms . . . have 'seriously leverage[d their] economic power into a means of affecting the community's political life.'" Br. Donald J. Trump as Amicus Curiae in Support of Petitioners in No. 22-277 at 2 (quoting Professor Volokh).

But this Court has repeatedly rejected the "anti-distortion" rationale that government may limit the voice of some to enhance the relative voice of others. *See e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 349-56 (2010); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

This Court also has held the government is powerless to prevent those with greater economic power from leveraging that power through political

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[78] Volokh, *supra* note 74, at 382. "Recommendations" includes newsfeeds. *Id.* at 409.

speech: "It is irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.' [Citation.] All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Citizens United*, 558 U.S. at 351.

So long as this Court is going to continue to read the First Amendment in this fashion in the campaign finance context, it would be squarely inconsistent to uphold Florida's and Texas's speech equalization mandates in the social media context.

CONCLUSION

For the foregoing reasons, this Court should hold that the content moderation provisions in both Florida's and Texas's laws are unconstitutional under the First Amendment.

DECEMBER 5, 2023

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