Nos. 22-555 & 22-277

In The
Supreme Court of the United States

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

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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

(For Continuation of Caption, See Inside Cover)

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS IN NO. 22-555 AND RESPONDENTS IN NO. 22-277

ABIGAIL E. SMITH
Foundation for Individual Rights and Expression
510 Walnut St.
Suite 900
Philadelphia, PA 19106

ROBERT CORN-REVERE
Counsel of Record
Foundation for Individual Rights and Expression
700 Pennsylvania Ave.
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org

Counsel for *Amicus Curiae*

Nos. 22-555 & 22-277

In The
Supreme Court of the United States

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

v.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitution and Statutes:

Other Materials:

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and amicus curiae filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023).

In lawsuits across the United States, FIRE seeks to vindicate First Amendment rights without regard to the speakers' political views. These cases include matters involving state attempts to regulate the internet and social media platforms. *See, e.g.*, *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023

---

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief.

WL 6135551 (N.D. Cal. Sept. 18, 2023); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023). *See also* Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Lindke v. Freed*, No. 22-611 (2023); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliffe v. Garnier*, No. 22-234 (2023).

INTRODUCTION

Responding to the perception that large social media companies were enforcing their terms of service to discriminate against conservative politicians and pundits, Texas and Florida enacted laws giving each state control over the platforms' content management process.[2] Florida targeted so-called "deplatforming" of political candidates, speech about candidates, or journalistic enterprises, Fla. Stat. §§ 501.2041(1)(c) – (f), 501.2041(2)(h), while Texas prohibited "viewpoint-based" moderation practices. TEX. CIV. PRAC. & REM. CODE § 143A.002(a). The Circuit courts that reviewed these laws reached opposite conclusions, with the

[2] *See*, *e.g.*, *News Release, Ron DeSantis, Governor, Fla., Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech* (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech, https://perma.cc/QGD9-53BE; Press Release, Greg Abbott, Governor, Tex., *Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship* (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship, https://perma.cc/3MZ3-CV4T.

Eleventh Circuit upholding an injunction of the Florida law on First Amendment grounds, *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022), and the Fifth Circuit overturning injunctive relief. *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022). This Court has agreed to address the dispute between the circuits.

The importance of the issues now before the Court cannot be overstated. Along with the other cases on this term's docket (*Lindke v. Freed*, No. 22-611 (argued Oct. 31, 2023), *O'Connor-Ratcliffe v. Garnier*, No. 22-234 (argued Oct. 31, 2023), and *Murthy v. Missouri*, No. 23-411 (pet'n for *cert.* granted Oct. 20, 2023)), this Court must determine the relationship between the government and the most powerful communications medium the world has ever seen. As the Court has observed, cyberspace and "social media in particular," have become "the most important places . . . for the exchange of views." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). The two questions presented here collapse to one overriding issue—whether the government or private actors shall have the predominant role in this arena.

The Framers of the Constitution faced the same fundamental question when they adopted the First Amendment. In contrast to European governments, which reacted to the printing press by fashioning various ways to control and censor it, *see* Ithiel de Sola

Pool, *Technologies of Freedom* 15–16 (Harv. Univ. Press 1983); M. Ethan Katsh, *The Electronic Media and the Transformation of Law* 137–38 (Oxford Univ. Press 1989), "[b]y adopting the First Amendment, the United States became the first nation to embrace the new technology as an essential component of its political system." Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 Hastings Comm/Ent L.J. 247, 264–65 (1994); *see also* M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 Geo. Wash. L. Rev. 1459, 1466–72 (1989) (similar). From the beginning, the press—the only private enterprise mentioned in the Constitution—was freed from government control in order to preserve personal and political freedom.

While the printing press was "born free" in the United States by virtue of the First Amendment, each advance in technology required relearning this lesson. This resulted from a "curious judicial blindness, as if the Constitution had to be reinvented with the birth of each new technology." Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991). The problem was repeated with cinema, broadcast radio and television, and cable television, among other emerging media. *See*, *e.g.*, Corn-Revere, *supra*, at 265–68. Throughout much of the twentieth

century, this Court treated each new medium as "a law unto itself." *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

This began to change as the Court recognized that, while each method of communication may present "its own peculiar problems," the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Although it took decades, this Court ultimately made "freedom of expression the rule" for cinema, *id.* at 501–02, broadcasting, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984), cable television, *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 815 (2000), and interactive media, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("'the basic principles of freedom of speech and the press . . . do not vary' when a new and different medium for communication appears") (quoting *Joseph Burstyn, Inc.*, 343 U.S. at 503).

In one important respect the internet broke with this pattern. Unlike every other new medium, this Court recognized at the outset that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). This was because the Court knew it was dealing with

"a unique and wholly new medium of worldwide human communication" that had not been subject to "government supervision and regulation" as had other media. *Id.* at 850, 867–70. In the years since that landmark decision, the Court has continued to appreciate that the "forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow," and that it is necessary to "exercise extreme caution" before ceding government authority over it. *Packingham*, 582 U.S. at 105.

This case, and the others under consideration this Term, will determine the future of freedom of speech online.

SUMMARY OF ARGUMENT

The Eleventh and Fifth Circuits reached opposite conclusions about the constitutionality of social media content regulation because they proceeded from fundamentally different premises. The Eleventh Circuit enjoined Florida's "deplatforming" law because it viewed social media platforms as "a new and different medium for communication" to which "the basic principles of freedom of speech and the press" apply. *Netchoice v. Att'y Gen., Fla.*, 34 F.4th at 1203. The Fifth Circuit rejected media regulation as the proper framework, and instead concluded that First Amendment precedents governing

pamphleteers' access to shopping malls and military recruiters' access to law schools permit government control of platforms' "conduct." *Paxton*, 49 F.4th at 455, 460–62. The Eleventh Circuit is right and the Fifth Circuit is not—and this case shows how starting off in the wrong direction inevitably leads to the wrong destination.

This is just one of the ways the Fifth Circuit got off on the wrong foot. It was both facile and fallacious for that court to reject *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), as a controlling precedent on the asserted ground that online platforms differ from twentieth century newspapers in how they respectively select and exclude content. *See Paxton*, 49 F.4th at 459–60. The Fifth Circuit tried to conceal the absence of supporting precedent for its conclusions by going on offense and proclaiming (among other things) "the Platforms have pointed to no case applying the overbreadth doctrine to protect censorship rather than speech." *Id.* at 451. But this misses the point in two elementary ways: First, it confuses private editorial decisions with censorship, and second, it cannot mask the court's failure to cite *a single case* about media regulation that supports its conclusion.

The Fifth Circuit's most fundamental mistake was its equating private moderation decisions with censorship. It overlooked the foundational concept

that the First Amendment "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). And it performed this act of doctrinal transubstantiation through incantation rather than by resort to logic or precedent. This error is so stark, so obvious, and so flamboyantly wrong, that the dissent below was able to sum up the problem in eight words: "The majority's perceived censorship is my perceived editing." *Paxton*, 49 F.4th at 496 (Southwick, J., dissenting).

Once the Fifth Circuit's false premises are revealed, the correct result snaps into focus. Content moderation decisions are editorial choices about what third-party speech to transmit via social media platforms, and state intervention into that process violates the First Amendment. The Fifth Circuit's assertion that this Court has never upheld "freestanding" protection for editorial discretion simply misreads the law. At various times and for diverse media, this Court has upheld protection for editing as part of the speech process. Governmental efforts to single out a piece of that process to regulate it as "conduct" are fundamentally illegitimate.

The Fifth Circuit's further conclusion that moderation decisions don't "qualify" as editorial choice because they largely take place after material is posted ignores this Court's recognition in *Reno* that

the internet deserves full protection despite its differences with traditional media. Quite to the contrary—it receives maximum First Amendment protection *because* of those differences. *Reno*, 521 U.S. at 850–51.

Likewise, state efforts to regulate how platforms respond to complaints about their moderation practices intrude deeply into the editorial process and violate the First Amendment. The Texas prohibition against "viewpoint based" moderation dictates the substance of platforms' editorial policies and directly infringes their constitutional prerogatives. But even if the law did not affect the content of moderation policies, the process burdens alone are excessive. Large social media platforms deal with many millions of posts daily; requiring them to provide a "detailed rationale" for each contested moderation decision on a short time frame is an impossible burden even under the most lenient level of First Amendment review. However, the Court should take this opportunity to clarify that strict scrutiny applies to any state supervision of this process.

ARGUMENT

I. The Basic Principles of Freedom of Speech and the Press Govern These Cases.

The *NetChoice* cases involve government regulation of content carried on a medium of

communication, and once they are understood as such, basic First Amendment principles govern the outcome. The Fifth Circuit erred by ignoring this context.

A. These Cases Involve Government Media Regulation.

Texas law prohibits large social media platforms from engaging in viewpoint-based moderation of users' posts and requires them to have an appeal process for removed posts and to respond to complaints within 14 business days.[3] The Florida law bars removing certain users, and likewise requires platforms to explain and justify their decisions to the state's satisfaction. The specific features of these two schemes don't matter that much; the point is, both impose state supervision over content moderation for private speech forums.

The Fifth Circuit found no First Amendment problem with this at all, concluding that "the State can regulate conduct in a way that requires private entities to host, transmit, or otherwise facilitate

[3] HB 20 prohibits large social media platforms from blocking, banning, removing, deplatforming, demonetizing, de-boosting, restricting, denying equal access or visibility to, or otherwise discriminating against expression based on "the viewpoint of the user or another person," the "viewpoint represented in the user's expression or another person's expression," or the user's "geographic location" in the state. TEX. CIV. PRAC. & REM. CODE § 143A.002(a).

speech." *Paxton*, 49 F.4th at 455. It refused to view platforms' rules for hosted content as part of any editorial process and went even further to assert that this Court's cases "do not carve out 'editorial discretion' as a special category of First-Amendment-protected expression." *Id.* at 463. This cluster of fallacies is, as the Fourth Circuit put it in a related context, "a compendium of traditional First Amendment infirmities." *Washington Post v. McManus*, 944 F.3d 506, 513, 515 (4th Cir. 2019).

The Fifth and Eleventh Circuits' divergent conclusions were predictable. The Eleventh Circuit viewed platform regulation primarily through the lens of cases involving media regulation, such as *Tornillo* and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). Consequently, it reaffirmed that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1203 (quoting *Ent. Merchs. Ass'n*, 564 U.S. at 790).

In sharp contrast, the Fifth Circuit majority reached its conclusions by extracting what it believed were controlling principles from cases that have nothing to do with media, like *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v.*

Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (*FAIR*). Only by doing so could it find the Texas law "does not regulate the Platforms' speech at all." *Paxton*, 49 F.4th at 448. Such a stunning pronouncement can follow only from ripping case holdings from their proper context.

The cases now before the Court are not about handing out leaflets at a shopping mall or making space for military recruiters at a law school. They are about the degree to which the government can regulate a global medium of communication. Laws that target a particular medium regulate speech, regardless of how those regulations may be characterized. *Near v. Minnesota*, 283 U.S. 697, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance does not permit an invasion of the constitutional immunity against restraint."). This is true even for measures that do not overtly call out "speech" *per se*. *See*, *e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Com'r of Revenue*, 460 U.S. 575, 582 (1983) (tax on ink and paper "burdens rights protected by the First Amendment"). The First Amendment protects the "process of expression through a medium" as well as "the expression itself." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010). Consequently, this Court observed, "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." *Ent. Merchs. Ass'n*, 564 U.S. at 792 n.1.

During the recent argument in *Lindke v. Freed*, Justice Kagan raised a note of caution about approaching the subject of internet regulation by analogy to unrelated situations. She observed "it's hard to predict the future, but change has happened very quickly in the last however many years and is going to continue to happen" as online media become more central to our lives. *Lindke v. Freed*, No. 22-611, Arg. Tr. 75 (Oct. 31, 2023). Drawing on hypothetical examples like talking to a public official in a grocery store does not really "tak[e] into account the big picture." *Id.* at 75–76. Same here. Rulings about shopping malls and campus-based military recruiters do not answer the central question in these cases: What is the proper relation between the government and the internet?

In only one limited respect did the Fifth Circuit consider this as a problem of media regulation. Judge Oldham, writing only for himself, concluded that Texas could regulate social media platforms as common carriers, and that imposing a non-discrimination requirement presented no First Amendment problem. *Paxton*, 49 F.4th at 469–79. His analysis drew primarily on nineteenth century precedents on common carriage and public accommodations from long before the development of First Amendment jurisprudence. Other *amici* will ably address why Judge Oldham's common carrier analogy is inapt, and how his analysis fails to account

for the differences between the telegraph or telephone services and mass media distributors, including social media platforms.

It suffices to note for present purposes that this Court has recently reaffirmed that public accommodation concepts do not trump the First Amendment. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 599–600 (2023). Distinguishing *FAIR*, this Court observed in *303 Creative* that, notwithstanding public accommodation laws, "no government . . . may affect a 'speaker's message' by 'forcing' her to 'accommodate' other views; no government may 'alter' the 'expressive content' of her message; and no government may 'interfere with' her 'desired message.'" *Id.* at 596 (cleaned up). Likewise, no government may force a multimedia platform to "become" a common carrier. *See*, *e.g.*, *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of *en banc* review).

Cases striking down the federal law that barred telephone companies from providing cable television service affirmed this principle. That law, in effect, required the phone companies to provide *only* common carrier service and not to act as electronic publishers on the theory that they could monopolize the multichannel video medium. Applying this Court's then-recent ruling in *Turner Broadcasting*, lower

courts uniformly invalidated the restrictions as violating the First Amendment.[4]

Just as the government cannot compel a platform to *remain* a common carrier, it cannot force it to *become* one. As the Fourth Circuit explained, "[t]he First Amendment's problem with Section 533(b) [of the Communications Act] is that the provision does not allow the telephone companies to engage in protected speech, that is, the provision, *with editorial control,* of cable television services." *C&P Tel. Co. of Va.*, 42 F.3d at 189 n.10 (emphasis in original). These decisions were rendered moot after Congress lifted the telco-cable ban in the 1996 Telecommunications Act. *See* Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 124 (1996). But the controlling principle remains: The First Amendment restricts forced common carrier requirements.

The Court should address this case in its proper context—as requiring the setting of correct constitutional boundaries for regulating a medium of communications. And it should reaffirm this Court's conclusion in *Reno*, that there is "no basis for qualifying the level of First Amendment [protection]"

---

[4] *See C&P Tel. Co. of Va. v. United States*, 42 F.3d 181, 203 (4th Cir. 1994), *vacated as moot*, 516 U.S. 416 (1996); *U.S. West, Inc. v. United States*, 48 F.3d 1092, 1097–98 (9th Cir. 1995), *vacated as moot*, 516 U.S. 1165 (1996); *Ameritech Corp. v. United States*, 867 F. Supp. 121 (N.D. Ill. 1994); *BellSouth Corp. v. United States,* 868 F. Supp. 1335 (N.D. Ala. 1994).

for this "unique and wholly new medium of worldwide human communication." *Reno*, 521 U.S. at 870.

B. The Fifth Circuit Misapplied the Concept of Censorship.

The premise of the Florida and Texas laws of preventing "censorship" by social media platforms misconceives basic constitutional concepts. Again, the Eleventh Circuit got it right when it observed, "[o]ne of those 'basic principles'—indeed, the most basic of the basic—is that '[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.'" *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1203 (quoting *Halleck*, 139 S. Ct. at 1926).

The Fifth Circuit, conversely, tries to justify intervention into the inner workings of social media moderation by invoking the state's claim that it needs to prevent "censorship" by the platforms. *Paxton*, 49 F.4th at 455 ("We reject the Platforms' efforts to reframe their censorship as speech."). Apparently believing that repetition makes it so, the majority opinion invokes the word "censor" or "censorship" 145 times.

This is sophistry, not legal reasoning. No amount of repetition can convert a private editorial choice into an act of illegal censorship. "The text and original meaning of [the First and Fourteenth] Amendments,

as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928. The Fifth Circuit's obsessive misuse of the term "censorship" brings to mind Inigo Montoya's immortal words from *The Princess Bride*: "You keep using that word. I don't think it means what you think it means."[5]

Indeed, it doesn't. Yet the Fifth Circuit majority boldly takes ownership of this error at every turn. It mischaracterizes the platforms' arguments as promoting an "*unenumerated* right to *muzzle* speech" which Judge Oldham misleadingly reframes as a claim that "corporations have a freewheeling First Amendment right to censor what people say." *Paxton*, 49 F.4th at 445. The majority further describes the platforms' arguments as "a rather odd inversion of the First Amendment" and concludes the Texas law "does not chill speech; if anything, it chills censorship." *Id.* at 445, 448.

But it is the Fifth Circuit majority that has weirdly inverted the First Amendment. Judge Southwick, writing in dissent, crystalized the problem concisely by observing "[t]he majority's perceived censorship is

---

[5] *See Chester v. TJX Companies, Inc.*, 2016 WL 4414768, at *1 (C.D. Cal. Aug. 18, 2016) (quoting *The Princess Bride*, Act III Communications and Twentieth Century Fox 1987).

my perceived editing." *Id*. at 496 (Southwick, J., dissenting). Debunk the load-bearing premise of "private censorship" and the rest of the majority opinion collapses of its own dead weight.

Such confusion is to be expected when questions of censorship get politicized. After Simon & Schuster canceled a contract to publish Senator Josh Hawley's book (ironically, *The Tyranny of Big Tech*) because of his actions related to the January 6, 2021 attack at the Capitol, he claimed it was "a direct assault on the First Amendment."[6] Nonsense. No one has a "right" to have their words printed and distributed by their preferred publisher. *See* Ilya Shapiro, *The Cancellation of Josh Hawley's Book Deal Isn't a First Amendment Issue*, Jan. 11, 2021, https://www.cato.org/commentary/cancellation-josh-hawleys-book-deal-isnt-first-amendment-issue, https://perma.cc/6FYF-F7LJ. For the same reason, comedians Tom and Dick Smothers had no valid First Amendment claim when the CBS network canceled "The Smothers Brothers Comedy Hour." *Smothers v. Columbia Broad. Sys., Inc.*, 351 F. Supp. 622, 627 (C.D. Cal. 1972) (quoting *Post v. Payton*, 323 F. Supp. 799, 803-04 (E.D.N.Y. 1971) ("It is only governmental

[6] Josh Hawley (@HawleyMO), Twitter (Jan. 7, 2021, 6:42 PM), https://twitter.com/HawleyMO/status/1347327743004995585, https://perma.cc/V66S-YLN4.

action which can violate the First and Fourteenth Amendments.")).

The Florida and Texas legislatures were quite candid in their reasons for passing these two laws—to even out what they saw as a political playing field. Unlike the Fifth Circuit, the Eleventh Circuit saw this partisan power play for what it was and observed "this would be too obvious to mention if it weren't so often lost or obscured in political rhetoric—platforms are private enterprises, not governmental (or even quasi-governmental) entities." *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1204. Accordingly, "no one has a vested right to force a platform to allow her to contribute to or consume social-media content." *Id.*

While the states argue they should be permitted to intervene because of the massive power of "Big Tech," this Court rejected the same argument based on "corporate power" in *Tornillo*. It noted that the press, as understood by the Framers in 1791, was very different in the modern age, and that both electronic media and print publications had become enormously powerful and influential in their capacity "to manipulate popular opinion and change the course of events." *Tornillo*, 418 U.S. at 248–49. Nevertheless, it unanimously rejected resorting to the coercive power of government as a cure, which it found "at once brings about a confrontation with the express provisions of the First Amendment." *Id.* at 254. The Court

concluded "it has yet to be demonstrated how governmental regulation of [editorial control and judgment] can be exercised consistent with First Amendment guarantees of a free press." *Id.* at 258. That conclusion applies equally here.[7]

II. Content Moderation Restrictions and Individualized Explanation Requirements Violate the First Amendment.

When viewed through the proper framework, the right result in the *NetChoice* cases is obvious. The government is asserting authority over social media platforms' choices regarding what content they carry and how they should prioritize and display it. First Amendment violations rarely are more manifest.

A. Content Moderation Decisions Are Part of the Speech Process Protected by the First Amendment.

The Fifth Circuit's failure to apply settled First Amendment principles to limit the regulation of content moderation flows from two fundamental errors. First, it failed to acknowledge well-established protections for the editorial function and concluded—without any relevant citations—that this Court's cases "do not carve out 'editorial discretion' as a

[7] To the extent the Court is concerned about unreviewable viewpoint-based moderation decisions where the government is involved, it will have the opportunity to address that issue in *Murthy v. Missouri*, No. 23-411.

special category of First-Amendment-protected expression." *Paxton*, 49 F.4th at 463. But it also erroneously assumed that moderation decisions don't reflect editorial judgments and that Texas law "does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct*." *Id.* at 448 (emphases in original). Both are false premises.

First, this Court has long held that the First Amendment protects editorial decision-making, even when it consists of deciding only what material to exclude. As former Chief Justice Warren Burger wrote: "For better or worse, *editing is what editors are for*; and editing is selection and choice of material." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) (emphasis added) (upholding broadcasters' refusal to air political issue advertising). The Court made this point forcefully in *Tornillo*, which rejected a similar attempt by Florida to mandate that a media platform—there, a newspaper—provide evenhanded political commentary. The Court acknowledged that the regulation sought to achieve the "undoubtedly desirable goal" of a "responsible press." *Tornillo*, 418 U.S. at 256. Yet good intentions did not excuse government "intrusion into the function of editors." *Id.* at 258; *see also Mills v. Alabama*, 384 U.S. 214, 220 (1966) ("no test of reasonableness can save [such] a

state law from invalidation as a violation of the First Amendment").

The Court has emphasized that protection for editorial discretion is not limited to newspaper or broadcast editors alone. Rather, it is an expansive concept that applies whenever a private actor chooses to transmit some but not other expression, no matter the format. Cable operators, for example, "engage in and transmit speech," and are protected by the First Amendment when they "'exercise editorial discretion over which stations or programs to include in their repertoire.'" *Turner Broad. Sys.*, 512 U.S. at 636–37 (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)) (cleaned up). And a parade organizer exercises "the autonomy to choose the content of his own message" when he selectively allows some groups to march with the parade, but not others. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

Editorial selection is protected because it is a crucial part of the speech process, and it cannot be disaggregated and regulated separately as "conduct" without undermining the First Amendment. This is because "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). As Justice Scalia cautioned, "[c]ontrol any cog in the machine, and you can halt the whole apparatus.

License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part), *rev'd in part*, *Citizens United*, 558 U.S. at 365–66; *see also McManus*, 944 F.3d at 518 ("the integrity of the newsroom does not readily permit mandated interaction with the government").

The Fifth Circuit's failure to recognize editorial discretion as "a freestanding category of First-Amendment-protected expression," *Paxton*, 49 F.4th at 464, results from asking the wrong question. *See also id.* at 463, 465, 492. Editing is neither "freestanding," nor is it a "category"—it is integral to the communication process. And the purpose of the First Amendment is to prevent the government from placing its thumb on the scale at any point in that process.

The Court has on that basis invalidated numerous measures that restrict speech at different stages, including "requiring a permit at the outset," burdening speech "by impounding proceeds on receipts or royalties," imposing "a cost after the speech occurs," and "subjecting the speaker to criminal penalties." *Citizens United*, 558 U.S. at 336–37 (citations omitted); *see also Minneapolis Star*, 460 U.S. at 592–93 (invalidating tax on newsprint and ink). Likewise, supervising social media platforms'

editorial choices is an obvious and basic First Amendment violation. *Tornillo*, 418 U.S. at 256 ("compulsion to publish that which 'reason tells [editors] should not be published' is unconstitutional").

But the Fifth Circuit's error did not end with its rejecting constitutional protection for the editorial function. It also concluded that platforms' moderation decisions don't "qualify" as editing because platforms make their content selection decisions at a different point in the speech process. *Paxton*, 49 F.4th at 464. Unlike newspaper editors and cable operators who select material "*before* that content is hosted, published, or disseminated," social media platforms generally apply moderation decisions to material already posted by users. *Id*. at 464–65, 492–93. According to the Fifth Circuit, this different sequencing converts the platforms' management of speech into "conduct" and its private decisions into "censorship." *Id*. at 448, 459–62.

But *why*? This conclusion hinges on the court's bald assertion that *ex ante* content selection decisions are sacrosanct, but *ex post* moderation choices lack constitutional protection. Yet both involve decisions about what speech to disseminate to the public, so one act cannot be considered "conduct" any more than the other. And both involve private decision-making, so no

amount of semantic alchemy can transform such choices into "censorship."

The First Amendment is not so easily evaded. "Speech is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). Otherwise, the government could claim "publishing a newspaper is conduct because it depends on the mechanical operation of a printing press." *Id.* This Court has long understood that "the creation and dissemination of information are speech within the meaning of the First Amendment," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011), and that "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) (citation omitted) (regulating the disclosure of information is "a regulation of pure speech . . . not a regulation of conduct"); *see also ACLU of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (a statute that targets communication technology "burdens First Amendment rights directly, not incidentally").[8]

[8] Editorial decisions are pure speech, not some form of symbolic expression like burning a draft card. *See. e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968). Accordingly, the Eleventh Circuit's secondary rationale, that moderation decisions might be classified as "expressive conduct" undervalues the First

The Fifth Circuit's attempt to cabin online platforms as mere "conduits" to distinguish them from newspapers, *Paxton*, 49 F.4th at 460, ignores this Court's findings from *Reno* that "the Internet is a unique and wholly new medium of worldwide human communication" that is "constantly evolving" to allow both individual and group communication and where service providers perform multiple roles. *Reno*, 521 U.S. at 850–51 (cleaned up). As noted, moderation decisions for third-party speech in this singular medium generally are made after the fact because, unlike with traditional newspapers, it is possible for individual users to post content without prior review by anyone. That difference does not alter the fact that moderation decisions are editorial choices, nor does it justify the Fifth Circuit's attempt to analyze this case as if it involved a siloed communications technology of the nineteenth or twentieth centuries.

When an online platform demotes certain speech via algorithm or removes other content from its platform entirely, it signals to users that such speech is not worthy of their time, and that it "should not be published." *Tornillo*, 418 U.S. at 254 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)); *accord Preferred Comms., Inc.*, 476 U.S. at 494 ("[B]y exercising editorial discretion over which

---

Amendment interests at stake. *See NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1214.

stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats.").

The Eleventh Circuit understood this fact while Judge Oldham did not. It observed that "social-media platforms aren't 'dumb pipes': They're not just servers and hard drives storing information or hosting blogs that anyone can access, and they're not internet service providers reflexively transmitting data from point A to point B. Rather, when a user visits Facebook or Twitter . . . she sees a curated and edited compilation of content from the people and organizations that she follows." *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1204. This is the essence of editorial discretion. Platforms "invest significant time and resources into editing and organizing—the best word, we think, is *curating*—users' posts into collections of content that they then disseminate to others." *Id.* at 1204–05. By this process, "platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints." *Id.* at 1205.

Once these moderation decisions are correctly understood as private editorial choices, the First Amendment leaves the government no legitimate supervisory role. This Court should hold that both the Florida and Texas laws are unconstitutional for that reason.

B. Individualized Explanation Requirements Violate the First Amendment.

Just as the First Amendment bars state governments from dictating platforms' moderation policies, it also prohibits forcing platforms to explain or justify their editorial decisions. The Fifth Circuit erred in upholding a requirement that platforms must establish an appeal process and explain content removal decisions within 14 business days, while the Eleventh Circuit correctly held that requiring platforms to provide a "thorough explanation" of each moderation decision likely violates the First Amendment. These respective provisions differ somewhat but implicate the same First Amendment concern: intrusion into the function of editors.

Any law authorizing state oversight of moderation decisions intrudes deeply into platforms' editorial prerogatives. It does not matter whether platforms enforce their "own" policies. Imposing time limits on the review process and empowering government functionaries to assess the adequacy of platforms' responses is a significant burden. For that reason, two federal district courts correctly enjoined laws in New York and California that sought to empower the states to oversee platforms' moderation and complaint procedures.

New York adopted what it called a "Hateful Conduct Law" that required platforms to provide a

mechanism for users to complain about instances of "hateful conduct" and to disclose how they responded to any such complaints. *Volokh*, 656 F.Supp.3d at 437–38. California passed an Age-Appropriate Design Code Act that required platforms to design their services and features to avoid "harm" to minors, and also to enforce their "published terms, policies, and community standards" subject to state supervision. *Bonta*, 2023 WL 6135551, at *14. In both cases, the courts held that state oversight of the complaint process unconstitutionally disrupts private editorial choice. *See Volokh*, 656 F. Supp. 3d at 442 ("Plaintiffs have an editorial right to keep certain information off their websites and to make decisions as to the sort of community they would like to foster on their platforms."); *Bonta*, 2023 WL 6135551, at *15 (state oversight "flies in the face of a platform's First Amendment right to choose in any given instance to permit one post but prohibit a substantially similar one").

Even if state supervision would not affect the substance of platforms' moderation decisions, the process-burdens alone violate the First Amendment because of the sheer scale of the platforms' operations. As this Court recently observed in *Twitter, Inc. v. Taamneh*, "for *every minute* of the day, approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter." 598 U.S. 471, 480 (2023).

The platforms' content removal takes place on a similar scale. For example, "YouTube removed over a billion comments in a three-month period in 2020." *Paxton*, 49 F.4th at 487. That translates to YouTube removing over ten million comments *a day*.

The administrative burden of the Texas law that requires platforms to act on complaints within 48 hours, decide appeals from those decisions within 14 days, and to provide a detailed rationale for each would be staggering. TEX. BUS. & COM. CODE §§ 120.102–104. Now, imagine a similar requirement multiplied by 51 jurisdictions if Texas can impose such a scheme.

The Fifth Circuit's response was essentially to say, "what burden?" It dismissively waved away any thought that individualized explanation requirements might be problematic by stating social media platforms "already provide an appeals process substantially similar to what [the law] requires for most other categories of content they host." *Paxton*, 49 F.4th at 487. But it is one thing for platforms to allow users to complain and appeal a particular moderation decision; it is quite another for the government to dictate when and how that process must proceed under the gaze of state bureaucrats who can haul platforms into court and collect investigative costs and attorney's fees for any infraction. TEX. BUS. & COM. CODE § 120.151. "It is the presence of

compulsion from the state itself that compromises the First Amendment." *McManus*, 944 F.3d at 515.

The Eleventh Circuit held that Florida's similar requirement that platforms provide a detailed justification for every content-moderation action likely violates the standard set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1230. The Fifth Circuit agreed that *Zauderer* set the correct standard but concluded the Texas law "easily passes muster" thereunder. *Paxton*, 49 F.4th at 487. Once again, the Eleventh Circuit got it right while the Fifth Circuit did not—at least with respect to the First Amendment burden. But both courts erred in using *Zauderer* as the benchmark.

The error is quite basic: *Zauderer* applies to the regulation of potentially deceptive commercial *advertising*, not editorial choices. Under this test, non-intrusive disclosure requirements may be permissible as a minimally restrictive measure to guard against potentially misleading commercial speech. *Zauderer*'s intrusion on the speech rights of advertisers was premised solely on "the State's interest in preventing deception of consumers." 471 U.S. at 651. Even in that context, however, any required disclosures are limited to "purely factual and uncontroversial information about the terms under which . . . services will be available" and the requirements could not be

"unjustified or unduly burdensome." *Id.* This Court has confirmed that *Zauderer's* test for requiring disclosures does not apply outside those circumstances. *See National Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (*NIFLA*) (citing *Hurley*, 515 U.S. at 573).[9]

It is a misnomer to describe the Texas and Florida explanation and appeal mandates as "disclosure" requirements. They bear no relationship to the types of commercial safeguards that concerned this Court in *Zauderer*—preventing hidden charges for services or other similar problems. Instead, the laws at issue dictate how editorial decisions must be made, communicated, and justified. Such requirements compel platforms to "speak a particular message" and accordingly should be subject to strict scrutiny.

[9] In recent years, *Zauderer* has undergone something of a "mission creep." In various cases, circuit courts held that compelled commercial disclosures could be required to serve government interests other than just preventing potential deception. *See, e.g.*, *American Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*); *NAM v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); *American Beverage Ass'n v. San Francisco*, 871 F.3d 884 (9th. Cir. 2017). This Court has not yet addressed this trend, and in *NIFLA* declined to decide whether *Zauderer* was the correct standard for certain of the disclosures at issue. Instead, it held the compelled disclosure requirements were unconstitutional regardless of the test. *NIFLA*, 138 S. Ct. at 2377. Here, the Court should take the opportunity to halt *Zauderer's* doctrinal expansion, and to confine it to cases of potentially deceptive commercial speech.

NIFLA, 138 S. Ct. at 2371 (citing *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

Ultimately, requiring platforms to justify and explain moderation decisions is unconstitutional under any First Amendment standard. *See NIFLA*, 138 S. Ct. at 2377 ("We need not decide whether the *Zauderer* standard applies" to hold disclosure requirements are "unjustified or unduly burdensome."); *McManus*, 944 F.3d at 520 (finding it unnecessary to choose a level of scrutiny to hold that burdensome disclosure requirements are unconstitutional). The numbers speak for themselves where "[t]he targeted platforms remove millions of posts per day." *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1230. For a task of this magnitude, the notice requirements and the level of detail required to explain each moderation decision alone renders the law excessively burdensome. *See NIFLA*, 138 S. Ct. at 2378. Nevertheless, the Court should clarify that *Zauderer* is confined to deceptive commercial speech cases and hold that the First Amendment precludes state control of social media moderation policies.

CONCLUSION

The Texas and Florida legislatures became convinced large social media companies were making moderation decisions to their political disadvantage, so they decided to even the score. They passed laws that placed those decisions under state supervision,

forgetting "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976). To paraphrase P.J. O'Rourke, giving state legislatures such power over social media platforms "is like giving whiskey and car keys to teenage boys." P.J. O'Rourke, *Parliament of Whores* xviii (Atlantic Monthly Press: New York, 1991). Nothing good can come of it, and only this Court can stop it.

December 6, 2023

Respectfully Submitted,

ABIGAIL E. SMITH
Foundation for Individual Rights and Expression
510 Walnut St.
Suite 900
Philadelphia, PA 19106

ROBERT CORN-REVERE
Counsel of Record
Foundation for Individual Rights and Expression
700 Pennsylvania Ave.
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org

Counsel for Amicus Curiae