Nos. 22-277, 22-555

IN THE

Supreme Court of the United States

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

V.

NETCHOICE, LLC, 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 Courts of Appeals for the Fifth and Eleventh Circuits

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF RESPONDENTS IN 22-277 AND PETITIONERS IN 22-555

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QUESTIONS PRESENTED

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

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

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

To advance these goals, the Liberty Justice Center regularly litigates cases challenging the misuse of government power to control speech. *See, e.g., Hart v. Meta Platforms,* Ninth Cir. No. 23-15858; *McDonald v. Lawson*, Ninth Cir. No. 22-56220; *Minnesota Voters Alliance v. Ellison*, D. Minn. No. 0:23-cv-02774-NEB-TNL. This case interests *amicus* because the right to speak is fundamental, and government attempts to control the marketplace of ideas should be subject to the strictest constitutional scrutiny.

SUMMARY OF ARGUMENT

It is not the role of the government to ensure the "proper" exercise of free speech online. Government has an "interest in engaging with social-media companies, including" on the controversial issues of the day, "[b]ut the government is not permitted to advance these interests to the extent that it engages in viewpoint suppression." *Missouri v. Biden*, 83 F.4th 350, 2023 U.S. App. LEXIS 26191 *92-93 (5th Cir. 2023).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

Contemporary social media is a core outlet of free expression, used by tens of millions of Americans every day, and hundreds of millions of people around the world. Empowering government officials to control the political content of social media therefore "jeopardize[s] a fundamental aspect of American life." *Id.* at *89.

Like many of the *amici* supporting Florida and Texas in these two cases, *Amicus* is deeply concerned about the manipulation of online private platforms to tilt the playing field of public discourse towards the politically powerful, regardless of which political party is in power. Indeed, *Amicus* currently represents one of the many victims of federal officials' now well-publicized "jawboning" of social media companies into suppressing disfavored views. *See Hart v. Meta Platforms et al.,* Ninth Cir. No. 23-15858. In that case, *Amicus* has argued that federal officials so far insinuated themselves into private social media companies by providing them with content moderation training on COVID Misinformation, their content moderation decisions may be fairly attributed to the Government. LJC likewise represents doctors who have been targeted by the State of California for expressing disfavored views regarding COVID-19—one of whom was actively investigated by the medical board simply for tweeting news articles with the 'wrong' science. *McDonald v. Lawson*, Ninth Cir. No. 22-56220. Government actors and agencies should not be in the business of strong-arming private parties in order to suppress 'dangerous' ideas, nor should they be working jointly in tandem with them in a cooperative fashion by receiving specific training to suppress free speech. Either approach is offensive to the First Amendment.

But if government abridges free expression when it uses pressure and threats to control the editorial decisions of private platforms, or even if these private platforms jointly cooperate with officials and receive content moderation training, it can only be more offensive to the First Amendment for the government to expressly legislate away private platforms' editorial discretion. To allow the authorities to set the rules of debate—and to mandate who should get to speak in what manner on matters of public concern—is to deputize the fox to guard the henhouse. Under our bill of rights, government authorities are "to be controlled by public opinion, not public opinion by authority." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

If Texas and Florida can legislate "to combat the 'biased silencing' of 'our freedom of speech as conservatives,'" *NetChoice v. Moody*, 34 F.4th 1196, 1205 (11th Cir. 2022) (quoting the Florida press release), then California can legislate to combat the spread of information on social media that supports reopening schools and ending mask mandates; Illinois can legislate to suppress claims of public corruption; Oregon can legislate to ensure social media content never questions the wisdom of defunding the police; and the federal government could pass a national law deciding once and for all whether or not each or any of us is responsible enough, in their view, to express our views on the internet. That way lies madness. What is good for the goose is not always good for the gander.

This Court should affirm the Eleventh Circuit, reverse the Fifth Circuit, and hold that government's role in the important debates about what content

should and should not be allowed on social media platforms is, simply, to stay out of it.

ARGUMENT

I. The use of state power to suppress dissenting views online is a serious and ongoing problem.

Today, the most important forum in which citizens exchange and express their views "is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)). The vast majority of Americans use one or more social media platforms on a more or less daily basis, mostly via their phones, which have become such "a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014).

As these mediums become more and more important to our lives, the rules governing access become more and more contentious—what content is appropriate or inappropriate, what claims are fair game or beyond the pale; which eccentric ideas are shared in good faith, and which with nefarious intent? Some Justices of this court have expressed concern as to exactly what legal regime should govern these online platforms. *See, e.g. Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring); *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial). The Biden

Administration had its own opinion on this: that anyone expressing disfavored ideas must be stifled, and it was the federal government's role to decide which ideas should or should not spread online.

"Jawboning," is "when a government official threatens to use his or her power — be it the power to prosecute, regulate, or legislate — to compel someone to take actions that the state official cannot." This "allows government officials to assume powers not granted to them by law," such that "individual officials can jawbone at will, without any sort of due process, by opening their mouths, taking up a pen, or tweeting." Will Duffield, *Jawboning against Speech*, Cato Institute, Policy Analysis No. 934, September 12, 2022.[2] Of course, "the line between demands and requests is blurry," *id.*, but the core point is that the use of official authority to suppress private speech is never acceptable—that "no official, high or petty, can prescribe what shall be orthodox." *Barnette*, 319 U.S. at 642.

The current administration's misbehavior in this regard is now well documented. In July 2021, the President declared that social media companies were "killing people" by not censoring dissenting views to the president's satisfaction. Nandita Bose and Elizabeth Culliford, *Biden says Facebook, others 'killing people' by carrying COVID misinformation*, Reuters, July 16, 2021.[3] His press secretary followed up with demands

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[2] https://www.cato.org/policy-analysis/jawboning-against-speech.

[3] https://www.reuters.com/business/healthcare-pharmaceuticals/white-house-says-facebooks-steps-stop-vaccine-misinformation-are-inadequate-2021-07-16/.

for broad spectrum censorship—insisting that citizens "shouldn't be banned from one platform and not others for providing misinformation." Rachel Olding, *Psaki: COVID Deniers Banned From One Social Network Should Be Booted From Them All*," Daily Beast, July 16, 2021.

We now know that this was not simply posturing—nor simply political figures expressing their own preferences—but part of an official policy of jawboning. Behind the scenes, the administration acted on its frustrations, demanding the private companies get in line behind the government's official policy. As the Fifth Circuit found, "a few days later, a White House official said they were 'reviewing' the legal liability of platforms—noting 'the president speak[s] very aggressively about' that—because 'they should be held accountable.'" *Missouri v. Biden*, 2023 U.S. App. LEXIS 26191 at *17. And as it turns out, "The platforms responded with total compliance"; Under pressure from the White House, "they capitulated . . ."

> Facebook asked what it could do to "get back to a good place" with the White House. It sought to "better understand . . . what the White House expects from us on misinformation going forward," [and] to see "how we can be more transparent," comply with the officials' requests, and "deescalate" any tension. . . A few days later, Facebook told the Surgeon General that "[w]e hear your call for us to do more," and wanted to "make sure [he] saw the steps [it took]" to "adjust policies on what we are removing with respect to misinformation," including

> "expand[ing] the group of false claims" that it removes.

Id. at *17-18. Indeed, "the platforms began taking down content and deplatforming users they had not previously targeted . . . In general, the platforms had pushed back against deplatforming users in the past, but that changed . . . [meanwhile], platforms continued to amplify or assist the officials' activities, such as a vaccine 'booster' campaign." *Id.* at *18-19.

In short, the Biden Administration abused its power to pressure social media companies to censor viewpoints the White House disapproved of. This Court will have occasion to decide whether this violated the First Amendment. *See Murthy v. Missouri*, No. 23-411. But whether or not the administration's abuses crossed the constitutional line, they were abuses, and we should expect more of those entrusted to administer the most powerful nation in the history of the planet.

If nothing else, the attempts by the administration to insist that all of social media live Its Truth should fail the most basic requirements of intellectual humility. To take one small but now obvious example, earlier this year the Department of Energy announced that in its best judgment the COIVD-19 began with a leak of virus samples from a lab in Wuhan, China.[4] In this,

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[4] Michael R. Gordon and Warren P. Strobel, *Lab Leak Most Likely Origin of Covid-19 Pandemic, Energy Department Now Says*, Wall Street Journal, Feb. 26, 2023, https://www.wsj.com/articles/covid-origin-china-lab-leak-807b7b0a.

Energy joined the FBI, who had previously come to the same conclusion.[5] This theory, now endorsed by two federal agencies with access to classified intelligence on the matter, had been dismissed by public health authorities,[6] "debunked,"[7] and declared a fringe conspiracy theory.[8] We now have internal communications from top federal public health officials confirming that they also found this theory credible, but suppressed the theory as a matter of political convenience. Michael Barone, *Lab Leak Story: How Elite Scientists Lied and Concealed the Truth*, American Enterprise Institute, Mar. 3, 2023.[9]

This lack of humility is particularly destructive in the context of emerging means of communication. "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions,

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[5] Michael R. Gordon and Warren P. Strobel, *FBI Director Says Covid Pandemic Likely Caused by Chinese Lab Leak*, Wall Street Journal, Feb. 28, 2023, https://www.wsj.com/articles/fbi-director-says-covid-pandemic-likely-caused-by-chinese-lab-leak-13a5e69b.

[6] Christopher Brito, *Dr. Fauci again dismisses Wuhan lab as source of coronavirus*, CBS News, May 5, 2020, https://www.cbsnews.com/news/anthony-fauci-wuhan-lab-coronavirus-source-dismissal/.

[7] Geoff Brumfiel, *Scientists Debunk Lab Accident Theory Of Pandemic Emergence*, NPR, Apr. 22, 2020, https://www.npr.org/2020/04/22/841925672/scientists-debunk-lab-accident-theory-of-pandemic-emergence.

[8] Alexandra Stevenson, *Senator Tom Cotton Repeats Fringe Theory of Coronavirus Origins*, New York Times, Feb. 17, 2020.

[9] https://www.aei.org/op-eds/lab-leak-story-how-elite-scientists-lied-and-concealed-the-truth/.

we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be." *Packingham*, 582 U.S. at 105. And since we cannot appreciate it, it is incumbent upon us to tread lightly. It should not be up to the President, or his press secretary, or the CDC, or the surgeon general, whose views are worth being heard online. The marketplace of ideas is not improved by the imposition of central planning. "Compulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641.

II. Legislative control of private content moderation offends the First Amendment.

Florida and Texas were understandably concerned about the swing in moderation policies among the social media companies—and for good reason, as much of that swing was driven by the misuse of federal government power to demand private censorship. As this Court has explained, to "foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 582 U.S. 108.

But the answer to the abuse of federal power in one direction is not to abuse state power in the other direction. "However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual." *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 254 (1974). And where, as here, "it is governmental coercion, this at once brings about a confrontation with the express

provisions of the First Amendment." *Id.* As the Eleventh Circuit recognized, the platforms' moderation decisions are traditional exercises of editorial discretion—equivalent to the newspaper in *Miami Herald* deciding which editorials should and should not grace their pages. The fact that most content is supplied by users does not change this calculus—*Miami Herald* shouldn't have come out differently if it were about letters to the editor; the selection of which letters to run is likewise the speech of the platforms. "Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts." *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

This is not to say that the First Amendment licenses social media companies to abuse their influence or their customers—they remain subject to any number of laws and regulations like any other media company. They can, and have been, held to account. To give just a few examples, they're subject to suit when they discriminate on the basis of race, sex, religion, or other suspect classifications. *See, e.g., United States v. Meta Platforms*, SDNY No. 1:22-cv-05187 (June 21, 2022) (Facebook algorithms targeted housing ads based on race, sex, religion); *Liapes v. Facebook, Inc.*, 95 Cal. App. 5th 910, 915 (2023) (targeting insurance ads based on age and gender). And for claims that their services knowingly exploit the mental health of children. *See State of Arizona v. Meta Platforms*, NDCA No. 4:23-cv-05448 (Oct. 24, 2023) (claims Facebook and Instagram knowingly addict children for profit). And yes, they are even subject to suit when they deplatform users for arbitrary and capricious reasons. *See Berenson v. Twitter, Inc.*, No. 21-09818, 2022 U.S.

Dist. LEXIS 78255 (N.D. Cal. Apr. 29, 2022) (finding plaintiff had sufficiently pled breach of contract and promissory estoppel claims).

As with newspapers, it "is beyond dispute that the States and the Federal Government can subject [social media companies] to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). Florida and Texas, "however, ha[ve] not chosen to apply its general" laws against fraud, discrimination, or consumer protection. "Instead, [they have] created a special" rule targeted at specific companies they disfavor. *Id.*

And if the Florida and Texas schemes survive, there will be 48 more following them. California already targets the platforms for what it deems "hate speech" and "disinformation." Olafimihan Oshin, *Newsom Signs Controversial Social Media Bill Into California Law*, The Hill, Sept. 14, 2022.[10] If Texas can declare by statute that platforms' moderation policies are too strict, California legislation can judge them too lenient. If Florida can dictate who can and cannot be removed from Facebook, so can Massachusetts. And Idaho will want its say, and Illinois, and Oregon and Washington, and Maryland and Virginia—each with its own specific rules about who should and should not get to speak. Eventually the federal government will be forced to develop a national standard, at which point the behind-the-scenes jawboning that so deeply

[10] https://thehill.com/homenews/state-watch/3642407-newsom-signs-controversial-social-media-bill-into-california-law/.

concerned the Fifth Circuit—and likewise concerns *amicus*—will become public, official, federal control of moderation decisions, with its own agency department deciding which information deserves to spread on social media.

Nor is it a meaningful distinction that Florida and Texas purport to increase access, whereas other states might want to increase censorship. "Just as the State is not free to 'tell a newspaper in advance what it can print and what it cannot,' the State is not free either to restrict [the company's] speech to certain topics or views or to force [the company] to respond to views that others may hold." *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 11 (1986) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting). "Under [*Miami Herald v.*] *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden." *Id. Pacific Gas* demonstrates that this is not some special rule for newspapers—the utility company likewise had a right to control the speech expressed in its billing materials, and a right to exclude others from speaking at its discretion, and so the court order was invalid "because it force[d] [the company] to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints." *Id.* at 20-21.

The proper role of government under these circumstances is to butt out—not to demand that disfavored citizens be deplatformed, nor to insist that the companies disseminate the work of the politically favored. There will—and should—be much debate as to where and how these platforms should moderate content, and

the solution is to have those debates. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *Barnette*, 319 U.S. at 641-42. These matters are important—vitally important, and "freedom to differ is not limited to things that do not matter much. . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id.* Indeed, Congress has said as much by expressly stating that the policy of the United States is to preserve the vibrant free market of the internet, "unfettered by Federal or State regulation." 42 U.S.C. §230(b)(2).

CONCLUSION

For the foregoing reasons, this court should find that both state statutes violate the First Amendment.

Respectfully submitted,

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