Nos. 22-277 and 22-555

IN THE

Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, et al.

Petitioners,

v.

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,

Respondents.

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,

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 FIRST AMENDMENT AND INTERNET LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are professors and scholars who are experts in the First Amendment and Internet law. They share an interest in the healthy development of the Internet, in protecting the rights of Internet users, and in ensuring the rule of law online.

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case raises complex questions about social-media platforms' First Amendment rights. But Florida Senate Bill 7072 (SB 7072) and Texas House Bill 20 (HB 20) also severely restrict platform *users*' First Amendment rights to select the speech they listen to. Any question here is straightforward: such intrusions on listeners' rights are flagrantly unconstitutional.

SB 7072 and HB 20 are the most radical experiments in compelled listening in United States history. These laws would force millions of Internet users to read billions of posts they have no interest in or affirmatively wish to avoid. This is compulsory, indiscriminate listening on a mass scale, and it is flagrantly unconstitutional.[2]

Users rely on platforms' content moderation to cope with the overwhelming volume of speech on the Internet. When platforms prevent unwanted posts from showing up in users' feeds, they are not engaged in censorship. Quite the contrary. They are protecting users from a neverending torrent of harassment, spam, fraud, pornography, and other abuse — as well as material that is perfectly innocuous but simply not of interest to particular users. Indeed, if platforms did not engage in these forms of moderation against unwanted speech, the Internet would be completely unusable, because users would be unable to locate and listen to the speech they do want to receive.

[2]This brief is limited to the first question presented in each case: the constitutionality of SB 7072 and HB 20's content-moderation restrictions. *Amici* take no position on the second question presented: the constitutionality of SB 7072 and HB 20's individualized-explanation requirements.

Although these laws purport to impose neutrality among speakers, their true effect is to systematically favor speakers over listeners. SB 7072 and HB 20 prevent platforms from routing speech to users who want it and away from users who do not. They convert speakers' undisputed First Amendment right to speak without government interference into something much stronger and far more dangerous: an absolute right for speakers to have their speech successfully thrust upon users, despite those users' best efforts to avoid it.

In the entire history of the First Amendment, listeners have always had the freedom to seek out the speech of their choice. The content-moderation restrictions of SB 7072 and HB 20 take away that freedom. On that basis alone, they can and should be held unconstitutional.

ARGUMENT

I. Users have a First Amendment right to choose the speech they listen to

The parties to these cases have framed them as cases about speakers' rights under the First Amendment. The states argue that SB 7072 and HB 20 protect users' right to speak. NetChoice and CCIA respond that platforms are speakers, too, and that these laws unconstitutionally restrict their members' rights to choose the speech they publish and recommend.

But both of these views are incomplete, because SB 7072 and HB 20 also unconstitutionally restrict *listeners*' First Amendment rights to choose the speech they read. These laws prevent social-media users from finding the speech they want by ensuring that it will be hidden like a needle in an incomprehensibly large haystack, surrounded by speech the users do not want and are affirmatively trying to avoid. This Court's precedents recognizing listeners' rights protect social-media users against such an intrusion into their autonomy.

A. The First Amendment protects the freedom to listen

The right to receive speech is the "reciprocal" of the right to speak. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976). In the words of Frederick Douglass,

> Equally clear is the right to hear. To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker. It is just as criminal to rob a man

> of his right to speak and hear as it would be to rob him of his money.

Frederick Douglass, Address: A Plea for Free Speech in Boston (1860), *in Great Speeches by Frederick Douglass* 48, 50 (James Daley ed., 2013). Listeners enjoy full-fledged First Amendment rights equal to speakers:

- "[T]he protection afforded is to the communication, to its source *and to its recipients* both." *Va. Citizens Consumer Council*, 425 U.S. at 756 (emphasis added).
- "This freedom embraces the right to distribute literature, and necessarily protects *the right to receive it*." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (emphasis added).
- "[T]he general rule is that the speaker *and the audience*, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (emphasis added).
- "More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion).

B. Freedom of listening includes the freedom to choose what to listen to

An indispensable component of the freedom to listen to speech is the freedom to choose what speech to listen to. *See generally* James Grimmelmann, *Listeners' Choices*,

90 U. Colo. L. Rev. 365 (2019). The freedom to listen includes the equal freedom not to listen. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev. 939 (2009). The First Amendment protects "the liberty of each man to decide for himself what he will read and to what he will listen." *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result).

This Court has drawn a sharp distinction between prohibitions on speech *due to government demand* (generally unconstitutional) and identical prohibitions *at the request of the listener* (generally constitutional as long as they do not intrude on other listeners' rights). *Lamont v. Postmaster General* held that the Post Office could not require individuals to fill out a reply card to receive "communist political propaganda" through the mails). 381 U.S. 301, 307 (1965). But *Rowan v. Post Office Dept.* held that the Post Office could require mailers to stop sending material to recipients who had requested not to receive it, where the recipient had the "sole discretion" to determine which material qualified. 397 U.S. 728, 730 (1970) (quoting 39 U.S.C. § 4009 (a) (1964 ed., Supp. IV)); *accord U.S. v. Pent-R-Books, Inc.*, 538 F.2d 519, 521, 524 (2nd Cir. 1976) (holding that once a recipient has requested an order "directing the sender to refrain from further mailings . . . it makes no difference what the particular merits of appellant's literature might be.").

The Court's precedents on door-to-door solicitation are to the same effect. *Martin* struck down a law prohibiting distributing handbills door to door because it "substitutes the judgment of the community for the judgment of the individual householder." 319 U.S. at 144. The Court emphasized that homeowners "desiring to receive it, as

well as those who choose to exclude such distributers from the home" are protected by the First Amendment. *Id.* at 149.

Since then, the Court has repeatedly treated laws that allow residents to bar solicitors by posting "No Solicitation" signs as (constitutionally unproblematic) less restrictive alternatives to laws that require governmental permits to go door to door. *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 168–69 (2002); *Vill. of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 639 (1980). And *Frisby v. Schultz* could hardly have been more emphatic: "There simply is no right to force speech into the home of an unwilling listener." 487 U.S. 474, 484 (1988).

The distinction between "one-to-many" and "one-to-one" speech is crucial here. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. U. L. Rev. 731 (2013). A book publisher reaches many readers; banning the book from store shelves because one person is offended by it interferes with other readers' rights. *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541 (1980). But a telephone harasser reaches a single listener; serving him with a no-contact order protecting his victim leaves him free to call anyone else in the world, and leaves them free to listen. *See* Grimmelmann, *supra*, at 391–92.

Numerous statutory schemes unproblematically prohibit unwanted one-to-one speech. The national Do-Not-Call registry prohibits unsolicited telemarketing calls to telephone subscribers who have placed their numbers on the list. 16 C.F.R. § 310.4(b)(1)(iii)(B); 47 C.F.R. § 64.1200(c)(2). The CAN-SPAM Act prohibits sending bulk commercial email to users who have opted

out. Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7704(a)(4). The Telephone Consumer Protection Act prohibits sending unsolicited advertising faxes. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1)(C). All three of these laws have been upheld against First Amendment challenges. *See Mainstream Mktg. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (Do Not Call); *United States v. Smallwood*, 2011 WL 2784434 (N.D. Tex. July 15, 2011) (criminal provisions of CAN-SPAM); *Mo. ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F. 3d 649 (8th Cir. 2003) (TCPA). But SB 7072 and HB 20 reject this narrow and listener-empowering approach in favor of sweeping mandates telling platforms what they must and must not show users.

Similarly, this Court has supported the development and use of listener-controlled filtering technologies to enable people to decide what speech they will receive. In numerous cases, the Court has pointed to listener-controlled blocking as a less restrictive alternative to government regulation of unwanted speech. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 667 (2004) (filtering software "impose[s] selective restrictions on speech at the receiving end, not universal restrictions at the source"); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 807 (2000) ("signal blocking on a household-by-household basis" of sexually explicit cable television channels was a less restrictive alternative to a law limiting the times of day during which these channels could be transmitted); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127–31 (1989) (FCC procedures gave households effective choice whether to have access to "dial-a-porn" services, making a prohibition on those services unconstitu-

tional). In contrast, SB 7072 and HB 20 prohibit platforms from creating listener-controlled filters.

C. STATE-COMPELLED LISTENING TO PRIVATE SPEECH IS GENERALLY UNCONSTITUTIONAL

In general, listeners can choose for themselves whether or not to receive speech. The government cannot act to ban speech out of a generalized concern that some listeners might not want to hear it. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (offensive slogan on jacket); *Snyder v. Phelps*, 562 U.S. 443 (2011) (offensive signs at protest); *Consol. Edison*, 447 U.S. 530 (commercial advertising mailers).

But when listeners have decided that they do not wish to receive particular speech, the government cannot turn around and compel them to listen to it, any more than it can compel them to listen to its own messages. As a New York court put it in a case involving unwanted newspaper deliveries,

> The constitutional right of free speech does not correspond to the "right" to force others to listen to whatever one has to say. . . . The state does all that it needs to do in order to protect the constitutional rights of a newspaper publisher when it refrains from censorship . . . . The State need not, and in our opinion, should not, compel anyone to read, to buy, or even to touch, pick up, or handle a newspaper of which the individual in question wants to have no part.

Tillman v. Distrib. Sys. of Am., 648 N.Y.S.2d 630, 636 (App. Div. 1996).

Speakers can attempt to persuade audiences to listen. They cannot have the government do the compulsion for them. Mandatory disclaimers — speech forced upon audiences seeking goods or services — have been upheld only when they are "purely factual and uncontroversial." *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

Although the government cannot make these choices for them, listeners are entitled to make these choices for themselves. They can decline to pick up the the phone when they see who is calling; they can delete emails without reading them.

Listeners also rely on third parties to help them find the speech they are actually interested in. Every magazine subscription is a choice to delegate a little discretion about speech; it is an implicit request to "show me some speech each month you think I'll be interested in." Whether that speech is about golfing or current events, whether it is serious or silly, and *everything else about it* is strictly between the magazine and its subscribers. If subscribers don't like the magazine's editorial judgment, they can cancel their subscriptions. An aspiring golf journalist has no right to force *Golf Digest* magazine to include his article on the PGA-LIV merger. Forcing the magazine to print it is an intrusion on readers' autonomy just as much as it is on the magazine's.

The listener-controlled filters this Court cited with approval in *Ashcroft*, *Playboy Entertainment Group*, and *Sable Communications of Cal.* are all examples of third-party technologies that help listeners select among speech. In each case, listeners were dependent on tech-

nology platforms — filtering software vendors, cable system operators, and telephone companies — to create and maintain the relevant filtering technology. A law that prohibits technology companies from helping users also prevents users from helping themselves.

D. State-compelled listening interferes with other speakers' freedom of speech

The freedom not to listen is an essential precondition of the freedom of speech. Unwanted speech that drowns out wanted speech is antithetical to the principles of the First Amendment. You cannot listen to someone whispering in one ear if someone else is shouting in your other ear. Listeners who cannot tune out the speech they do not want to hear cannot tune in the speech they do.

This Court has sustained numerous laws that prevent unwanted speech from drowning out the speech that listeners actually want to receive. *Grayned v. City of Rockford*, for example, struck down an anti-picketing ordinance but upheld the application of an anti-noise ordinance to the same protesters, remarking that "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation [and] make studying impossible." 408 U.S. 104, 119 (1972); *see also Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding New York City's limits on the volume of amplified music in central Park); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding a Trenton ordinance prohibiting the use of amplified sound trucks); *Red Lion Broad. Co. v. FCC*, 395 U.S. 36, 387 (1969) ("The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.").

Listener choices to ignore unwanted speech are especially critical on the Internet, because the volume of speech online is so unimaginably large. There are over five billion Internet users.[3] It is absolutely, utterly, completely impossible for anyone to listen to all of them. Users upload 500 hours of video to YouTube every minute.[4] It is physically impossible to watch more than 0.0033 percent of them, even if you do nothing but watch YouTube. Every single Internet user constantly makes choices about which speech to pay attention to online. If every online speaker had an equal claim to users' attention, no one could be heard at all. As the Court put it in another case about technologically-amplified speech, "the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality." *Red Lion Broad.*, 395 U.S. at 387–88. On the Internet, this "problem of interference" takes the form of competition for users' limited attention.

Indeed, it is completely impossible for anyone *even to review* all of the possible speech sources online to decide which ones to receive. If you spent every second of the day looking at descriptions of YouTube video, and you could get through one description per second, you would still only get through the descriptions of two percent of the videos being posted — without any time left over to watch any of them. The only way that users can experience the content they actually want to is by ignoring the overwhelming majority of other content.

[3] *Number of Internet and Social Media Users Worldwide as of October 2023*, Statista (Oct. 25, 2023), https://www.statista.com/statistics/617136/digital-population-worldwide/ (last visited Dec. 4, 2023).

[4] *YouTube for Press*, YouTube (n.d.), https://blog.youtube/press/ (last visited Dec. 4, 2023).

There is nothing legally or morally wrong with users' choices not to hear most speech online. It is simply a physical fact. More than that, it is a positive virtue. Users who follow their specific interests and passions serve the goals of the First Amendment by delving deep into matters of great personal importance. The "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), enables listeners to pick and choose for themselves which of those sources they will hear from. The only reason any speakers can ever be heard at all online is because users have willingly chosen to hear them — and every choice to hear from one speaker is a choice not to hear from millions of others.

E. INTERNET USERS USE PLATFORMS AND ALGORITHMS TO CHOOSE THE SPEECH THEY RECEIVE

Content moderation is an essential tool for enabling users to choose the speech they receive. Users make countless choices about speech on platforms. They do so explicitly, by joining and leaving communities, by following or blocking other users, and by clicking "see more of this" or "see less of this" for content they are interested or uninterested in. Users also make choices about speech implicitly, by communicating their preferences to platforms. Each click on a post is a signal to the platform's algorithms that the post is of interest to the user who clicked.

Users have diverse preferences. Not only do they have different substantive interests in speech, they also have different procedural preferences about how to find that speech. Some users want to do the work of find-

ing speech for themselves. They read specific blogs; they have extensive collections of bookmarked sites; they create topical lists of other users to follow. These users have fully-formed interests, high technical skills, and the time to devote to curating their social-media feeds.

But other users would rather delegate some of the work of finding speech to experts they trust. These users typically give platforms instructions and advice — add this user to my feed, show me more posts like this, hide all from this user — but they leave the details up to the platform. These users may not have the technical skills or the time needed to do all the work themselves. But, just as often, they delegate the job of finding speech to platforms because platforms *are good at it*. Every user delegates some of the time, and many users do it most of the time. Everyone who does a search for "kid-friendly restaurants" on Yelp or for "Chopin etudes" on YouTube has delegated the tasks of finding relevant restaurants and concert videos and ranking them by likely appeal. And anyone who chooses the "For you" tab on Threads rather than "Following" has opted in to algorithmic ordering.

Indeed, platforms compete for users by offering better content moderation — i.e., better choices about what speech users receive. Google Search succeeded because it was so much better than competing search engines at finding search results that were relevant to users' specific queries. Facebook succeeded because its News Feed was successful at showing users interesting posts from their friends and highlighting interesting discussions, without requiring users to specify in detail exactly what they were looking for. Reddit succeeded because its system of communities allowed users to join numerous

groups united by shared interests, from cocktail-making to bowhunting.

Each of these platforms uses different moderation techniques and algorithms. A law like SB 7072 or HB 20 that eliminates these differences and prevents platforms from innovating with new moderation approaches would destroy the diversity of the Internet and flatten it out into a boring sameness. If Google could not discriminate among websites, it could not exist, because it could no longer differentiate among sites that were more or less likely to be relevant to a user's query.

Algorithms are essential to content moderation as we know it today. For one thing, the algorithms that power Google Search, the Facebook News Feed, and the X Timeline are astonishingly complex. They are complex because they have to be: users have wildly varying preferences and the range of content these algorithms are applied to is as vast as human thought.[5] There is no way to remove these algorithms from content moderation without massively undermining users' ability to receive speech of interest to them. " [T]he automation process only increases the value of the speech to readers beyond what purely manual decision-making can provide."

[5]Other *amici* in *Gonzalez v. Google LLC* have explained in detail how content-moderation and recommendation algorithms work. *See generally* Brief of Center for Democracy & Technology and 6 Technologists as *Amici Curiae* in Support of Respondent at 6–20, *Gonzalez v. Google LLC*, No. 21-1333 (U.S. Jan. 18, 2023); Brief of Information Science Scholars as *Amici Curiae* in Support of Respondent, *Gonzalez*, No. 21-1333 (Jan. 19, 2023); Brief of the Integrity Institute and AlgoTransparency as *Amici Curiae* in Support of Neither Party at 3–9, *Gonzalez*, No. 21-1333 (Dec. 7, 2022); Brief of *Amici Curiae* CITP Tech Policy Clinic in Support of Neither Party at 3–11, *Gonzalez*, No. 21-1333 (Dec. 6, 2022).

Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. Econ. & Pol'y 883, 889 (2012).

For another thing, every platform struggles with spam and abuse. Spammers, harassers, and foreign governments all use high-volume algorithms (including cutting-edge generative-AI technologies) to flood platforms with harmful materials. Users of YouTube and Facebook, no less than users of Gmail, rely on algorithmic filtering to detect and block these automated attacks. A platform that cannot use complex algorithms to prevent abuse is a platform that will rapidly become unusable, because users will be confronted with a constant stream of spam, fraud, pornography, and other unwanted material.

Users want content moderation. Users demand content moderation. Users need content moderation.

II. SB 7072 AND HB 20 COMPEL USERS TO LISTEN TO UNWANTED SPEECH

Users need content moderation, but SB 7072 and HB 20 make content moderation illegal.

A. SB 7072 FORCES PLATFORMS TO SHOW USERS UNWANTED SPEECH

Section 5 of SB 7072 is a content-based restriction on the content moderation platforms are allowed to perform for their users. Fla. Rev. Stat. § 501.2041. Paragraph (2)(h) provides that a platform "may not apply or use post-prioritization or shadow banning algorithms for *content* and material posted by or about" candidates for political office, Fla. Rev. Stat. § 501.2041(2)(h) (emphasis added), and paragraph (2)(j) provides that a platform may not

"censor, deplatform, or shadow ban a journalistic enterprise based on the *content* of its publication or broadcast," *id.* § 501.2041(2)(j) (emphasis added). These provisions discriminate in favor of particular speakers (candidates and journalists) and particular subjects (political discussions and candidates). They push political speech on users who would rather read about science or sports; they send journalism to users who would rather catch up with their friends.

Although paragraph (2)(j) superficially appears designed to prevent content-based distinctions among speech, in substance it is a content-based restriction on speech. It prohibits one kind of content-based distinction within the category of "journalistic" speech, but the definition of the category itself is content-based. A law that magazines could not discriminate against "[articles] about [music] based on the content of [those articles]" would force *Rolling Stone* to review classical concerts and *Gramophone* to write about rap. The law is content-neutral within the category of "articles about music" but content-based overall because articles about music — and only articles about music — are singled out for special treatment. All other material, from recipes to rodeos, is left untouched.

The definitions of the key terms show that SB 7072 severely restricts user choice. "Post prioritization" includes any "action . . . to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results." *Id.* § 501.2041(1)(e). Under this rule, Facebook cannot show a user photographs of her baby nephew before photographs from a political rally, because that would be "plac[ing] . . . certain con-

tent . . . ahead of . . . others." YouTube cannot even show a user who searches for "history of napoleon" an animated history of the Napoleonic Wars higher in its search results than a video about a candidate for mayor because that would be a "more prominent position."

Similarly, "[c]ensor" includes "any action taken by a social media platform 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." *Id.* § 501.2041(1)(b). Under this definition, if a website dedicated to all things gory and gruesome posts graphic photographs of accident victims, beheadings, and open-heart surgery, there is nothing a platform can do to stop those images from showing up in other users' feeds. It cannot remove the photographs; that would be "delet[ing]" them. It cannot keep the photographs out of users' feeds; that would be "restrict[ing]" them. It cannot blur the photographs; that would be "edit[ing]" them. It cannot even apply a warning label that the photographs contain graphic material; that would be "post[ing] an addendum."

In short, SB 7072 exempts speech posted by journalists and by or about candidates from almost all content moderation. It does so regardless of whether any user of the platform actually wants to receive that speech, even though showing users the speech they want to see is the central goal of content moderation. These results are absurd, but they are demanded by the statute, which ignores users' wishes entirely. The content-moderation restrictions of SB 7072 are unworkable and unconstitutional.

B. HB 20 FORCES PLATFORMS TO SHOW USERS UNWANTED SPEECH

HB 20 is even more egregious in overriding user choices about speech. Where SB 7072 prohibited content moderation of speech by journalists and by and about candidates, section 7 of HB 20 expressly prohibits content moderation of *all speech*, with only a few narrow and unhelpful exceptions. A platform may not "censor . . . a user's expression" based on the expression's viewpoint. Tex. Civ. Prac. & Rem. Code § 143A.002(a). "Expression" is defined to include "any word, music, sound, still or moving image, number, or other perceivable communication." Tex. Civ. Prac. & Rem. Code § 143A.001(2). And "censor" is equally broad: "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate." *Id.* § 143A.001(1). The platform that shows a user photographs of her nephew is "deny[ing] equal . . . visibility to" photographs of celebrities.

The restriction in HB 20 to viewpoint-based content moderation is illusory. *Id.* § 143A.002(a)(1), (a)(2). Many content-moderation policies are explicitly viewpoint-based, because what makes harmful content harmful to users is often precisely its viewpoint. The difference between "I'm glad you have cancer' and "I'm sorry you have cancer' is viewpoint, but only the former violates Facebook's Bullying and Harassment Community Standard.[6] Numerous garden-variety content-moderation

[6] *Bullying and Harassment*, Facebook Cmty. Standards (Sept. 28, 2023), https://transparency.fb.com/policies/community-standards/bullying-harassment/ (last visited Dec. 4, 2023) (prohibiting "[c]elebration or mocking of death or medical condition").

rules would become instantly illegal under HB 20, forcing users to put up with posts like "Jews are vermin" (viewpoint-based animus towards Jews) and "kill yourself now" (viewpoint-based promotion of suicide). These opinions are protected speech under the First Amendment, which means that the government itself cannot prohibit them — but nothing in the First Amendment requires users to subject themselves to a torrent of abuse like this, day in and day out.

Even more fundamentally, users have viewpoints too, and they turn to social media both to express those viewpoints themselves and to *receive others' expression of particular viewpoints*. A user who frequently interacts with and replies to Houston-area libertarians on X wants to see more posts from Houston-area libertarians, and that is precisely what the algorithm will show her. If her feed is filled instead with posts from socialists and monarchists, she will have been deprived of the very speech she went to X to find. "The Cowboys stink!" and "The Cowboys rule!" are not viewpoints of equal interest to a Dallas Cowboys fan, but Texas would require that platforms treat them identically.

HB 20's rejection of viewpoint-based moderation also interferes with users' associational rights. Members of Reddit's "AnarchoPacifism" and "Second Amendment" communities have come together to discuss shared viewpoints. Forcing them to carry posts from people who are violently opposed to these shared philosophies would render these communities useless as places for discussion and organizing. Regardless of whether or not social-media platforms have associational rights at stake in these cases, their users indisputably do. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) ("This right

is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”). HB 20 prevents them from gathering in groups of their choosing to discuss what they want to discuss. Its content-moderation restrictions are also unworkable and unconstitutional.

C. THE EXCEPTIONS IN SB 7072 AND HB 20 FAIL TO PROTECT LISTENERS’ CHOICES ABOUT SPEECH

Both SB 7072 and HB 20 contain provisions that are putatively designed to increase users’ ability to choose what content they receive on social-media platforms. But all of these provisions are radically underinclusive; they give users a button to push while keeping the rest of the content-moderation mechanism off-limits. Many are also ineffective; given the other provisions of SB 7072 and HB 20, pushing that button will do nothing useful. Most significantly, the inclusion of these provisions shows that the Florida and Texas legislatures were well aware that users want to choose what speech they receive, making SB 7072 and HB 20’s overall indifference to user choices all the more striking.

SB 7072 provides that platforms must allow users to “opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content.” Fla. Rev. Stat. § 501.2041(2)(f). This rule strictly increases the options available to users. Under it, users who are dissatisfied with a platform’s algorithmic content ordering can vote with their mouse clicks and avoid it. But because SB 7072 still prohibits other types of content moderation entirely, *id.* § 501.2041(2)(h), (2)(j), the Florida Legislature does not actually trust

users to make these choices. Users who are currently satisfied with a platform's moderation have no way to opt *in* to the kinds of moderation that the rest of SB 7072 forbids. Research shows that users who are given chronological rather than algorithmic feeds decrease the time they spend on a platform — that is, they *consume less speech*. Andrew M. Guess et al., *How do Social Media Feed Algorithms Affect Attitudes and Behavior in an Election Campaign?*, 381 Science 398 (2023). The amount of speech a person receives should be a personal choice, not a state mandate.

For its part, HB 20 protects listeners from everyone except the Texas Legislature itself. Its core provision protects "a user's ability to receive the expression of another person." Tex. Civ. Prac. & Rem. Code § 143A.002(a). This ensures that users can receive speech they are interested in, which is one half of what they need. But by forcing users to also receive speech they are not interested in, HB 20 undercuts this protection in practice. To find the occasional post they would like to read, users will have to scroll through pages and pages of posts they find repugnant. Indeed, HB 20 explicitly prohibits users from contracting with a platform for more proactive content moderation. *See id.* § 143A.003(a) (prohibiting waivers of content-moderation restrictions as "void as unlawful and against public policy").

HB 20 also contains a few ineffectively narrow exclusions from its prohibitions, including content moderation authorized by federal law, *id.* § 143A.006(a)(1), to prevent sexual exploitation of children and protection of sexual-abuse victims from further harassment, *id.* § 143A.006(a)(2), of incitement of criminal activity or threats of violence on the basis of membership in a pro-

tected category, *id.* § 143A.006(a)(3), or of "unlawful expression." *id.* § 143A.006(a)(4). These content-based exclusions cover only a tiny subset of the material users may not wish to see.

HB 20's content-moderation restrictions still force platforms to show users videos of animals being tortured and killed, clips of video game characters being dismembered, posts reading "God Hates Fags" and Thank God for Dead Soldiers," and lies about receiving military honors. All of these forms of speech are protected under the First Amendment out of a belief that listeners are mature enough to decide for themselves whether to experience them. *United States v. Stevens*, 559 U.S. 460 (2010) (animal crush videos); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (violent video games); *Snyder*, 562 U.S. 443 (anti-gay and anti-military messages); *United States v. Alvarez*, 567 U.S. 709 (2012) (stolen valor). These robust First Amendment protections would be far harder to justify if unwilling listeners were constantly bombarded with speech they find gruesome and repugnant and had no ability to avoid. But that is precisely what HB 20 would do.

HB 20 does allow a platform to "authoriz[e] or facilitat[e] a user's ability to censor *specific expression* on the user's platform or page at the request of that user." Tex. Civ. Prac. & Rem. Code § 143A.006(b) (emphasis added). But this provision is uselessly narrow, because it is restricted to "specific expression." To block a "specific" post of vulgar harassment, the user must first experience it. Once they have seen the homophobic slur or the picture of a dog defecating, they cannot unsee it. Effective content moderation requires generalization: don't just show (or hide) this message, but show (or hide) others that are rel-

evantly like it. The "specific expression" exception says nothing about larger categories of expression or accounts. It works only for the tiny slice of content that users already know about, but not for the vast universe of content they do not — and which they want a platform's help in exploring. Both SB 7072 and HB 20 effectively prohibit platforms from learning users' implicit preferences among types of speech.

Perhaps the Florida Legislature assumed that the "post-prioritization and shadow banning" opt-out would preserve users' ability to choose whether to read about politics or poetry. But that is not what SB 7072 says or does. Perhaps the Texas Legislature assumed that the "specific expression" exception would allow social-media users to block other users who send them harassing innuendo, diet-pill ads, paranoid rants, and other unwanted material. But that is not what HB 20 says or does. Texas and Florida enacted laws that make user-protective content moderation impossible; they cannot now claim that SB 7072 and HB 20 are not as absurdly broad as they self-evidently are.

It might be possible to draft a social-media content-moderation law that expressly distinguishes moderation to help users receive the speech they want to receive from moderation for other purposes. Such a law would raise more difficult First Amendment issues. But SB 7072 and HB 20 do not even try, because they do not recognize that listeners' choices are a legitimate basis for private parties to distinguish among speech.

D. THIS COURT SHOULD INVALIDATE THE CONTENT-MODERATION PROVISIONS OF SB 7072 AND HB 20

This Court's precedents require invalidating the content-moderation restrictions of SB 7072 and HB 20 based on their effects on listeners' rights. The rule of its cases is clear and consistent. A law that restricts listeners' First Amendment rights is unconstitutional, regardless of whether the speaker's First Amendment rights have also been violated. *See, e.g., Lamont*, 381 U.S. 301 (non-citizens located abroad); *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974) (inmates).

The Court has also consistently allowed both listeners and speakers to assert their First Amendment rights when the other cannot. In *Kleindienst v. Mandel*, listeners had standing as listeners to raise a First Amendment argument that a foreign scholar should be admitted to the United States, even though the scholar himself did not make a similar claim. 408 U.S. 753, 762 (1972). In *Lamont*, listeners had standing to challenge a law limiting their ability to receive mail from abroad, even though the senders were not before the court. 381 U.S. at 307–08 (Brennan, J., concurring).

Conversely, the Court's cases on commercial and corporate speech show that a speaker has standing to challenge a law that unconstitutionally restricts listeners' interest in hearing. The foundation of commercial speech rights is the "consumer's interest in the free flow of commercial information." *Va. Citizens Consumer Council*, 425 U.S. at 763. "[E]ven if the [commercial speaker's] interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader." *Greater New Orleans Broad. Ass'n, Inc. v.*

United States, 527 U.S. 173, 185 (1999). As *First National Bank of Boston v. Bellotti* explained, the "inherent worth of the speech" consists in "its capacity for informing the public," 435 U.S. 765, 777 (1978), and in "affording the public access to discussion, debate, and the dissemination of information and ideas," *id.* at 783, rather than in it its expressive value to the corporate speaker. "The Amendment is written in terms of 'speech,' not speakers." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 929 (2010) (Scalia, J., concurring).

The states and the federal government have numerous options to protect users from large technology companies that do not create the unique constitutional problem that compelled listening does. The antitrust laws, for example, target "agreement[s] limiting consumer choice." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986). They prevent competing platforms from conspiring to implement uniform content-moderation policies. Privacy laws protect the right to "read . . . anonymously, free from governmental intrusion" and its associated chilling effect. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1051 (Colo. 2002). Consumer-protection laws protect users against deception when they sign up for a social-media service. *Zauderer*, 471 U.S. at 651. The Florida and Texas legislatures instead chose to regulate technology platforms by forcing speech on listeners, and that choice is unconstitutional.

CONCLUSION

Platforms do not engage in content moderation out of some nefarious plot. They block spam, ban fraudsters, downrank gory photographs, and delete harassing comments because their users overwhelmingly want them to. Content moderation is a service that platforms provide to their users, and it is a service that users gladly pay for, in money and attention. This relationship is the marketplace of ideas working as it is supposed to.

SB 7072 and HB 20 interfere with this core First Amendment relationship. Suppose that a homeowner hires a neighborhood teenager and says, "Please walk over to the newsstand and buy me a copy of the *New York Times* and a magazine you think I'd like." SB 7072 would require the teenager to also return with a copy of *Revolution* because it is published by a "journalistic enterprise," Fla. Rev. Stat. § 501.2041(2)(j), and contains material by and about the Revolutionary Communist Party's "candidate[s]" for political office, *id.* § 501.2041(2)(h). HB 20 would prohibit the teenager from buying *The Nation* rather than *The National Review* because that would constitute "censorship" of *The National Review*'s "expression . . . based on the viewpoint represented in" it. Tex. Civ. Prac. & Rem. Code § 143A.002(a)(2).

No court would allow such blatant governmental intrusion into a reader's personal choices. The homeowner has 'the right to be free from state inquiry into the contents of his library." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). So do social-media users.

"As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). SB 7072 and HB 20 dictate what users

see, read, and hear by prohibiting platforms from helping them discover and receive speech they are interested in. For this reason alone, they are unconstitutional.

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APPENDIX

List of Amici: 1a

List of Amici

All affiliations are listed for identification purposes only. *Amici* submit this brief in their individual capacities, and not on behalf of any institutions or organizations.

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