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, DBA NETCHOICE, ET AL.

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

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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QUESTIONS PRESENTED

These cases concern laws enacted by Florida and Texas to regulate major social-media platforms like Facebook, YouTube, and X (formerly known as Twitter). The relevant provisions of the laws differ in some respects, but both laws (1) restrict covered platforms' ability to engage in content moderation by removing, editing, or arranging the user-generated content presented on their websites, and (2) require covered platforms to provide individualized explanations for certain forms of content moderation. The questions presented are:

1. Whether the laws' content-moderation restrictions comply with the First Amendment.

2. Whether the laws' individualized-explanation requirements comply with the First Amendment.

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INTEREST OF THE UNITED STATES

These cases present questions about whether and to what extent the First Amendment permits States to regulate social-media platforms. Congress has enacted laws governing the communications industry, including social-media platforms. See, *e.g.*, 47 U.S.C. 230. The United States thus has a substantial interest in the resolution of the questions presented. At the invitation of

the Court, the United States filed a brief as amicus curiae at the petition stage of these cases.

STATEMENT

A. Background

1. These cases concern large social-media platforms—specifically, websites and corresponding mobile applications that allow users to "upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share." *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 480 (2023). Facebook, for example, allows users to "share status updates, photos, videos, and links," and to "follow" pages maintained by their family and friends, as well as "businesses, organizations, and public figures." *Paxton* J.A. 138a.[1] "YouTube is an online platform that allows users to create, upload, and share videos." *Id.* at 108a. And X (formerly known as Twitter) allows users to post text, pictures, and videos, and to follow and reply to posts by others. See *Knight First Amendment Inst.* v. *Trump*, 928 F.3d 226, 230 (2d Cir. 2019), vacated, 141 S. Ct. 1220 (2021).

Social-media platforms differ from "traditional media outlets" like newspapers because they do not "create most of the original content on [their] site[s]." *Moody* Pet. App. 5a. But they also differ from "internet service providers" and other communications services that simply "transmit[] data from point A to point B." *Id.* at 5a-6a. A user who visits Facebook, YouTube, or X is not presented with an undifferentiated stream of other users' posts, but instead sees "a curated and

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[1] We cite the joint appendix in No. 22-555 as "*Paxton* J.A." and the joint appendix in No. 22-277 as "*Moody* J.A." We use the same convention for the petition appendices and briefs.

edited compilation of content," *id.* at 6a, that reflects the platform's editorial choices in a variety of ways.

To begin, the platform "will have removed posts that violate its terms of service or community standards" and excluded users that have violated its rules. *Moody* Pet. App. 6a; see *Paxton* J.A. 70a-78a. Many platforms prohibit violent, fraudulent, and pornographic content. *Paxton* J.A. 70a-71a. Platforms have also adopted many other rules based on "the kind of online community [they] wish[] to foster and what speech and speakers [they] wish[] to associate with or avoid." *Id.* at 78a. For example:

- "YouTube generally attempts to remove content that supports Nazi ideology." *Id.* at 83a.
- Facebook seeks to "identify[] and proactively suppress[] racist content" and "antisemitic content." *Id.* at 85a.
- Many platforms "limit material that would encourage eating disorders or other forms of destructive self-harm." *Id.* at 86a.

The content a user sees is also shaped by other forms of moderation that seek to "promote various values and viewpoints." *Moody* Pet. App. 7a. YouTube, for example, "extensively" relies on age restrictions that prevent teenagers or younger children from viewing videos that include "vulgar language," "provocative poses," or content related to illegal drugs. *Paxton* J.A. 74a. Platforms may also "attach warning labels, disclaimers, or general commentary informing users that certain user-submitted content has either not been verified by official sources or may contain upsetting imagery." *Id.* at 75a. YouTube, for example, displays information about

the National Suicide Prevention Hotline "in response to search queries for terms related to suicide." *Id.* at 114a.

Finally, when a user visits a platform, the platform "will have arranged [the] available content by choosing how to prioritize and display" posts and advertisements, often using automated algorithms. *Moody* Pet. App. 6a. Facebook, for example, "displays ranked content in a curated News Feed," which "uses algorithms to show a constantly updated and personalized list of stories" to each user. *Paxton* J.A. 139a. Other platforms likewise seek to increase user engagement and advertising revenue by presenting users with a customized feed of posts and advertisements based on their expressed interests and past activity. See *Twitter*, 598 U.S. at 480-481. And platforms tailor their algorithms to promote favored content and suppress disfavored content—by, for example, highlighting trustworthy sources of information after a "breaking news event" or demoting "'borderline content'" that comes close to violating their terms of service. *Paxton* J.A. 113a-114a.

2. The largest social-media platforms host billions of pieces of content and are constantly engaged in content moderation on a vast scale. "In the first quarter of 2021, Facebook removed 8.8 million pieces of 'bullying and harassment content,' 9.8 million pieces of 'organized hate content,' and 25.2 million pieces of 'hate speech content.'" *Paxton* J.A. 80a. "In the last three months of 2020," "YouTube removed just over 2 million channels and over 9 million videos." *Id.* at 82a. And "[i]n the last six months of 2020, Twitter took action against 3.5 million accounts, suspended over 1 million accounts, and removed 4.5 million pieces of content." *Ibid.*

Like newspapers, broadcast television stations, and other traditional media outlets, large social-media

platforms are for-profit companies in the business of selling advertisements, and they devote substantial resources to content moderation in order to attract and retain users and advertisers. For many platforms, "a substantial proportion of the value provided to users is the service's arrangement of relevant, useful, or entertaining information in a way that provides the sort of content and experience that the user is seeking." *Paxton* J.A. 92a. Users who confront harassing, offensive, or pornographic content may respond by spending less time on the platform or abandoning it for one that provides a better experience. *Id.* at 97a. Advertisers, for their part, do not want their ads displayed alongside objectionable content, and platforms have "lost millions of dollars in advertising revenue" when companies pulled ads "after seeing them distributed next to videos containing extremist content and hate speech." *Id.* at 103a.

3. These cases arise from two laws enacted in 2021 by Florida and Texas to regulate large social-media platforms: Florida S.B. 7072 (Ch. 2021-32, Laws of Fla.) and Texas H.B. 20 (2021 Tex. Gen. Laws 3904). The details of the laws differ, but both include two types of requirements relevant here. First, the laws' content-moderation provisions restrict platforms' choices about whether and how to present user-generated content to the public. Second, the laws' individualized-explanation provisions require platforms to explain particular content-moderation decisions to affected users.[2] Two trade associations representing platforms (collectively, NetChoice) brought suits asserting that the laws violate the First Amendment.

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[2] Both laws also include other provisions, including general disclosure requirements, that are not at issue here.

B. The Florida Litigation

1. Florida enacted S.B. 7072 in May 2021. *Moody* Pet. App. 7a. The law regulates "[s]ocial media platform[s]" that have "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants." Fla. Stat. § 501.2041(1)(g)(4).

S.B. 7072 restricts forms of content moderation it calls censoring, shadow banning, deplatforming, and post-prioritization. The law defines "[c]ensor" to "include[] any action taken" to "restrict, edit, alter" or "post an addendum to any content or material posted by a user." Fla. Stat. § 501.2041(1)(b). A "[s]hadow ban" is an action "to limit or eliminate the exposure of a user or content or material posted by a user." *Id.* § 501.2041(1)(f). "Deplatform[ing]" means banning a user or deleting her posts for "more than 14 days." *Id.* § 501.2041(1)(c). And "[p]ost-prioritization" includes any action "to place, feature or prioritize certain content or material" on the platform. *Id.* § 501.2041(1)(e).

S.B. 7072 broadly prohibits platforms from engaging in the defined types of content moderation with respect to certain users and topics. It provides, for example, that "[a] social-media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." Fla. Stat. § 501.2041(2)(j). It further provides that a platform "may not willfully deplatform a candidate" for public office, *id.* § 106.072(2), or use "post-prioritization or shadow banning algorithms for content and material posted by or about" a candidate. *Id.* § 501.2041(2)(h).

S.B. 7072 also provides that a platform must "apply censorship, deplatforming, and shadow banning standards in a consistent manner." Fla. Stat. § 501.2041(2)(b).

It prohibits platforms from changing their terms of service more than "once every 30 days." *Id.* § 501.2041(2)(c). And it requires platforms to allow users to "opt out" of post-prioritization algorithms and instead choose to see posts in "sequential or chronological" order. *Id.* § 501.2041(2)(f)(2) and (g).

In addition to those content-moderation requirements, S.B. 7072 requires a platform to provide an individualized explanation to a user if it removes or alters her posts. Fla. Stat. § 501.2041(2)(d)(1). The notice must be delivered within seven days and must contain both "a thorough rationale" for the action and an explanation of how the platform "became aware" of the post. *Id.* § 501.2041(3)(c) and (d).

S.B. 7072's provisions related to political candidates are enforced by the Florida Elections Commission, which can impose fines of up to $250,000 per day. Fla. Stat. § 106.072(3). The law's other provisions can be enforced either by the State or through private suits for damages and injunctive relief. *Id.* § 501.2041(5) and (6) (authorizing up to $100,000 in damages per violation).

2. NetChoice brought a pre-enforcement challenge to S.B. 7072 in the Northern District of Florida. The court granted a preliminary injunction barring enforcement of the statute. *Moody* Pet. App. 68a-95a.

3. The Eleventh Circuit affirmed in part and reversed in part. *Moody* Pet. App. 1a-67a. As relevant here, the court held that "social-media platforms' content-moderation activities" are "'speech' within the meaning of the First Amendment." *Moody* Pet. App. 48a; see *id.* at 19a-48a. The court thus held that S.B. 7072's "content-moderation restrictions are subject to either strict or intermediate First Amendment scrutiny, depending on whether they are content-based or content-neutral."

Id. at 55a. And the court concluded that it is "substantially likely that none of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny." *Id.* at 57a.

The Eleventh Circuit also determined that NetChoice is likely to succeed in its challenge to S.B. 7072's individualized-explanation requirement. *Moody* Pet. App. 64a-65a. The court deemed it "substantially likely" that S.B. 7072's "requirement that platforms provide notice and a detailed justification" for each content-moderation action would chill "platforms' exercise of editorial judgment." *Id.* at 64a-65a.

C. The Texas Litigation

1. Texas H.B. 20 regulates social-media platforms that have "more than 50 million active users in the United States in a calendar month." Tex. Bus. & Com. Code Ann. § 120.002(b). Although H.B. 20 differs in some respects from Florida's law, it similarly imposes content-moderation and individualized-explanation requirements.

With some exceptions, H.B. 20's content-moderation provisions prohibit "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person" based on "(1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in [Texas]." Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a); see *id.* § 143A.006 (exceptions). The law defines "[c]ensor" as "to block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against." *Id.* § 143A.001(1).

H.B. 20 also requires that "concurrently with the removal" of user content, the platform shall "notify the

user" and "explain the reason the content was removed." Tex. Bus. & Com. Code Ann. § 120.103(a)(1). H.B. 20 additionally requires platforms to "allow the user to appeal the decision to remove the content to the platform," *id.* § 120.103(a)(2), and compels platforms to address those appeals within 14 days, *id.* § 120.104.

H.B. 20 can be enforced in suits for declaratory or injunctive relief by users and by the Texas Attorney General. Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.007, 143A.008. "[I]f a social media platform fails to promptly comply with a court order" enforcing the law, H.B. 20 authorizes "daily penalties sufficient to secure immediate compliance." *Id.* § 143A.007(c).

2. NetChoice brought a pre-enforcement challenge to the relevant provisions of H.B. 20 in the Western District of Texas, and the district court issued a preliminary injunction. *Paxton* Pet. App. 143a-185a. The Fifth Circuit stayed the injunction pending appeal, but this Court vacated the stay. 142 S. Ct. 1715.

3. A partially divided Fifth Circuit panel reversed the preliminary injunction. *Paxton* Pet. App. 1a-142a.

a. The Fifth Circuit held that platforms' content-moderation activities are "not speech," *Paxton* Pet. App. 113a, and are instead "censorship" that States may freely regulate without implicating the First Amendment. *Id.* at 55a. The court further held that, even if content moderation warrants First Amendment protection, H.B. 20's content-moderation restrictions "satisf[y] intermediate scrutiny." *Id.* at 91a. The Fifth Circuit also upheld H.B. 20's individualized-explanation requirement. *Id.* at 91a-99a. The court took the view that even if the platforms' activities constitute speech, the individualized-explanation requirement does not unduly burden that speech because the platforms "already

provide an appeals process substantially similar" to what H.B. 20 requires for some types of content-moderation decisions. *Id.* at 96a.

b. All three members of the panel wrote separately. In a portion of the majority opinion speaking only for himself, see *Paxton* Pet. App. 2a n.*, Judge Oldham explained his view that H.B. 20's content-moderation provisions are "permissible common carrier regulation." *Id.* at 55a; see *id.* at 55a-80a. Judge Jones concurred to emphasize her view that platforms' content-moderation activities are not protected by the First Amendment. *Id.* at 114a-116a. And Judge Southwick concurred in the court's analysis of the individualized-explanation requirement, but dissented from its analysis of the content-moderation provisions. *Id.* at 117a-142a.

SUMMARY OF ARGUMENT

I. The content-moderation provisions of S.B. 7072 and H.B. 20 violate the First Amendment.

Social-media companies are engaged in expressive activity when they decide which third-party content to display to their users and how to display it. This Court has long recognized that presenting a curated compilation of third-party speech is itself a form of speech. That aptly describes what the platforms do: Like publishers, editors, and parade organizers, they shape third-party speech into compilations that constitute distinct expressive offerings reflecting the platforms' own values, priorities, and viewpoints. Laws requiring platforms to present content they deem harmful, offensive, or otherwise objectionable thus implicate the First Amendment.

The States assert that platforms are equivalent to services that can be subjected to common-carrier regulation, such as telephone and telegraph providers. But

unlike those providers, the platforms are not merely conduits transmitting speech from one person to another. Instead, they are media companies presenting their own expressive offerings. The States also emphasize the scale and influence of the large platforms. Those circumstances might be relevant in deciding whether a regulation governing the platforms withstands First Amendment scrutiny. But this Court has rejected the suggestion that a media company's prominence or power strips its editorial choices of First Amendment protection.

The conclusion that the First Amendment applies to the platforms' content-moderation activities does not mean that the platforms are immune from regulation. Like other media companies, platforms are subject to the antitrust laws and a wide range of other general regulations targeting conduct rather than speech. And even regulations targeting the platforms' expressive activities could be consistent with the First Amendment if they are content-neutral and do not burden substantially more speech than necessary to further legitimate government interests. A holding that the platforms are engaged in expressive activity means only that First Amendment scrutiny applies, not that all regulation is impermissible.

Here, however, the States have failed to justify the content-moderation requirements under any potentially applicable form of First Amendment scrutiny. The States assert that the requirements serve an interest in ensuring that the public has access to diverse sources of information. But this Court has repeatedly rejected the suggestion that the government has a valid interest in increasing the diversity of views *presented by a particular private speaker*—even if that speaker

controls a powerful or dominant platform. And because the only interest the States have asserted here is a bare desire to change the way private social-media platforms are exercising their editorial discretion, the Court need not consider how the First Amendment might apply to different regulations justified by different interests.

II. The individualized-explanation requirements also violate the First Amendment because they impose unjustified burdens on the platforms' expressive activity. Those requirements compel platforms to provide an individualized explanation each time they choose to remove or otherwise moderate user content. Disclosure requirements applicable to commercial actors are generally subject to deferential review, and a variety of disclosure requirements that might apply to the platforms would be consistent with the First Amendment. But the individualized-explanation requirements cannot withstand even deferential scrutiny because they impose a penalty in the form of administrative costs and potential liability each time a platform engages in a form of expressive activity. Given the millions of moderation decisions the platforms make each day, that burden is substantial and likely to chill protected activity.

ARGUMENT

I. THE CONTENT-MODERATION PROVISIONS VIOLATE THE FIRST AMENDMENT

"The question at the core" of these cases is whether social-media platforms "are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate." *Moody* Pet. App. 3a. The Eleventh Circuit correctly held that the answer to that question is yes: When platforms decide which third-party content to present and how to present it, they engage in expressive activity protected by the

First Amendment because they are creating expressive compilations of speech.

That does not mean that social-media platforms are immune from regulation, any more than traditional media companies are immune from regulation. But the content-moderation restrictions imposed by S.B. 7072 and H.B. 20 trigger First Amendment scrutiny because they directly target the platforms' expressive choices—including by forcing platforms to present and promote content they regard as objectionable. And the Eleventh Circuit correctly held that those restrictions cannot survive any potentially applicable form of First Amendment review.

A. The Content-Moderation Provisions Restrict Expressive Activity Protected By The First Amendment

This Court has long held that presenting an edited compilation of speech created by others is expressive activity. Bookstores, editorial pages, parades, and others are thus protected by the First Amendment when they choose which speech to present and how to present it. The First Amendment does not, however, reach every act that merely facilitates third-party speech. Telecommunications carriers, for example, can be made to serve all comers because they are not engaged in expressive activity when they transmit their customers' speech from one place to another.

Under those principles, social-media platforms are protected by the First Amendment because their websites are expressive compilations that reflect the platforms' values, priorities, and viewpoints. The platforms shape and present collections of content they believe will attract users and advertisers. To do that, they make editorial and curatorial choices about what content should be allowed and how it should be prioritized,

arranged, and contextualized. Those choices are protected expressive activity even though the vast majority of the content comes from third parties, and even though the platforms remove only a small fraction of the content submitted by their users.

1. Presenting a compilation of third-party speech is expressive activity

a. This Court has repeatedly held that "the presentation of an edited compilation of speech generated by other[s]" is protected by the First Amendment. *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 570 (1995). The Court has emphasized, for example, that such presentations are "a staple of most newspapers' opinion pages," which "fall squarely within the core of First Amendment security." *Ibid.* The Court has applied that principle in a long line of cases.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court held that Florida violated the First Amendment by enacting a law giving politicians a "right to equal space to reply to criticism" published "by a newspaper." *Id.* at 243. The Court explained that "[a] newspaper is more than a passive receptacle or conduit," and that choices about the "material to go into a newspaper" thus constitute "the exercise of editorial control and judgment" protected by the First Amendment. *Id.* at 258.

In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986) (*PG&E*), the Court held that California could not require a utility that distributed a newsletter in its billing envelopes to separately include material submitted by a consumer-advocacy group opposed to the utility. *Id.* at 21 (plurality opinion). That requirement implicated the First

Amendment because it compelled the company to "disseminate hostile views" and to "alter its own message as a consequence." *Id.* at 14, 16.

In *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) (*Turner I*), the Court held that "cable operators" are "entitled to the protection of the * * * First Amendment" when they select the channels to offer to customers. *Id.* at 636. The Court ultimately held that a federal statute requiring operators to set aside channels to carry local broadcast stations survived intermediate scrutiny. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 224-225 (1997) (*Turner II*). But the Court began with the premise that a cable operator engages in expressive activity when it "exercis[es] editorial discretion over which stations or programs to include in its repertoire." *Turner I*, 512 U.S. at 636.

In *Hurley*, the Court held that Massachusetts could not require the sponsors of Boston's St. Patrick's Day parade to "include among the marchers a group imparting a message the organizers do not wish to convey." The Court explained that the "selection of contingents to make a parade" is entitled to First Amendment protection because "every participating unit affects the message conveyed." 515 U.S. at 570, 572. And the Court held that the sponsor's decision "to exclude a message it did not like from the communication it chose to make" was "enough to invoke its right as a private speaker to shape its expression," *id.* at 574.

In all of those contexts, the Court recognized that an entity engages in "communicative acts" entitled to First Amendment protection when it makes decisions about whether and how to present expressive content as part of a "compilation of the speech of third parties." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666,

674 (1998). The same principle applies to a publishing house, a bookstore, a theater, and many other presenters of third-party speech that have long been understood to enjoy First Amendment protection. The unifying feature of those examples is that a party is compiling third-party speech to create its own expressive offering: A newspaper, a newsletter, a slate of channels, a parade, or a collection of books or performances. The party doing the compiling may be more or less selective, and it may not agree with all of the third-party speech that it includes. But the compilation is still its own expressive offering that conveys messages distinct from those in its component parts.

b. NetChoice relies on many of the same precedents, but sometimes errs by suggesting that they establish a more sweeping principle. It asserts, for example, that "the dissemination of speech is itself speech within the First Amendment." NetChoice *Moody* Br. 15; see, *e.g.*, *id.* at 17, 20, 40. Similarly, NetChoice states that the First Amendment applies whenever a party "provide[s] a forum for third-party speech." NetChoice *Paxton* Br. 21 (brackets and citation omitted). As the foregoing discussion illustrates, disseminating or providing a forum for third-party speech is often expressive activity. But not always.

For example, telegraph and telephone companies surely disseminate speech, but they may nonetheless be subjected to the sort of "nondiscrimination rules the common law sometimes imposed on common carriers." *303 Creative, LLC* v. *Elenis*, 600 U.S. 570, 590 (2023) (citing *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1, 14 (1894)); see 47 U.S.C. 201-202. The same is true of FedEx and UPS, even though they ship written material from one place to another. As NetChoice itself

elsewhere recognizes, such services are not protected by the First Amendment because they are merely "conduits for the speech of others." NetChoice *Moody* Br. 49 (brackets and citation omitted). Unlike the editors of a newspaper or the sponsors of a parade, they do not compile the speech they are transmitting into any new "form of expression." *Hurley*, 515 U.S. at 568. The collection of speech that happens to be occurring on Verizon's phone lines at a given moment is not an expressive compilation presented to an audience. Neither is the collection of documents that happens to be on a particular FedEx truck. Transmitting a particular call or letter thus does not alter any protected expression by Verizon or FedEx themselves.

This Court has relied on the same principle in cases about hosting speech on physical property. In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court rejected a shopping mall's First Amendment challenge to a state law requiring it to allow members of the public to distribute handbills in the mall. *Id.* at 85-88. That holding rested on the Court's conclusion that compelled access would not affect the mall owner's "exercise of his own right to speak" because he was not engaged in expressive activity. *PG&E*, 475 U.S. at 12.

Similarly, in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), the Court reiterated that an entity cannot assert a First Amendment objection to facilitating third-party speech when the entity is not engaged in "inherently expressive" activity. *Id.* at 64. *FAIR* concerned a statute that compelled law schools to allow the military to participate in on-campus recruiting. See *id.* at 60. The Court held that the schools had no First Amendment right to exclude the military based on their disapproval of its

policies because "the schools are not speaking when they host interviews and recruiting receptions." *Id.* at 64. The Court explained that because "[a] law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," the forced "accommodation of a military recruiter's message" did not "interfere with any message of the school." *Ibid.*

The lesson from those precedents is that a party that merely transmits or hosts speech by others is not necessarily engaged in activity protected by the First Amendment, even when it seeks to exclude particular speech it would prefer not to include. Instead, the question is whether the party is creating its own expressive compilation or otherwise engaged in expressive activity that would be affected by the challenged regulation.

2. Social-media platforms engage in expressive activity when they decide which third-party speech to present and how to present it

Like publishers, parade organizers, and cable operators, the companies that run social-media platforms "are in the business of delivering curated compilations" that primarily consist of speech created by others, but that constitute distinct expressive offerings. *Moody* Pet. App. 26a. Accordingly, when the platforms decide which content to present and how it should be presented, they are exercising the same sort of "editorial discretion" that this Court "recognized in *Miami Herald*, *PG&E*, *Turner*, and *Hurley*." *Paxton* Pet. App. 129a-130a (Southwick, J., concurring in part and dissenting in part).

a. Social-media platforms do not merely transmit speech from one place to another or host speech while engaged in nonexpressive activities. The major

platforms are media companies whose core business is creating and presenting an expressive product to the public to attract users and sell advertisements. And they often do so through a medium that has become a central vehicle for expression in the Internet age: a website. See *303 Creative*, 600 U.S. at 587; *Reno* v. *ACLU*, 521 U.S. 844, 852-853, 870 (1997).

A user who visits a social-media website (or uses the corresponding mobile application) is presented with a curated collection of third-party speech that the platform believes will be of interest to the user, along with elements of the platform's own speech and advertisements. See pp. 2-4, *supra*. The combination of these elements produces "an inherently expressive" compilation, *FAIR*, 547 U.S. at 64: A user takes in not only the messages presented by other users, but also the overall messages conveyed by the combination of content the platform has shaped and presented. The platforms' choices about which content to display to which user, in what form and what order therefore constitute "the exercise of editorial control and judgment" protected by the First Amendment. *Tornillo*, 418 U.S. at 258.

A government requirement that a platform include or promote content that it wishes to exclude or minimize implicates the First Amendment because it alters the expressive compilations the platform presents to its users. The consequences of the various restrictions imposed by S.B. 7072 and H.B. 20 illustrate the point:

- Under S.B. 7072, a platform could not remove, demote, contextualize, or restrict access to a post by a candidate or "journalistic enterprise"—even if the candidate or enterprise posted violent videos, hate speech, or other content to which the

platform objects. See Fla. Stat. §§ 106.072(2), 501.2041(2)(j) and (h); *Moody* Pet. App. 46a.

- Under H.B. 20's prohibition on viewpoint discrimination, a platform could not exclude, suppress, or restrict content supporting antisemitism, terrorism, drug use, suicide, or conspiracy theories unless it imposed the same restrictions on content opposing them. See Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a); see also *Paxton* J.A. 124a-127a (examples).
- S.B. 7072's bar on changes to terms of service more than once every 30 days would limit a platform's ability to quickly change its approach to a particular form of content in response to events—by, for example, prohibiting posts promoting "viral 'dares' that risk significant physical harm" or suppressing conspiracy theories that are spawning violence. *Paxton* J.A. 117a; see Fla. Stat. § 501.2041(2)(b) and (c).

b. In arguing that the platforms are not engaged in expressive activity, the States and the Fifth Circuit have asserted that the platforms' content-moderation activities are unprotected conduct akin to that of the shopping center in *PruneYard* and the law schools in *FAIR*. See *Paxton* Pet. App. 34a-48a; *Moody* Pet. 18-21; *Paxton* Br. in Resp. 18-19. That analogy is inapt.

PruneYard and *FAIR* stand for the proposition that an entity is not entitled to the First Amendment's protections when it refuses to "host" or "accommodate" third-party speech without engaging in expressive activity of its own. *FAIR*, 547 U.S. at 63. Neither the owner of the mall in *PruneYard* nor the law schools in *FAIR* could point to any "inherently expressive"

compilation they were producing through their hosting. *Id.* at 64. And *FAIR* specifically contrasted those circumstances with cases like *Tornillo* and *Hurley*, *ibid.*, where an entity's refusal to present third-party speech constitutes an exercise of the entity's "editorial control and judgment" about the content of its own expressive compilation, *Tornillo*, 418 U.S. at 258. Because social-media platforms compile user speech into websites that are themselves a form of expression, the relevant precedents here are *Tornillo* and *Hurley*, not *PruneYard* and *FAIR*.

3. The States' remaining arguments lack merit

a. The States and the Fifth Circuit have emphasized that although the major social-media platforms prioritize and arrange all of the content that appears on their websites, they do not remove or modify most of it; do not endorse the messages expressed by users; and are shielded from liability for third-party content under 47 U.S.C. 230(c)(1). The States and the Fifth Circuit have also highlighted the scale of the platforms and their resulting influence on public discourse. Those arguments identify important ways in which the platforms differ from traditional media companies, and those differences could in some circumstances be relevant in deciding whether regulations of the platforms withstand First Amendment scrutiny. But they do not take the platforms outside the First Amendment altogether.

First, it is undoubtedly true that the platforms do not remove or restrict the vast majority of user-submitted speech. Cf. *Moody* Pet. 15. But *Hurley* rejected a similar contention that the sponsors of the parade fell outside the First Amendment's coverage because they had been "rather lenient in admitting participants" and because their choice not to "edit their themes" more

stringently made it difficult to "isolate" their "exact message." 515 U.S. at 569. The Court explained that inclusion of third-party speech in an expressive compilation itself communicates a message that the speech is "worthy of presentation." *Id.* at 575. And the Court reaffirmed that a "particularized message" is not a precondition for First Amendment protection. *Id.* at 569.

Of course, the amount of speech available on major social-media platforms dwarfs that in a parade. But the constitutional principle turns on the nature of the platforms' activity—the presentation of an expressive compilation of speech—not the scale at which it occurs. And S.B. 7072 and H.B. 20 are specifically targeted at the subset of third-party speech "that platforms *do* review and remove or deprioritize." *Moody* Pet. App. 29a; see pp. 2-5, *supra*.

Second, and relatedly, the States suggest that viewers attribute the speech on social-media platforms to the users who post it, not to the platforms. *Moody* Pet. 20; *Paxton* Br. in Resp. 22, 24-25. But an audience will seldom attribute units within an expressive compilation to the compiler. Viewers of a parade, for example, do not assume that the sponsor created every float or agrees with all of the messages expressed. But audiences nonetheless correctly attribute to parade organizers, publishers, and other compilers the distinct messages communicated by the compilations as a whole. So too here: Viewers do not assume that social-media platforms endorse every message on their websites, but they do attribute to the platforms the messages communicated by the websites as a whole, which are a reflection of the platforms' choices about the content they deem worthy of presentation and the manner in which they choose to present it.

Third, the States emphasize that platforms are shielded from many forms of legal liability for third-party content under 47 U.S.C. 230(c)(1). *Paxton* Br. in Resp. 23. But the First Amendment's coverage does not depend on Congress's choices about damages liability. Instead, what matters is whether platforms are engaged in expressive activity. And on that score, social-media platforms are held accountable in the marketplace of ideas in much the same manner as other speakers. Users and advertisers correctly recognize that the platforms are responsible for their editorial decisions and choose to join or abandon platforms on that basis. See, *e.g.*, *Paxton* J.A. 97a-103a. Members of the public and their elected representatives have likewise criticized the platforms for the harms created by their editorial choices and the content they present.[3]

Fourth, the States and the Fifth Circuit have emphasized the dominant role that platforms like Facebook, YouTube, and X have come to play in our Nation's public discourse. In some sense, it is fair to say that, collectively, social-media platforms and other Internet outlets have become a kind of "modern public square." *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017). But each platform is nonetheless a "private entit[y]" that enjoys the "right[] to exercise editorial control over speech and speakers" that it presents. *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1932 (2019).

The States' contrary arguments echo the defenders of the right-of-reply law in *Tornillo*, who likewise

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[3] See, *e.g.*, *Social Media's Impact on Homeland Security: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs*, 117th Cong., 2d Sess. (Sept. 14, 2022) (testimony from executives of YouTube, Twitter, Facebook, and TikTok).

emphasized that "a communications revolution" had led to a press that was "noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion." 418 U.S. at 248-249. This Court acknowledged that "the concentration of control of media" had "place[d] in a few hands the power to inform the American people and shape public opinion." *Id.* at 249-250. The Court was not unsympathetic to those concerns, but it declined to create a new exception to the First Amendment's protection for private editorial choices. Here, too, the legitimate concerns about the harms caused by social media and concentration in the social-media industry do not justify the States' attempt to deny all First Amendment protection to the platforms' expressive activities.

b. At the certiorari stage, the States argued that the platforms are equivalent to telephone companies and other common carriers whose services are not shielded by the First Amendment. *Moody* Pet. 23-25; *Paxton* Br. in Resp. 19-20. And Texas asserted that any contrary argument is inconsistent with the government's defense of the net-neutrality regulations adopted by the Federal Communications Commission (FCC) in 2015, which classified broadband internet access service as a telecommunications service subject to common-carrier regulation. *Paxton* Supp. Br. 6-7; see *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd 5601 (2015).[4] Those arguments lack merit.

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[4] In 2018, the FCC issued a new order superseding the 2015 regulations and abandoning the common-carrier classification. See *In re Restoring Internet Freedom*, 33 FCC Rcd 311 (2018). Administrative and judicial proceedings on some aspects of the 2018 order remain pending. See *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 18 (D.C. Cir.

Unlike telephone companies and broadband providers, social-media platforms do not merely provide a service for transmitting speech; instead, they shape third-party speech into expressive compilations by editing, annotating, and arranging it. See pp. 18-22, *supra*. The platforms also differ from common carriers because they are openly engaged in removing and modifying content in accordance with their terms of service. See pp. 2-5, *supra*. The internet service providers covered by the net-neutrality regulations, in contrast, "'hold themselves out as neutral, indiscriminate conduits' to any internet content of a subscriber's own choosing." *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (*USTA*) (citation omitted) (Srinivasan, J., concurring in the denial of rehearing en banc).

To be sure, then-Judge Kavanaugh concluded that broadband providers are more like the cable operators addressed in *Turner* than the telephone companies permissibly subject to common-carrier regulation. *USTA*, 855 F.3d at 428-431 (Kavanaugh, J., dissenting from the denial of rehearing en banc). But the proper classification of broadband providers is not at issue here. The relevant point for present purposes is that Texas errs in asserting that the Court's conclusions about social-media platforms will dictate the treatment of internet service providers. To the contrary, judges on both sides of the net-neutrality issue have agreed that the First Amendment applies where, as here, a government seeks to "regulate the editorial decisions of Facebook," "YouTube," or "Twitter." *Id.* at 433; see *id.* at 392 (Srinivasan, J., concurring in the denial of rehearing en banc)

2019). In 2023, the FCC issued an NPRM proposing to return to a common-carrier classification. See *Safeguarding and Securing the Open Internet*, 88 Fed. Reg. 76,048 (Nov. 3, 2023).

(distinguishing broadband providers from "platforms such as Facebook, Google, Twitter, and YouTube").

4. Social-media platforms' expressive activities do not confer immunity from regulation

The conclusion that the First Amendment protects the platforms' content-moderation activities does not mean that the platforms are immune from regulation. The First Amendment poses no obstacle to data-privacy, consumer-protection, and other laws that regulate the platforms' nonexpressive activities. Content-neutral laws that target conduct rather than speech likewise pose no First Amendment problem even when they impose "incidental" burdens on expression. *FAIR*, 547 U.S. at 62. This Court has thus emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws." *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 670 (1991) (citation omitted). And like newspapers, social-media platforms are subject to the antitrust laws and other generally applicable regulations targeting conduct even if particular applications of those laws affect the platforms' expressive activity. See, *e.g.*, *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951); *Associated Press* v. *United States*, 326 U.S. 1, 19-20 (1946).

Even laws that directly regulate the platforms' expressive activity may withstand First Amendment review. In *Turner*, for example, the Court upheld federal must-carry regulations after concluding that they satisfied intermediate scrutiny. *Turner II*, 520 U.S. at 224-225. Courts of appeals have upheld other cable regulations under the same framework. See, *e.g.*, *Time Warner Cable, Inc.* v. *FCC*, 729 F.3d 137, 154-167 (2d Cir. 2013); *Cablevision Sys. Corp.* v. FCC, 649 F.3d 695, 710-714 (D.C. Cir. 2011). The government similarly

argued that the 2015 net-neutrality regulations would have survived intermediate scrutiny even if they were deemed to burden expressive activity. See FCC Br. at 149-154, *USTA*, *supra* (No. 15-1063). Here, too, the Court should make clear that a holding that the platforms are engaged in expressive activity means only that First Amendment scrutiny applies, not that all regulation is impermissible.

B. The Content-Moderation Provisions Cannot Withstand First Amendment Scrutiny

Although some regulations affecting the platforms' expressive activities would be consistent with the First Amendment, the content-moderation provisions of S.B. 7072 and H.B. 20 are not. Those requirements directly target the platforms' expressive activity and require them to present and promote content to which they object. The Court need not determine whether the laws' various requirements trigger strict or intermediate scrutiny because the States have failed to justify them even under the more deferential intermediate standard.

1. The degree of First Amendment scrutiny that applies to a regulation of speech depends on the nature of the regulation. In general, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). In contrast, a content-neutral regulation is valid if it furthers a "substantial governmental interest" that is "unrelated to the suppression of free expression," and if it does not "burden substantially more speech than is necessary." *Turner I*, 512 U.S. at 662 (citations omitted).

This Court has held that a law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin* v. *Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 69 (2022) (citation omitted). That readily describes S.B. 7072's restriction on moderating posts "about * * * a candidate" for office. Fla. Stat. § 501.2041(2)(h); see *Moody* Pet. App. 55a. But it does not naturally describe S.B. 7072's 30-day-change and user opt-out requirements, which appear content-neutral in their application. See Fla. Stat. § 501.2041(2)(c), (f), and (g).

Other provisions are harder to categorize. The provisions of S.B. 7072 that give preferential treatment to journalists and political candidates discriminate based on speaker, not content. See Fla. Stat. §§ 106.072(2), 501.2041(2)(h) and (j). Provisions that "distinguish between speakers" on content-neutral grounds trigger only intermediate scrutiny. See *Turner I*, 512 U.S. at 645. But the Court has also cautioned that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 170 (citation omitted). Thus, the relevant provisions of S.B. 7072 would warrant strict scrutiny if the Court concluded they were adopted to favor the types of content that journalists and candidates are likely to post—*i.e.*, news and political views.

Still other provisions resist ready categorization under this Court's traditional framework for identifying content-based regulations. For example, some provisions of S.B. 7072 and H.B. 20 prohibit platforms from moderating posts based on their "content" or "viewpoint." Fla. Stat. § 501.2041(2)(j); Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a). Those regulations

apply regardless of the nature of the third-party content or viewpoints a platform seeks to moderate. But the regulations could nonetheless be viewed as content-based because their application depends on the content or viewpoint of the platforms' own moderation decisions. *Moody* Pet. App. 55a. S.B. 7072's requirement that platforms apply moderation standards in a "consistent manner" raises similar questions. See Fla. Stat. § 501.2041(2)(b).

In determining the applicable level of scrutiny for laws that require speakers to present speech by others, the Court has sometimes considered additional factors, such as the extent to which the speaker is able to dissociate itself from the unwanted speech. *Hurley*, for example, suggested that Massachusetts' efforts to regulate the St. Patrick's Day parade warranted a higher level of scrutiny than the must-carry regulations in *Turner* because parade observers are likely to view each "parade unit" as "contribut[ing] something to a common theme," such that changing the mix of participants is likely to alter the messages the parade communicates. 515 U.S. at 576. By contrast, "cable's long history of serving as a conduit for broadcast signals" means that television viewers are likely to disaggregate broadcast programming from the cable operator's own expressive compilation. *Ibid.* (quoting *Turner I*, 512 U.S. at 655). But *Hurley* ultimately declined to decide "the precise significance" of that distinction because it concluded that Massachusetts had failed to satisfy "the threshold requirement of any review" under the First Amendment, which is a showing that the challenged law serves a legitimate and "important governmental object." *Id.* at 577.

2. For similar reasons, this Court need not resolve the novel and difficult questions that would be posed by an attempt to definitively categorize the various provisions of S.B. 7072 and H.B. 20 as content-based or content-neutral. None of those provisions can withstand even intermediate scrutiny because the States have not established that they serve a "substantial governmental interest * * * unrelated to the suppression of free expression." *Turner I*, 512 U.S. at 662 (citation omitted).

The States have sought to justify the laws' content-moderation provisions by invoking the same broad interest served by the must-carry regulations upheld in *Turner*—that is, the government's interest in "assuring that the public has access to a multiplicity of information sources." 512 U.S. at 663; see *Moody* Pet. 25-26; *Paxton* Br. in Resp. 26-28; *Paxton* Pet. App. 86a. That interest is undoubtedly important, even compelling, when viewed "in the abstract." *Turner I*, 512 U.S. at 664. But this Court has insisted on greater specificity.

In particular, the Court has repeatedly rejected the suggestion that the government has a valid interest in increasing the diversity of views *presented by a particular private speaker*. The regulations in *Tornillo*, *PG&E*, and *Hurley* could have been described as "offer[ing] the public a greater variety of views" in the newspaper's editorial page, the utility's "billing envelope," or Boston's St. Patrick's Day parade. *PG&E*, 475 U.S. at 12. But even where, as in those cases, a private entity controls "an enviable vehicle for the dissemination of" speech, *Hurley*, 515 U.S. at 577, the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others," *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) (per

curiam). Put differently, an asserted government interest in changing the views that private speakers choose to present and promote is not an interest "unrelated to the suppression of free expression," *Turner I*, 512 U.S. at 662 (citation omitted)—even if the government characterizes its intervention in the marketplace of ideas as an effort to increase the overall diversity of views available to the public.

The States' asserted interest here cannot be reconciled with those principles. The States maintain that the major platforms are important outlets for speech and that they have removed or suppressed certain views, topics, or speakers. S.B. 7072's legislative findings state, for example, that platforms "have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians." S.B. 7072, § 1(9). But there is no "substantial government interest in enabling users" to "say whatever they want on privately owned platforms that would prefer to remove their posts." *Moody* Pet. App. 59a.

The States err in asserting that *Turner* held otherwise. See *Moody* Pet. 25-26; *Paxton* Br. in Resp. 26-27. The must-carry provisions in that case were designed to prevent cable companies from using their market power to deprive local broadcasters of viewers and advertising revenue—a result that could have driven the broadcasters out of business altogether. *Turner I*, 512 U.S. at 633-634. "The Government's interest in *Turner*" thus "was not the alteration of speech" by the cable operators, but instead "the survival of speakers." *Hurley*, 515 U.S. at 577; see *Turner I*, 512 U.S. at 647. Even though the resulting regulation constrained operators' editorial discretion, the challenged law furthered "an interest going beyond abridgment of speech itself." *Hurley*, 515

U.S. at 577. Here, by contrast, constraining the platforms' ability to choose the content and viewpoints they present on their websites is not an incidental consequence of the States' laws; it is their manifest purpose. Absent "some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.* at 578.[5]

II. THE INDIVIDUALIZED-EXPLANATION REQUIREMENTS VIOLATE THE FIRST AMENDMENT

Like the content-moderation provisions, the laws' individualized-explanation requirements restrict platforms' expressive activity in ways that do not withstand First Amendment scrutiny. Those requirements compel platforms to provide an individualized explanation each time they choose to remove or otherwise moderate user content—in Florida, a "thorough rationale" for the action and "a precise and thorough explanation" of how

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[5] Under intermediate scrutiny, the States bear the burden of demonstrating that their laws serve a substantial government interest. See *Turner I*, 512 U.S. at 664-665. In the Eleventh Circuit, Florida did not advance any other interests to justify S.B. 7072's content-moderation provisions—indeed, the State did not advance any argument that the provisions "survive heightened scrutiny." *Moody* Pet. App. 58a. At the certiorari stage, Florida briefly asserted that the law's consistency and 30-day-change requirements serve "a consumer-protection interest in ensuring that platforms moderate in conformity with their disclosed terms." *Moody* Pet. 20. Such an interest might well justify appropriately crafted regulations. One might also posit other legitimate justifications for regulations akin to S.B. 7072's opt-out requirement, which requires platforms to give users more control over how they view the content the platforms present. Fla. Stat. § 401.2041(f)(2) and (g). But because the State did not develop those arguments below, and because this Court "is a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should not address them here.

the platform learned about the content, Fla. Stat. § 501.2041(3)(c) and (d); and in Texas, an explanation of "the reason the content was removed" and an opportunity to appeal, Tex. Bus. & Com. Code Ann. § 120.103(a)(1). Like the content-moderation provisions, those unusual requirements violate the First Amendment because they impose unjustified burdens on the platforms' noncommercial expressive activity.

Under *Zauderer* v. *Office of Disciplinary Council*, 471 U.S. 626 (1985), laws requiring businesses to disclose "purely factual and uncontroversial information" about their services are generally permissible so long as they are not "unjustified" or "unduly burdensome." *Id.* at 651. By definition, such laws require businesses to provide "more information than they might otherwise be inclined to present." *Id.* at 650. But this Court has explained that disclosure requirements trigger only deferential review because a speaker's "constitutionally protected interest in *not* providing" such information "is minimal." *Id.* at 651.

Many disclosure requirements that might apply to social-media platforms would be entirely consistent with the First Amendment. But the individualized-explanation requirements cannot withstand scrutiny under even the deferential *Zauderer* standard because they are unduly burdensome. As discussed above, the platforms engage in noncommercial expressive activity protected by the First Amendment when they decide which content to present on their websites and how to present it. The individualized-explanation requirements place significant burdens on the platforms' determinations to remove or moderate content.

Like the right-of-reply statute at issue in *Tornillo*, the individualized-explanation requirements "exact[] a

penalty"—here, in the form of administrative costs and burdens—each time the platforms engage in certain forms of noncommercial expression. 418 U.S. at 256. Indeed, the Eleventh Circuit explained that the sheer volume of content moderation that the platforms undertake makes it impracticable for them to comply with those mandates: "The targeted platforms remove millions of posts per day" under their content-moderation policies; "YouTube alone removed more than a billion comments in a single quarter of 2021." *Moody* Pet. App. 64a; see pp. 4-5, *supra*. The burdens imposed by the individualized-explanation requirements thus threaten to achieve indirectly the sorts of changes to the platforms' moderation practices that the States cannot achieve directly.

The States primarily defend the individualized-explanation provisions as an extension of the voluntary notice and appeal procedures the platforms already provide. *Moody* Pet. 27; *Paxton* Pet. App. 95a-96a. But the platforms have produced evidence that their voluntary efforts are substantially more limited than what the laws require. *Paxton* Pet. 33. And in any event, the fact that a speaker has adopted a "consensual" limitation on its own speech does not mean that a parallel "government-enforced" restriction complies with the First Amendment. *Tornillo*, 418 U.S. at 254. That is particularly so where, as is true of the Florida law, the government mandate is backed by up to $100,000 in damages per violation. *Moody* Pet. App. 64a.[6]

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[6] Because the individualized-explanation provisions cannot withstand review under *Zauderer*, the Court need not address NetChoice's assertion that *Zauderer* is limited to disclosures required to avoid deception in commercial advertising. See NetChoice

CONCLUSION

The decision in No. 22-277 should be affirmed, and the decision in No. 22-555 should be reversed.

Respectfully submitted.

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DECEMBER 2023

Paxton Br. 47-48. As our certiorari-stage brief explained (at 20-22), that question was more squarely presented by NetChoice's challenge to the general-disclosure provisions that were upheld by both the Fifth and Eleventh Circuits, but this Court declined to take up those challenges. If the Court nonetheless reaches the issue, it should reject NetChoice's effort to limit *Zauderer*. As the courts of appeals have recognized, the principles reflected in *Zauderer* extend "more broadly than the interest in remedying deception." *American Meat Inst.* v. *USDA*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc); see, *e.g.*, *id.* at 23 (country-of-origin labeling); *Discount Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 556-558 (6th Cir. 2012) (health warnings for tobacco).