

In The
Supreme Court of the United States

ASHLEY MOODY, Attorney General of Florida, et al.,
Petitioners,

v.

NETCHOICE, LLC, dba NETCHOICE, et al.,
Respondents.

NETCHOICE, LLC dba NETCHOICE, et al.,
Petitioners,

v.

KEN PAXTON, Attorney General of Texas,
Respondent.

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

**BRIEF OF AMICI CURIAE INTERNET WORKS,
GLASSDOOR, LLC, INDEED, INC., MOZILLA
CORPORATION, NEXTDOOR, INC.,
PINTEREST, INC., TRIPADVISOR, LLC,
TUMBLR, INC., AND VIMEO, INC.
IN SUPPORT OF NETCHOICE, LLC ET AL.**

MICHAEL A. CHEAH
INTERNET WORKS
1155 F Street NW, Suite 230
Washington, D.C. 20004
(917) 405-8076
mcheah@theinternet.works
Counsel for Internet Works

JEAN-PAUL JASSY
Counsel of Record
MEGHAN E. FENZEL
JASSY VICK CAROLAN LLP
355 South Grand Avenue,
Suite 2450
Los Angeles, California, 90071
(310) 870-7048
jppjassy@jassyvick.com

*Counsel for Internet Works,
Glassdoor, LLC, Indeed, Inc.,
Mozilla Corporation,
Nextdoor, Inc., Pinterest, Inc.,
Tripadvisor, LLC,
Tumblr, Inc., and Vimeo, Inc.*

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STATEMENT OF INTEREST

Amici curiae submit this brief in support of NetChoice, LLC and Computer & Communications Industry Association (petitioners in No. 22-555 and respondents in No. 22-277).¹ Amici are:

Internet Works is a trade association whose members are a diverse group of small to mid-sized Internet companies and organizations working together to ensure that all Internet users are represented in important policy conversations on supporting and sustaining responsible content moderation and that the Internet remains a place of limitless possibility and innovation.

Glassdoor, LLC provides a community for workplace conversations and employee reviews of employers, attracting more than 55 million unique monthly visitors.

Indeed, Inc. provides the world's number one job site, with over 350 million visitors per month and job listings that cover 94 percent of the world's gross domestic product.

Mozilla Corporation is the maker of the open-source Firefox web browser used by hundreds of millions of people around the world. Mozilla plans to

¹ Amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members (in the case of Internet Works only), or their counsel contributed money intended to fund the preparation or submission of this brief. A list of Internet Works' members is available at <https://www.theinternet.works>.

launch a social media service, Mozilla.social, which is presently in private beta mode. As a mission-driven technology company owned by a not-for-profit foundation, Mozilla is dedicated to creating an Internet where individuals can shape their own experience and are empowered, safe, and independent.

Nextdoor, Inc. provides over 310,000 online “neighborhoods” where real-life neighbors can meet, receive information about local goings on, give and get help, and build real-world relationships.

Pinterest, Inc. provides a place where hundreds of millions of people around the world come each month to discover and visualize ideas for daily activities, like cooking dinner or deciding what to wear; for major commitments, like house remodeling or marathon training; or for ongoing passions like gardening or fashion.

Tripadvisor, LLC provides a wealth of information on travel and experiences, offering more than one billion ratings, reviews, and insights on nearly eight million accommodations, restaurants, experiences, airlines, and cruises.

Tumblr, Inc. provides a short-form microblogging website that allows users to share small elements of content—short sentences, quotes, images, videos, and the like. While Tumblr’s user base is a relatively small one, it provides a special place on the Internet, a home for a wide array of artists and creators, and a hub for fandom, memes, and Internet quirks.

Vimeo, Inc. provides high-quality video tools that allow users to create, collaborate, host, distribute, and monetize video. Vimeo plays host to a global community of over 300 million users, ranging from creative storytellers to teams at the world's largest companies.

Internet Works' members and the corporate amici have long used content moderation (deciding what user content is acceptable for a particular website) and curation (deciding how to organize and display user content) to differentiate themselves from larger companies, build vibrant communities, and provide helpful information and useful services, and therefore bring a unique perspective.

In this brief, amici explain how content moderation and curation benefits users, why these activities are expressive, and how the State laws at issue penalize them. Regardless of whether these particular laws apply to amici or not, a ruling on whether content moderation and curation decisions are expressive (and therefore protected by the First Amendment) will determine whether States may restrict basic speech-related activities performed by websites of all sizes.

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SUMMARY OF ARGUMENT

Websites like those operated by amici provide Americans with a wealth of opportunities to express themselves, form communities, learn, find inspiration, discover independent film, land jobs, find help, plan vacations, and much more. Florida SB 7072 and Texas

HB 20 threaten those opportunities by penalizing websites when they make basic decisions about what user speech is acceptable (or not) and how to organize and present it—decisions that are critical to their ability to offer unique and innovative services.

I. The laws do not, as the States suggest, regulate only the four or five largest social media companies. In fact, the laws could sweep in an indeterminate number of websites that allow users to post content—including social media sites far smaller than Facebook or YouTube, as well as non-social media sites that provide information about jobs, local businesses, and travel recommendations, thus impacting a wide range of economic activity and speech.

Worse, the laws disproportionately impact smaller- and mid-sized companies by burdening their ability to distinguish themselves and attract new users—the very things that made them successful in the first place. In a world where all websites must adopt undifferentiated content moderation and curation policies and practices, the companies with the largest built-in audiences will have the upper hand, to the detriment of everyone else. Thus, one ironic consequence of the State laws is that they may actually entrench the very companies the States purport to be regulating.

II. A website's decisions around content moderation and curation tell the world what a website's purpose is and what kind of community it is trying to build. Pinterest seeks to provide positivity and inspiration through its image discovery site. Reddit allows

ordinary people to create communities in which they can engage in conversations about shared interests and viewpoints. Tripadvisor seeks to provide trusted sources for reviews about travel and local businesses. The uniqueness of each website depends upon effective content moderation and curation tailored to its purpose and values.

Not only do websites' content decisions serve legitimate private purposes, but they also provide important pro-speech benefits to the public. In particular, content moderation and curation: (1) allow users to form unique communities around shared interests or characteristics (*e.g.*, Reddit); (2) make people feel comfortable expressing themselves online (*e.g.*, Nextdoor's network of neighbors); and (3) give audiences an easy way to discover high-quality and relevant information on myriad topics (*e.g.*, Indeed, Glassdoor, Tripadvisor). Without content moderation and curation, users who expect a good experience online would instead find helpful materials drowned out by useless or toxic content.

III. The State laws are heavy-handed attempts to penalize websites that engage in content moderation and curation. For example, by purporting to ban "viewpoint discrimination," Texas' law invites lawsuits over virtually any content moderation or curation decision. This is not speculation: Last year, Reddit was sued under Texas HB 20 when volunteer community moderators ejected a user from their Star Trek-themed group for what they perceived as uncivil conduct.

Florida stymies content selection decisions by prohibiting content moderation outright with respect to certain preferred individuals (like political candidates and media companies) or speech about political campaigns, imposing impossible “consistency” requirements, and compelling websites to make burdensome disclosures anytime they touch user content. Individually and collectively, these rules make it impracticable—and potentially cost-prohibitive—for websites to do the very things that make their services an appealing place to speak and discover ideas and information.

This Court should affirm the decision of the Eleventh Circuit (which declared SB 7072’s key provisions unconstitutional) and reverse the contrary decision of the Fifth Circuit (which upheld HB 20).

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ARGUMENT

I. A DECISION IN THESE CASES WILL HAVE WIDE RANGING CONSEQUENCES

A. The State Laws Apply to More than the Four or Five Largest Social Media Companies

While Florida and Texas may have set their sights on “social media behemoths like Twitter and Facebook,” *Moody* Pet. 2, or “social-media platforms that dominate [the] modern public square,” *Paxton* Resp. 1, the laws are not so targeted. Florida’s law applies to every website with 100 million global users and

annual revenue exceeding \$100 million.² Texas’ law applies to websites that principally feature user content with 50 million domestic users.³ As a result, the laws do not just regulate the four or five largest social media companies, but they also apply to an indeterminate number of websites that allow users to post materials. *See, e.g., Packingham v. North Carolina*, 582 U.S. 98, 107 (2017) (noting the broad definition of “social networking site” could apply to “commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com”).⁴

Nor are the laws limited to “common carriers” or firms with market power. Neither law attempts to incorporate either of these concepts into its subject

² Fla. Stat. § 501.2041(1)(g). SB 7072 broadly defines “social media” as “any information service, system, Internet search engine, or access software provider” that provides or enables access to a computer server. *Id.* This is the same definition as “interactive computer service” found in Section 230 of the Communications Decency Act, 47 U.S.C. § 230(f)(2), except it omits the words, “Internet search engine.”

³ Tex. Bus. & Com. Code §§ 120.001, 120.002. HB 20 defines “social media” as any “Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images,” *id.* § 120.001(1), and exempts Internet service providers, email providers, and publishers of non-user speech for whom interactive functionality is incidental. *See id.*

⁴ For example, Florida’s law would reach Walmart.com (448 million web visits per month) and Foxnews.com (835 million web visits per month). *See Traffic Analytics, SEMRUSH* (Nov. 30, 2023), <https://semrush.com>.

matter definitions. Instead, the laws apply whenever covered websites serve a certain number of users. But a large user base alone does not establish common carriage or market power⁵: Many members of Internet Works and the corporate amici serve large audiences, but none of them can plausibly be labeled as a common carrier or an oligopolist.

Moreover, notions of common carriage, market power, and audience size cannot possibly serve as a limiting principle for the foundational question in these cases—whether a website’s removal of a user post that fails to comply with its speech guidelines is expressive. Resolution of this question turns on the nature of the decision to remove speech; it has nothing to do with the identity of the decisionmaker or the size of its audience. To put it another way, “First Amendment protection does not go away simply because you have a large communications platform.” *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 430 (D.C. Cir. 2019) (Kavanaugh, J., dissenting in respect of denial of petition for rehearing).⁶

⁵ “[T]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.” *Verizon v. FCC*, 740 F.3d 623, 651 (2014) (citation omitted). Market power typically refers to the ability “to force a purchaser to do something that he would not do in a competitive market.” *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 36 (2006) (citation omitted).

⁶ It is also doubtful that vague notions of common carriage and market power would be relevant to any balancing inquiry. The Court has previously dismissed the notion that the Internet can be regulated in the same manner as broadcast television or

Relatedly, if the States were to prevail on this foundational First Amendment question, the doors would be flung open for restrictive speech regulations affecting websites of all shapes and sizes. Other states, like California or New York, may very well take a very different approach to content moderation and curation than Florida and Texas, thus creating the risk of a fifty-state patchwork of inconsistent regulations. The result would be a splintered regulatory environment where governments, and not private entities, determine the flow of online speech.

B. Enforcement of the Laws Would Have Drastic Consequences on Internet Users and Smaller- and Mid-Sized Companies

The State laws interfere with the private flow of online speech by imposing a panoply of regulations that seek to penalize websites for deciding what speech they want to host or promote. *See* Part III, *infra*. HB 20, for example, allows users to sue whenever a website removes material due to the “viewpoint” expressed. Because nearly any removal of a post can be framed as having to do with a viewpoint, HB 20 exposes websites to litigation over everyday decisions to enforce community standards.

radio. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). And even content-neutral regulations imposed upon cable companies have required fact-intensive findings of market power. *See Turner Broadcasting Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 211 (1997).

Last year, Internet Works member Reddit was sued under HB 20 after the volunteer community moderators of a user-created forum called r/StarTrek ejected a user for violating their rules to “be nice” and not post “insulting or disparaging remarks about any human being.”⁷ Apparently, the posting user had called Wesley Crusher, a teenage character from *Star Trek: The Next Generation*, a “soy boy.” Empowered by HB 20, the user sued Reddit for having been “banned and/or de-platformed . . . for posting a lawful opinion about a fictional character.”⁸ Make no mistake: this is exactly the type of wasteful litigation that will proliferate should the State laws stand.⁹

Laws like HB 20 foist a Hobson’s choice upon websites: Moderate content at the risk of unending litigation or allow one’s website to be flooded with irrelevant and toxic content. If websites choose the latter, users will pay the price. Communities like r/StarTrek would struggle to stay topical and civil. Engagement in Nextdoor’s neighborhoods would suffer if discussions about recycling days became dominated

⁷ Guidelines, *r/StarTrek*, Reddit (Nov. 30, 2023), <https://www.reddit.com/r/startrek/wiki/guidelines/>.

⁸ See *Cox v. Reddit, Inc.*, No. S22-87J1 (Just. Ct. Denton Cnty., Tex. May 17, 2022).

⁹ HB 20 authorizes private lawsuits like *Cox v. Reddit*, see Tex. Civ. Prac. & Rem. Code § 143A.007 (authorizing declaratory and injunctive relief plus attorneys’ fees), as well as actions by the Texas Attorney General, see *id.* § 143A.008 (authorizing injunctive relief and attorneys’ fees and recoupment of investigatory costs) & Tex. Bus. & Com. Code § 120.151 (same).

by national politics. And users searching for unbiased reviews on Tripadvisor would have to wade through a sea of irrelevant and inauthentic reviews. In addition, some websites might choose to shutter speech forums, particularly if they are ancillary to the websites' core services (as in the case of news websites and retailers). The result would be less speech, not more—and certainly not better speech.

Burdensome speech regulations would also disproportionately impact mid-sized websites like Internet Works' members. Mid-sized companies have fewer resources to comply with onerous regulations and fight litigation than their larger competitors. For example, a small company might have a few dozen dedicated content moderators, whereas Facebook and YouTube have tens of thousands.¹⁰ In addition, mid-sized companies need content moderation and curation to differentiate themselves and target specific audiences that respond to unique moderation approaches. If all firms had to adopt a uniform set of community rules, there would be little reason for consumers to select the smaller companies when the same services can be had from larger firms that offer bigger audiences (and the network effects that come from greater scale). Thus, and ironically, the most likely beneficiaries of the State laws would be the existing largest firms.

¹⁰ See, e.g., Natasha Bernal, *Facebook's content moderators are fighting back*, WIRED (Nov. 6, 2021), <https://tinyurl.com/4jb3vcjm> (estimating that, as of 2021, Facebook had 15,000 content moderators).

Smaller companies and new entrants would also face tough questions about long-term sustainability prospects for growth and profitability. Amicus Mozilla, for example, is planning to launch a social media site that embraces stricter content moderation. As Mozilla explains, “We’re not building another self-declared ‘neutral’ platform,” but instead, one that “comes with rules governing how we engage with one another.”¹¹ Such an approach might not work for everyone, but that’s the point: While some people may prefer a forum with unfiltered speech, many seek communities where incivility is not the norm. The State laws disincentivize fledging competitors—and thereby stymie user choice—by insisting that an unmoderated forum is always better than a moderated one. In reality, there is room for both, and individuals, not the government, should be the ones to decide which is better.

II. CONTENT MODERATION AND CURATION ARE SPEECH ACTIVITIES THAT ENABLE THE SPEECH OF OTHERS

A. Websites’ Content Moderation and Curation Decisions Express Their Views About What Content They Wish to Host and Promote

Content moderation and curation activities are not merely technical affairs that mechanically and mindlessly remove or rearrange users’ posts without

¹¹ Steve Teixeira, The internet deserves a better answer to social, Mozilla Blog (May 4, 2023), <https://tinyurl.com/na94tt9f>.

regard to their content. Instead, these activities, which determine what speech is allowed or highlighted, communicate the website’s purpose and vision for the community it wishes to foster. As such, they necessarily convey websites’ subjective views about what “ideas and beliefs [are] deserving of expression, consideration, and adherence.” *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 641 (1994).

1. Content moderation begins with the adoption of guidelines that tell the public what speech the website finds acceptable for the users it serves. These guidelines are tailored to each website’s goals and values. For example, Amicus Pinterest, an image discovery site, seeks to provide “an inspiring platform that promotes positivity and emotional well-being,” and therefore “endeavor[s] to keep divisive, disturbing or unsafe content off our platform.”¹² Among other things, Pinterest has a policy on “harassment and criticism,”¹³ explaining that “Pinterest isn’t a place to insult, hurt or antagonize individuals or groups of people.” Pinterest’s rule and its accompanying explanation are

¹² Pinterest, Inc., 2022 Annual Report (Form 10-K), pp. 8 and 17 (Feb. 6, 2023).

¹³ Pinterest also bans graphic violence, nudity and sexualized content, self-injury and harmful behavior, hate speech, and various forms of misinformation. But not all of Pinterest’s content restrictions are absolute. Although Pinterest categorically bans graphic content, for example, it permits users to save disturbing images dedicated to remembrance and advocacy. In these cases, however, Pinterest will make the latter content less visible in places where people might not expect to see such imagery on its website. See *Community Guidelines*, Pinterest (Nov. 30, 2023), <https://policy.pinterest.com/en/community-guidelines>.

plainly “pure speech.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) (citation omitted).

2. Because a statement of policy would send an empty message without enforcement, websites spend significant efforts removing materials that they believe violate their guidelines. Enforcement approaches are as varied as the guidelines themselves. Today, most companies use a combination of human moderation and automated tools to review user speech either before or after publication. While companies like amici take a variety of approaches, the “how” is not as important as the “why,” which is to reinforce the website’s guidelines in a concrete manner. Thus, when Pinterest removes an image intended to degrade or shame another person, it says “we meant what we said about not allowing harassing content.” Consequently, decisions like these are “inherently expressive.” *Moody*, Pet. App. 26a.

3. The Fifth Circuit misapprehended content moderation when it asserted that websites “use algorithms to screen out certain obscene and spam-related content [and then] virtually everything else is just posted . . . with *zero* editorial control or judgment.” *Paxton*, Pet. App. 35a (emphasis in original). In fact, some websites conduct pre-publication review efforts to address a variety of issues, including relevance and integrity. Tripadvisor, for example, uses automated processes to screen all submitted reviews, thereby enabling it to catch the majority of fake reviews before

publication.¹⁴ But even if a website relies heavily on post-publication review, it still makes decisions that express the website’s views on what is acceptable or not¹⁵—and it should be entitled to no less protection than a supermarket removing an outdated posting from a community bulletin board or a comedy club pulling a flailing amateur off the stage during an open mic night. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

4. Finally, content curation—deciding how to organize and arrange information—is just as expressive as it involves decisions about what websites think their users will find relevant or interesting. Pinterest, for example, reinforces positivity and inspiration through its content feed, where users can see “Pins” (images with links to other websites) from other users.¹⁶ The specific images displayed in a given user’s feed will be unique and depend upon “the boards you

¹⁴ In 2022, Tripadvisor caught 72 percent of all fake reviews before publication. *See Transparency Report 2023*, Tripadvisor (Nov. 23, 2023), <https://tripadvisor.com/TransparencyReport2023>. Across all reviews removed that year, 43 percent were removed pre-publication by algorithmic means and 21 percent were removed pre-publication after human assessment. *See id.*

¹⁵ It would be impracticable for all websites to review all submissions in advance, particularly those that publish large quantities of user content. It would also be undesirable as *ex ante* review would likely delay publication (if reviewed by human teams) or result in more content being removed than necessary (if automatically reviewed). In addition, *ex ante* review is not possible for real-time communications like live streamed video.

¹⁶ *See Explore the Home Feed*, Pinterest (Nov. 30, 2023) <https://help.pinterest.com/en/article/explore-the-home-feed>.

create, Pins you engage with, and things you search for on Pinterest.”¹⁷ But in all cases, Pinterest’s algorithm curates images that Pinterest believes will most interest and inspire the user. In doing so, Pinterest necessarily conveys the message “this is what we think you’ll like” and hopes to encourage the user to submit inspirational images of their own. Such curation is therefore communicative.¹⁸

B. Content Moderation and Curation Benefit Users

While companies like amici have adopted unique and innovative approaches to moderation and curation of user content for business reasons—*e.g.*, to differentiate themselves in the marketplace and to attract and engage users—these approaches simultaneously provide important benefits to users.¹⁹ Specifically, they facilitate the speech of individuals by: (1) creating new spaces for people to associate; (2) encouraging speech;

¹⁷ *See id.*

¹⁸ In this regard, displaying curated images is similar to how search engines provide results. *See, e.g.*, Eugene Volokh & Donald M. Falk, Google: *First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 894 (2012) (arguing that search engines’ display of results are protected because “search engines select and sort the results in a way that is aimed at giving users what the search engine companies see as the most helpful and useful information”).

¹⁹ *See* Jack Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1195 (2018) (arguing that content moderation “allows platform owners to be profitable” and “helps foster a constant, vibrant flow of ideas and opinions”).

and (3) enabling content discovery. Each of these things expands the marketplace of ideas, a key First Amendment priority, *see 303 Creative LLC*, 600 U.S. at 585, and each is threatened by laws that penalize content moderation and curation.

1. *Enabling freedom of association.* On Reddit, speech guidelines allow users to create and self-govern online communities centered around their shared interests. Reddit is unique in that ordinary users—and not Reddit—establish its many communities (or “subreddits,” which are denoted with the “r/” prefix, like r/StarTrek) and create and enforce editorial guidelines using tools provided by Reddit. Subreddits are akin to user-run clubs: many are open to anyone, while others place limits on who may join.

Because subreddits are centered around the particular interests, passions, and beliefs of their users, each community’s rules are unique and reflect its purpose. Many of these rules limit speech based upon its topic or viewpoint. For example, the cornerstone rule of “Cats” (called “r/Cats”) is “Must be about cats”,²⁰ if you want to post about dogs, you must go elsewhere. Similarly, while r/Christianity welcomes a wide variety of discussion on Christian topics, it does not permit posts that mock or belittle Christianity.²¹ And, of course, many communities maintain basic civility

²⁰ *r/Cats*, Reddit (Nov. 30, 2023), <https://www.reddit.com/r/cats/>.

²¹ *See r/Christianity*, Reddit (Nov. 30, 2023), <https://www.reddit.com/r/Christianity>.

rules like those of r/StarTrek. Reddit users who chafe against a particular community’s rules are free to join other communities with different rules—or to start their own. There is no one-size-fits-all set of rules, and Reddit gives users the freedom to make these associational choices, both in how they govern speech in their own communities, and in which communities they choose to engage with.

2. *Enabling speech.* Content moderation creates an environment that encourages user speech. When users feel safe, they are more likely to speak in the first place.²² Conversely, harmful content, such as insults, bullying, and harassment, is toxic to online engagement as it worsens the experience for everyone. It thereby threatens to push some would-be speakers out of the marketplace of ideas and to rob speakers of the audiences they enjoy today.²³ For these reasons, websites with vibrant communities maintain and enforce rules designed to regulate civility.

Amicus Nextdoor, which seeks to connect real-life neighbors online so that they can share information, get help, and even meet up in person, provides a paradigmatic example. Nextdoor “set[s] clear guidelines

²² See Jack Balkin, *supra* n.19, at 1195 (arguing that when users feel safe, “they will continue to participate, post content, and make the platform part of their daily lives”).

²³ See Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 208 (2021) (“As malefactors dominate the material on a service, they crowd out legitimate conversations.”).

and use[s] a combination of people and technology to encourage kind conversations and promote neighborhood vitality.”²⁴ For example, Nextdoor requires people to use their real names, asks people to adhere to a civility code, and limits the places on its site where political issues can be discussed. Regarding politics, Nextdoor allows users to discuss local politics and elections in their main feeds (which their neighbors can see), but requires that discussions about national political issues or campaigns be confined to “groups” that are formed with and moderated by other users (similar to Reddit communities).²⁵ Nextdoor adopted this policy because, in its experience, posts about national politics are more likely to be well received by people who have specifically opted into a community subgroup versus the neighborhood at large.

Amicus Tumblr, a microblogging site that enables users to express themselves and discover content based on their interests, is a haven for creativity and self-expression. One way that Tumblr encourages creators to share works is by maintaining an attribution policy that helps protect each creator’s hard work.²⁶ In particular, this policy requires users who share the works of others to provide credit and links

²⁴ Nextdoor, Inc., 2022 Annual Report (Form 10-K) at p. 8 (Feb. 28, 2023).

²⁵ See Nextdoor, “Discuss important topics in the right place,” <https://tinyurl.com/na7p2hbj>.

²⁶ See Tumblr Community Standards, <https://www.tumblr.com/policy/en/community>.

back to the original creator’s page, thus giving creators exposure.

3. *Enabling content discovery.* Some websites use content moderation and curation to compile a body of high-quality and relevant information that can be more easily discovered by users.²⁷ In essence, these websites separate the wheat from the chaff and thus spare their audience from having to do that work themselves. For example:

Amicus Indeed maintains strict rules for posting jobs (and commentary about employers) in order to provide one of the world’s largest marketplaces for employment. Among other things, job postings must offer what Indeed considers to be a bona fide employment opportunity: Indeed does not allow postings for multi-level marketing, franchising, gig work, or unpaid internship opportunities, nor does it allow postings that require prepayment of fees or employee-paid training.²⁸

Likewise, Amicus Glassdoor seeks to attract employee reviews of their employer to help job candidates in their job searches. Reviews must reflect the current

²⁷ The Fifth Circuit is therefore mistaken in suggesting that all websites “unlike newspapers,” do not curate a “narrow ‘choice of material.’” *Paxton*, Pet. App. at 34a. The suggestion is also irrelevant because a speaker “‘does not forfeit constitutional protection simply by combining multifarious voices’ in a single communication.” *303 Creative LLC*, 600 U.S. at 588 (citation omitted).

²⁸ See Job Posting Standards, Indeed (Oct. 27, 2022), <https://tinyurl.com/mr98a779>.

or former employee's actual experiences or opinions and be free of any employer incentivization or coercion.²⁹ To help further foster a constructive forum for both employees and employers, Glassdoor allows employers to respond to employee reviews. Glassdoor actively moderates content and suspends users who do not respect its Community Guidelines. *See id.*

Lastly, Amicus Tripadvisor seeks to provide a trusted resource for the world's travelers. It does so by ensuring that the millions of user reviews about places and businesses are authentic and unbiased. Accordingly, each reviewer must have first-hand experience with the place or business being reviewed, must not be affiliated with it, and must not receive a fee for writing the review.³⁰ Each year, Tripadvisor removes over a million reviews that fail to comply with these guidelines, using a combination of automated and human-based review techniques.

III. THE STATE LAWS UNDULY BURDEN CONTENT MODERATION AND CURA- TION DECISIONS

The State laws assail the bedrock First Amendment principle that owners and lessees of private property are free to decide what speech and speakers they want on their properties. *See Halleck*, 139 S. Ct. at

²⁹ *See Community Guidelines*, Glassdoor (Oct. 25, 2023), <https://help.glassdoor.com/s/article/Community-Guidelines>.

³⁰ *Review Guidelines*, Tripadvisor (Oct. 20, 2022), <https://tinyurl.com/49by5e49>.

1931. As discussed below, the laws burden the ability of private websites to decide what user speech they wish to host and promote in myriad ways. This government intrusion upon private speech does not remotely comport with the First Amendment. Amici agree with the Fifth Circuit when it said, in a slightly different context, that websites’ “content-moderation decisions must be theirs and theirs alone.” *Missouri v. Biden*, 83 F.4th 350, 397 (5th Cir. 2023), *cert. granted*.

A. Viewpoint Neutrality Rule (HB 20)

HB 20 purports to require all covered entities to be “viewpoint neutral.” It does so by prohibiting websites from “censor[ing]”³¹ user speech based upon “viewpoint of the user or another person” or “the viewpoint represented in the user’s expression or another person’s expression,” regardless of whether the viewpoint is expressed online or elsewhere. Tex. Civ. Prac. & Rem. Code § 143A.002(a).

Virtually every content moderation is either based (in part or in whole) on a viewpoint or could at least be framed as involving one. Consequently, HB 20 invites endless lawsuits against websites (and potentially moderators) for basic acts of content moderation. *See, e.g., Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (“Programming decisions would be

³¹ To “[c]ensor” is “to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.” Tex. Civ. Prac. & Rem. Code § 143A.001(1).

particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint based.”³²

In some cases, it is obvious that the content is moderated *because* it expresses a certain viewpoint, such as a view that is antithetical to the core values of a Reddit community like r/Christian. In these cases, HB 20 stifles not only Reddit’s free speech rights, but it also tramples the free speech and associational rights of its users, who would no longer be able to exclude people who disagree with (or simply disrespect) their core tenets. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Yet even where a website tries to enforce what it believes to be viewpoint neutral rules, it may still run afoul of HB 20. For example, Nextdoor, which limits uncivil comments without regard to political views, may find itself at odds with the law because “[g]iving offense is a viewpoint.” *Matal v. Tam*, 582 U.S. 218, 220 (2017). As Reddit’s r/StarTrek lawsuit shows, websites

³² HB 20’s exception for “unlawful expression,” Tex. Civ. Prac. & Rem. Code § 143A.006(a)(4), does not meaningfully limit the statute’s reach because many categories of unwanted content are protected by the First Amendment. This includes insulting and uncivil speech, *Matal*, 582 U.S. at 243-44, lies (falling short of fraud or defamation), *United States v. Alvarez*, 567 U.S. 709 (2012), speech that threatens emotional distress in others (if on a matter of public concern), *Snyder v. Phelps*, 562 U.S. 443 (2011); and hateful race-based speech, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

will be sued when moderators try to enforce basic civility rules. *See* Section I.B., *supra*.

The same holds true for content curation decisions. Because every content arrangement choice involves a view as to what is worthy of promotion, websites are exposed to litigation risk by merely trying to provide basic content discovery. Reddit would be especially hard-pressed to comply because it ranks posts via a user voting system—which allows individual users to express their approval or disapproval of a particular post. Downvoted content becomes less visible, and if it is downvoted enough, it will eventually be hidden entirely from the default view of the community. A plaintiff whose speech has been downvoted to this degree could well argue that Reddit “den[ies] equal access or visibility,” Tex. Civ. Prac. & Rem. Code § 143A.001(1), to their posts based upon viewpoint.

Ultimately, any user content-related decision, even a seemingly mundane one geared towards civility or user safety, could be challenged as infringing upon someone’s viewpoint. Consequently, the only way a website could eliminate legal risk under HB 20 is to eliminate content moderation and curation, and thereby accept the business risks flowing from operating a service that would almost certainly be less appealing to users. Even websites who are willing to risk litigation would likely feel pressured to make some speech-related changes, such as reducing the places in which to speak or removing entire topics from

discussion. This would result in less speech, not more speech.³³

B. Political Candidate and Journalistic Enterprise Rules (SB 7072)

SB 7072 precludes most content moderation and curation activities with respect to users who run for political office or operate journalistic enterprises. In particular, the law bans the “de-platforming” of political candidates,³⁴ Fla. Stat. §§ 106.072(2), the prioritization (or deprioritization) of speech “posted by or about” political candidates, *id.* § 501.2041(2)(h), and any action to “censor, deplatform or shadow ban a journalistic enterprise based upon the content of its publication.” *Id.* § 501.2041(2)(j). A “journalistic enterprise” is not limited to news-gathering organizations; it covers all entities that publish certain amounts of content (on any subject) and have certain audience levels. *Id.* § 501.2041(2)(d).³⁵

³³ It would also distort the marketplace of ideas. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 174 (2015) (Alito, J., concurring) (“Limiting speech based on its ‘topic’ or ‘subject’ favors those who do not want to disturb the status quo.”).

³⁴ A candidate is any person who seeks to qualify for nomination or election, who seeks write-in status, who receives contributions or makes expenditures “with a view to bring about his or her nomination or election,” who appoints a treasurer and designates a primary depository, or who files qualifications papers. *See* Fla. Stat. §§ 106.072(1)(a), 106.011(3).

³⁵ Because this information is not likely to be either publicly available or easily obtainable, there is no way for a website to

These regulations plainly make it impossible to conduct basic content moderation and curation with respect to an entire class of individuals and entities on issues of public concern. Particularly troublesome is the prohibition on ranking content “about” a candidate, which regulates speech by anyone about a political campaign. Does this mean that Nextdoor cannot move a conversation about national elections to a group (and thereby allow it to dominate user feeds)? Must Reddit force the volunteer moderators of r/cats to permit a post about a (non-cat) presidential candidate and prevent it from being downvoted? If so, would posts about candidates have to appear above everything else? Can users evade basic content moderation and curation by simply appending “Biden 2024” or “Trump 2024” to their posts?

C. Enforcement Consistency Rule (SB 7072)

Florida’s requirement that websites “apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users,” Fla. Stat. § 501.2041(2)(b)—violation of which exposes websites to up to \$100,000 in statutory damages, *id.* § 501.2041(6)(a)—is a backhanded attempt to penalize content moderation and curation.

know when it is actually moderating the content of a protected entity.

At the outset, the notion that a speaker must act in a fair or consistent manner when selecting speech, particularly that of public import, is fundamentally at odds with free speech principles. As this Court recognized nearly fifty years ago, the “treatment of public issues and public officials—*whether fair or unfair*—constitute the exercise of editorial control and judgment.” *Miami Herald Pub’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (emphasis added).

Equally important, it is simply not practicable to guarantee consistent content moderation outcomes (whatever that may mean). First, achieving any semblance of consistency on a site-wide basis would be impossible for websites that employ, in whole or in part, decentralized content moderation, such as Reddit and Nextdoor. For these websites, merely allowing community-based moderation potentially exposes the website and volunteer moderators to the risk of significant financial losses.

Second, websites, like government regulators, have limited resources and must prioritize how they approach various types of content, users, and situations. A website may well decide to take a more aggressive approach to reduce harm in high-risk situations, such as those concerning vulnerable users. For example, Internet Works member Discord, which permits teenagers to use its service, takes a zero-tolerance approach to inappropriate conduct directed at minors and will consider “off-platform” behavior in cases

involving minors.³⁶ Thus, Discord might well ban a user for acting inappropriately towards a teenage user even if the same conduct vis-à-vis an adult user might ordinarily merit only a warning or a short suspension. While laudable, such efforts could potentially trigger claims of inconsistent treatment among users.

Third, allegations of inconsistency are simply unavoidable, particularly for decisions that boil down to judgment calls. For example, while amicus Vimeo bans pornography outright, it permits the depiction of sex when it “serve[s] a clear creative, artistic, aesthetic, or narrative purpose.”³⁷ Recently, enforcement of this rule drew complaints of inconsistent treatment from a filmmaker over the removal of a film depicting animated people made of fruit and vegetables performing sexual acts.³⁸ But while the filmmaker might chalk up the decision to capriciousness, Vimeo moderators may see a principled basis for distinguishing prior cases. Regardless of who is right, decisions like these could subject websites to unending litigation.

³⁶ See Discord’s Commitment to Teen and Child Safety, Discord (Jul. 11, 2023), <https://discord.com/safety/commitment-to-teen-child-safety>; see also *Teen and Child Safety Policy Explainer*, Discord (Jul. 11, 2023), <https://discord.com/safety/child-safety-policy-explainer>.

³⁷ Vimeo Acceptable Use Community Guidelines, § 1.3, Vimeo (Sept. 7, 2023), <https://vimeo.com/help/guidelines>.

³⁸ See Ivan Li, *Vimeo Deleted My Award-Winning Animated Film Because It Was Too ‘Sexually Stimulating,’* Cartoon Brew (Oct. 4, 2023), <https://tinyurl.com/bdfb5k26>. Warning: This link contains sexually suggestive materials.

Fourth, a website’s policy and enforcement approach may evolve over time. Websites are not static, and neither is content moderation. Websites revise standards as they gain more experience with certain types of content and adapt to an ever-changing speech environment on the Internet. Most will not proactively revisit prior decisions (or at least not at the time of a change in enforcement policy), which will result in apparent inconsistencies.

Fifth, apparent inconsistency will arise from the fact that many items of content have not (yet) been reviewed. Because many types of content are reviewed reactively (*e.g.*, in response to a complaint) after publication, not all violations will be found and immediately remediated. This makes hosting some degree of non-conforming content unavoidable. As a result, a user with enough time on their hands will always be able to gin up “evidence” of disparate treatment.³⁹

In sum, there is no realistic way of eliminating inconsistency, short of ceasing all content moderation. Consequently, the consistency rule is effectively a backhanded attempt by Florida to penalize content moderation efforts.

³⁹ This is what the plaintiff argued in a case against Vimeo over the removal of content promoting sexual orientation change efforts. *See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 604 n.9 (S.D.N.Y. 2020), *aff’d on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

D. Prioritization Opt-Out Rule (SB 7072)

SB 7072's requirement that websites allow users to opt out of content prioritization algorithms, in favor of "sequential or chronological" presentation, Fla. Stat. § 501.2041(2)(f)(2) & (g), interferes with websites' preferred methods of presenting content to users and would require websites to spend resources developing features that likely provide a worse user experience.

Pinterest's content feed illustrates the problem. Pinterest considers the date on which content is created to be irrelevant—it is a site for inspiration, not news—and so does not display that information to viewers. When a user views their feed (which shows Pins from other Pinterest creators), Pinterest's algorithm serves Pins that Pinterest believes will most interest and inspire the user, and orders the Pins by, among other things, relevance and visual appeal. Thus, a user who has expressed interest in kitchen remodeling will likely see Pins featuring kitchen redesigns. To require Pinterest to show content based upon notions of date would require a fundamental redesign of its service.

Even where date is relevant to a website's content, a website may still prefer not to show all listings chronologically. Once a job seeker on Indeed has entered certain information (geographic location and the jobs they seek), Indeed provides a feed of potentially relevant job listings. The order is determined in part by relevance and date (since newer postings are more likely to represent open roles). If Indeed had to show listings based

upon date alone, it would end up displaying a trove of irrelevant jobs: A law school graduate looking to start a career in Washington D.C. would see retail jobs in Oregon and other irrelevant listings.

E. 30-Day Policy Change Rule (SB 7072)

Florida prohibits covered entities from making changes to their “user rules, terms, and agreements” more than once every thirty days. Fla. Stat. § 501.2041(2)(c). Because user speech policies are plainly the speech of websites, this regulation burdens “pure speech.” *303 Creative LLC*, 600 U.S. at 586 (citation omitted). And the burden is significant because websites may have an urgent need to update or clarify their speech codes in response to changes in the regulatory environment, abuse by malicious users or third parties, or world events.⁴⁰

F. Individualized Disclosure Rules (HB 20 and SB 7072)

Both Florida and Texas require covered websites to provide users with individualized disclosures and the opportunity to appeal when they make certain decisions relating to their content. These disclosures

⁴⁰ Recently, for example, X (formerly Twitter) declared that statements concerning the Israel-Hamas war including the terms “decolonization” and “from the river to the sea” are euphemisms that “necessarily imply genocide” and could result in suspension. See Tara Suter, *Musk says anyone advocating for genocide will be removed from X following backlash*, The Hill (Nov. 18, 2023), <https://tinyurl.com/3b658zfa>.

compel speech about editorial decisions, and they penalize those decisions by imposing undue burdens.

Both laws compel speech in cases where websites may wish to remain silent. Not all websites provide notice of content moderation decisions, or at least not in all cases. One reason is cost: It takes significant resources to design a notification system and staff a team that can implement it. A website may well decide to provide notice for core speech activities, but not for ancillary ones. For example, Indeed generally provides notice when removing job postings, but does not do so for employer reviews.⁴¹ To require that every removal decision trigger a written explanation and an appeal process with a 14-day turnaround, *see* Tex. Bus. & Com. Code §§ 120.103-104, would impose significant costs and thereby disincentivize features that allow users to leave comments.⁴²

In addition, a website may not wish to provide notifications and appeal rights when removing spam,

⁴¹ Indeed’s business centers around connecting job seekers to employers through job postings. Indeed also hosts “Company Pages,” which display information about specific employers and allow current and former employees to post reviews about them. *See* Indeed, Company Reviews: Best Practices, Policies, and Guidelines, <https://tinyurl.com/4vb5aymv>.

⁴² This is especially true where such a feature is not essential to the core service. *See* Daphne Keller, *Platform Transparency and the First Amendment*, J. 1 FREE SPEECH 32 (2023) (“A mid-sized social media platform that is considering an event invitations feature, for example, is less likely to do so if even modest experiments will immediately trigger heavy compliance costs for transparency.”).

fraud, phishing attempts, or particularly egregious content like child exploitation materials. They may decline to provide notice due to the volume of posts at issue (particularly for spam and fraud⁴³), to demonstrate condemnation (in the case of egregious materials), or out of concern that notifications may supply bad actors with information about how to evade the website’s measures. In addition, it would be impossible for websites to write notices on behalf of moderating users—like volunteer moderators on Reddit—who remove the content of other users.

Florida’s law aggravates the problem by: (1) subjecting virtually all decisions involving content moderation *and* curation to its notification rules (due to the broad definitions of “censor” and “shadow ban”), Fla. Stat. § 501.2041(1)(b), (f); (2) requiring websites to provide a “thorough rationale” for each covered decision and a “precise and thorough explanation” as to how the website first identified the moderated materials, “including a thorough explanation of the algorithms used,” *id.* § 501.2041(3)(c), (d); and (3) creating a private right of action for non-compliance with statutory damages up to \$100,000, *id.* § 501.2041(6)(a). This is entirely unworkable.⁴⁴

Because Florida’s notification requirement applies whenever content is made less available, it embraces

⁴³ For example, in 2022, Tripadvisor removed 1.3 million fake reviews. *See* Tripadvisor Transparency Report 2023, <https://tripadvisor.com/TransparencyReport2023>.

⁴⁴ The law’s sole exception is for content that is “obscene.” Fla. Stat. § 501.2041(4).

innumerable decisions, not just those involving the outright removal of content. The substantive notification requirements compound the problem. It would be difficult for a website to know, pre-litigation, whether it has provided a “thorough rationale” or “precise and thorough explanation.” When all of this is combined with the threat of significant damages, it becomes clear that SB 7072 simply seeks to penalize content moderation and curation decisions.



CONCLUSION

Content moderation and curation are critical for websites that host user speech. They communicate what speech the website wishes to host and promote and are therefore expressive acts that should be protected by the First Amendment from heavy-handed government regulations like the State laws under review. The Court should affirm the correct decision of the Eleventh Circuit and vacate the contrary and erroneous decision of the Fifth Circuit.

Respectfully submitted,

MICHAEL A. CHEAH
INTERNET WORKS
1155 F Street NW, Suite 230
Washington, D.C. 20004
(917) 405-8076
mcheah@theinternet.works
Counsel for Internet Works

JEAN-PAUL JASSY
Counsel of Record
MEGHAN E. FENZEL
JASSY VICK CAROLAN LLP
355 South Grand Avenue,
Suite 2450
Los Angeles, California, 90071
(310) 870-7048
jppjassy@jassyvick.com
*Counsel for Internet Works,
Glassdoor, LLC, Indeed, Inc.,
Mozilla Corporation,
Nextdoor, Inc., Pinterest, Inc.,
Tripadvisor, LLC,
Tumblr, Inc., and Vimeo, Inc.*

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