Nos. 22-555 and 22-277

IN THE

Supreme Court of the United States

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, *et al.*,
Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ELEVENTH CIRCUIT

BRIEF OF THE CENTER FOR BUSINESS AND HUMAN RIGHTS OF THE LEONARD N. STERN SCHOOL OF BUSINESS AT NEW YORK UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Center for Business and Human Rights (the "Center" or "*Amicus*"), which is part of the Leonard N. Stern School of Business at New York University ("NYU"), is the *amicus curiae*. The Center researches the human rights implications of corporate conduct and uses this work to advocate and consult with corporations, lawmakers, and regulators. One of the Center's primary research focuses is the impact of social media on democracy—an issue which is front and center in the cases this Court is currently reviewing. Among the Center's work in this area are publications addressing the need for social media companies to be held accountable for their policies and practices, the need for greater transparency in content moderation, the potential for greater government regulation of social media platforms, and the mechanics and effects of content moderation. *See generally, e.g.*, P. Barrett & L. Warnke, *Enhancing the FTC's Consumer Protection Authority to Regulate Social Media Companies*, NYU Stern Center for Business and Human Rights (Feb. 2022), https://bhr.stern.nyu.edu/ftc-whitepaper; P. Barrett, *Spreading the Big Lie: How Social Media Sites Have Amplified False Claims of U.S. Election Fraud*, NYU Stern Center for Business and Human Rights (Sept. 2022), https://bhr.stern.nyu.edu/tech-big-lie.

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1. Pursuant to Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Based on the concerns raised in the Center's publications, such as the rise of hateful, divisive content and political misinformation on social media, the Center has called for greater industry self-regulation as well as narrowly tailored federal government oversight to address these problems. Content moderation, in which social media companies already engage and of which the Center recognizes the immense value, falls squarely within the ambit of self-regulation. Thus, the Center and many others have raised issues with the Florida (S.B. 7072) and Texas (H.B. 20) statutes at issue in these cases because they would undermine legitimate content moderation efforts. Though the Center disagrees with S.B. 7072 and H.B. 20, it is concerned that Petitioner NetChoice L.L.C. d/b/a NetChoice ("NetChoice") would have this Court imposing First Amendment constraints that could foreclose any regulation of social media companies, even if it were narrowly tailored, viewpoint- and content-neutral, and only regulated conduct or required disclosure of factual information. The Center has supported greater transparency for content moderation and urges the Court not to truncate legislative debate on this important topic.

SUMMARY OF ARGUMENT

In curating third-party content for their users, social media companies engage in an exercise of editorial judgment. This is done through the use of content moderation standards, enforcement of those standards, and complex algorithms that filter out some of the most objectionable, divisive, and pernicious materials that make their way onto social media platforms. The sum of this editorial judgment is then provided to social media users as a service.

Under this Court's precedent, the editorial judgment that social media companies exercise is a form of commercial expression protected by the First Amendment from government regulation. But the level of protection from government regulation that such expression receives depends entirely on the law in question—content-based restrictions are subject to strict scrutiny, while regulations that compel disclosure of only "purely factual and uncontroversial" information are subject to a more deferential standard. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). Here, S.B. 7072 and H.B. 20 contain provisions that trigger both of these standards of review.

NetChoice correctly argues, and the 11th Circuit—at least in part—correctly held, that the Florida law's content moderation provisions are subject to strict scrutiny and fail to satisfy such scrutiny. The same logic applies to the Texas law's content moderation provisions.

Moreover, as both the 5th and 11th Circuits correctly held, the individualized explanation disclosure provisions are subject to the more deferential *Zauderer* standard set forth by this Court. Though the Court initially set forth the deferential *Zauderer* standard for reviewing mandated disclosure regulations in the context of deceptive attorney advertising, the Court in no way limited its applicability to deceptive advertising regulations. Thus, the *Zauderer* standard is applicable to all commercial disclosure regulations requiring businesses to disclose "purely factual and uncontroversial information" about their services. *Zauderer*, 471 U.S. at 651. It is under this standard that the Court should strike down the individualized explanation provisions of S.B. 7072 and H.B. 20.

Finally, and perhaps most importantly, the Court should take precaution in construing the bounds and breadth of the First Amendment's applicability to social media platforms when analyzing both the content moderation provisions and the individualized explanation provisions. Although it is not at issue in this case, and *Amicus* is in no way requesting the Court to consider the constitutionality of the general disclosure provisions of S.B. 7072 and H.B. 20,[2] *Amicus* notes that social media platforms' protection under the First Amendment is not limitless. The editorial judgment that social media platforms exercise is without a doubt protected under the First Amendment, but that does not render social media platforms immune from all regulation. As such, the Court should ensure that it does not construe social media platforms' protection under the First Amendment in a manner that forecloses Congress' and states' ability to enact narrowly drawn regulations—including but not limited to disclosure requirements and data privacy laws—that both protect free speech and promote democracy.

ARGUMENT

Curating third-party content is the main service that social media companies perform for users. Social media platforms select, edit, and arrange content provided by third parties. The content, often referred to as "posts," may consist of text, still images, audio, or video, or a

2. The Court has chosen not to review the general-disclosure provisions of S.B. 7072 and H.B. 20, which were upheld by the courts below. These provisions require social media companies to divulge factual, uncontroversial information that would benefit consumers and that the companies routinely gather anyway. Moreover, the information can be assembled and disseminated without any undue burden.

combination thereof. In exchange, users provide their attention and access to their personal information, both of which the companies directly or indirectly sell to advertisers

By establishing standards for the content permitted on their platforms, and then enforcing the standards via elaborate content moderation programs—which include both human and automated filtering to exclude some of the most deleterious material that the internet has to offer, including hateful, divisive content and misinformation about elections and public health—social media companies create user "communities" that reflect particular values and viewpoints. *See, e.g.*, Facebook, *Facebook Community Standards*, https://transparency.fb.com/policies/community-standards/ (last visited Nov. 30, 2023). The sum of the service social media platforms provide is the direct result of editorial judgment exercised by social media platforms. This service allows individuals to engage in the sort of public discourse that the First Amendment was meant to foster without harassment, bigotry, or harmful conspiracy theories undermining public trust. And under this Court's precedent, it is well established that the exercise of editorial judgment is speech that is entitled to First Amendment protection. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a state's right-of-reply law requiring newspapers to provide space to political candidates the newspapers criticized); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666-68 (1994) (recognizing that cable operator's selection of programming was entitled to First Amendment protection, but ultimately holding that the federal regulator demonstrated that the regulation at issue was narrowly tailored to achieve the compelling government interest of maintaining access

to local broadcast channels); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2313 (2023) (noting that a speaker "'does not forfeit constitutional protection simply by combining multifarious voices' in a single communication") (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)).[3]

However, the level of scrutiny that government regulations of speech receive is dependent on what the law in question targets for regulation. A speech-regulating law that specifically mandates the content chosen or not chosen in the exercise of editorial judgment is a content-based regulation that is subject to strict scrutiny. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); *Herbert v. Lando*, 441 U.S. 153, 174 (1979) (observing that a law "that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest . . . would not survive constitutional scrutiny"). In contrast, a speech-regulating law that merely compels the disclosure of "purely factual and uncontroversial" information is only subject to the more deferential standard this Court set forth in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471

3. *See also*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995) (applying similar analysis to invalidate city's attempt to force parade organizer to include participant whose views it opposed); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion) (applying similar analysis to invalidate requirement that utility company include in its billing envelopes materials with which it disagreed).

of Ohio, 471 U.S. 626 (1985), which requires that the disclosure is "reasonably related to the state's interest in preventing deception of consumers," and not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010).

The regulations at issue in these cases, S.B. 7072 and H.B. 20, contain both content-based speech provisions—*i.e.*, the content moderation provisions—and mandated disclosure provisions—*i.e.*, the individualized explanation provisions—thereby triggering both standards of review.

I. THE CONTENT MODERATION PROVISIONS ARE SUBJECT TO, AND MUST BE STRUCK DOWN UNDER, STRICT SCRUTINY

As the 11th Circuit and NetChoice established, the content moderation provisions of the Florida and Texas laws are content-based regulations that are subject to, and fail to satisfy, strict scrutiny. In brief, Florida's law prohibits social media platforms from removing accounts of, or demoting content "by or about," public office candidates, Fla. Stat. §§ 106.072(2), 501.2041(2)(h), or censoring or removing "a journalistic enterprise" based on the content it publishes or broadcasts," *id.* § 501.2041(2)(j). Similarly, Texas' law bans platforms from censoring users or their content based on their "viewpoint," or on the user's location in Texas. Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a) (West Supp. 2022). Notably, however, these laws only target the largest social media platforms, as measured by annual revenue and user base. *See* Fla. Stat. § 501.2041(1)(g)(4) (2022) (targeting "[s]ocial media platform[s]" with annual gross revenue exceeding $100 million or over 100 million monthly users); Tex. Bus. &

Com. Code Ann. § 120.002(b) (West 2023) (targeting platforms with over 50 million active monthly users in the United States). This is no accident.

Based on the definitions of "social media platforms," it is only large platforms that have a perceived "liberal bias"—*i.e.*, Facebook, YouTube, and X (formerly Twitter)—that the statutes govern, while smaller platforms featuring conservative viewpoints—*i.e.*, Gab, Gettr, and Truth Social—evade the statutes' purview. Indeed, supporters of S.B. 7072 and H.B. 20, have made it clear that these laws are using corporate heft as an ideology barometer to punish platforms for promoting a certain political viewpoint.[4] These are exactly the kinds of content-based regulations that trigger the First Amendment, particularly where, as here, the underinclusive nature of the regulations undercuts the states' purported goal of

4. In his official signing statement, Florida Governor Ron DeSantis said: "If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable." News Release, Ron DeSantis, Governor, Florida, *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/. Additionally, the state's lieutenant governor stated that S.B. 7072 would allow Floridians to "fight[] against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative." *Id.* In the official statement accompanying his signing of H.B. 20, Texas Governor Greg Abbott said that the law would counter "a dangerous movement by social media companies to silence conservative viewpoints." *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship, Office Of The Tex. Governor* (Sept. 9, 2021), https://gov.texas.gov/news/ post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship.

preventing unfair censorship and manipulation of content posted by their residents. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011); *Republican Party of Minn. v. White,* 536 U.S. 765, 780 (2002) (A "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.'") (citation omitted). Taking the statutes' definitions and the signing governors' unabashed viewpoint-discrimination, it is unavoidable that, as the 11th Circuit held and NetChoice argues, these enactments target certain businesses based on their perceived viewpoints. Therefore, strict scrutiny is appropriate.

Under strict scrutiny, which demands that content-based infringement of free speech be the least restrictive means of accomplishing a compelling governmental purpose, it is clear that Florida's and Texas' interest in mandating ideological balance by restricting or eliminating the supposed liberal bias of the largest social media platforms is not even a legitimate interest, let alone a compelling one. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (stating that a city's objective of forcing a parade organizer to set aside its viewpoint and include marchers whose message the organizer opposed was "decidedly fatal" to the regulation in question). Ensuring that their residents can express themselves on privately owned social media platforms that would prefer to remove or demote their content—or remove their accounts altogether—simply is insufficient to justify the intrusion on platforms' First Amendment right to choose and shape the messages they convey. States may not favor the speech of their residents by limiting the ability of social media companies to express their own views via content moderation. *See U.S. Telecomm. Ass'n*

v. FCC, 855 F.3d 381, 435 (D.C. Cir. 2017) (noting that the government "may not…tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor") (Kavanaugh, J., *dissenting from denial of reh'g en banc*).

Accordingly, the content moderation provisions of S.B. 7072 and H.B. 20 must be struck down under strict scrutiny.[5]

II. THE *ZAUDERER* STANDARD APPLIES TO ALL COMMERCIAL MANDATED DISCLOSURE REGULATIONS, AND THE INDIVIDUALIZED EXPLANATION PROVISIONS SHOULD BE STRUCK DOWN UNDER THIS STANDARD

A. The *Zauderer* Standard is Not Limited to Mandated Disclosure Regulations Relating to Deceptive Advertising.

Despite reaching different conclusions regarding their respective state's laws that are now in question, the

5. This conclusion would be the same even if the Court agrees with the 11th Circuit that certain of Florida law's content moderation provisions are content-neutral and, thus, subject to intermediate scrutiny. Intermediate scrutiny requires the government to have a substantial interest and, as established above, Florida's and Texas' purported interest in enacting these regulations is not even a legitimate one, let alone a substantial one. *See NetChoice, L.L.C. v. Att'y Gen., Fla.*, 34 F.4th 1196, 1226-27 (11th Cir. 2022) ("Ultimately, though, we find that we needn't precisely categorize each and every one of S.B. 7072's content moderation restrictions because it is substantially likely that they are all 'regulation[s] of expressive conduct' that, at the very least, trigger intermediate scrutiny . . . and . . . none survive even that.").

5th Circuit (considering H.B. 20) and the 11th Circuit (considering S.B. 7072) agreed that the constitutionality of these laws' individualized explanation provisions should be analyzed using the *Zauderer* standard set forth by this Court. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022) ("Our review of these disclosure requirements is controlled by the Supreme Court's decision in *Zauderer*"); *NetChoice, L.L.C. v. Att'y Gen., Fla.*, 34 F.4th 1196, 1230 (11th Cir. 2022) ("We assess S.B. 7072's disclosure requirements—in §§ 106.072(4), 501.2041(2)(a), (c), (d), (e)—under the *Zauderer* standard"). In doing so, both courts rejected NetChoice's argument that the *Zauderer* standard does not apply to mandated disclosure laws relating to the editorial process. Nonetheless, NetChoice again argues that *Zauderer* is inapplicable to the individualized-explanation provisions at issue here; NetChoice is wrong on this point. *Amicus* now urges the Court to clarify that *Zauderer* is applicable to mandated commercial disclosures beyond just the deceptive advertising context and apply such standard to the Florida and Texas laws' individualized explanation provisions.

In *Zauderer*, the Court was reviewing the constitutionality of an Ohio disciplinary rule, which required that attorneys whose fees are contingent on achieving a recovery must disclose in their advertisements that clients might be liable for significant litigation costs (as opposed to fees) even if their lawsuits are unsuccessful. Analyzing the disclosure requirement in question, the Court declined to apply heightened scrutiny, opting instead to apply what, in essence, was rational basis review without explicitly labeling it as such. *Id.* at 651. Specifically, the Court asked whether the required disclosures were "purely factual and uncontroversial," and if so, whether

such disclosures were "reasonably related to the state's interest in preventing deception of consumers," and not "unjustified or unduly burdensome." *Id.*; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

Since its decision in *Zauderer*, the Court has not directly addressed if, when, or how the standard should be applied to prevent consumer deception outside the context of commercial advertising, but all circuit courts to have done so now recognize that the precedent's reasoning applies more broadly than the context in which it was originally set forth. *See, e.g., Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) ("The language with which *Zauderer* justified its approach…sweeps far more broadly than the interest in remedying deception."); *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019) (noting multiple cases holding that the *Zauderer* standard is not limited to advertising and consumer deception, as well as the Supreme Court's implicit agreement with this reading); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (noting that "*Zauderer* . . . describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases," and applying *Zauderer* to uphold the compelled disclosure at issue even though it "was not intended to prevent 'consumer confusion or deception' per se"); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 299, 310 (1st Cir. 2005) (applying *Zauderer* to law purporting to prevent consumer deception by requiring pharmacy benefit managers to disclose conflicts of interest and financial arrangements to healthcare providers despite the fact that such disclosures did not pertain

to commercial advertising and, were "on their face less related to 'economic interests'").

The significance of most circuit courts recognizing the applicability of *Zauderer* beyond the deceptive advertising context cannot be overstated. Since this Court decided *Zauderer* nearly forty years ago, the circuit courts, which in most cases are the federal appellate courts of last resort, have developed a significant body of First Amendment case law premised on the idea that regulations compelling disclosures in the commercial context warrant the equivalent of rational basis review so long as such disclosures are "purely factual and uncontroversial." If the Court were to limit the context in which *Zauderer* applies, the Court would render the circuit courts' precedent a nullity in most instances, and lead to further confusion as to when and how to analyze commercial disclosure mandates under the deferential standard as opposed to intermediate scrutiny.

And though the circuit courts could benefit from the Court's clarification as to what "purely factual and uncontroversial" means,[6] limiting the doctrine solely to

6. Determining whether a compelled disclosure regulation is "uncontroversial" would require detailed analysis of what this Court meant when it used the term in *Zauderer* and subsequent government-mandated disclosure cases. This Court has invalidated a state-required disclosure related to pregnancy services, including abortion, observing that abortion is "anything but an 'uncontroversial' topic." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2372 (2018). But circuit courts applying *Zauderer* have noted that the Court in *NIFLA* did not suggest that "any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial."

disclosure requirements relating to deceptive advertising would undermine the express rationale the Court offered for relying on the more deferential standard in the first place. Indeed, the Court reasoned that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal" because "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides" and "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *See Zauderer*, 471 U.S. at 651 (emphasis in original). This rationale applies with equal force regardless of whether the commercial speech in question is advertising or some other commercial speech because any commercial compelled disclosure would, in theory, be for the benefit of consumers of a product or service.

Therefore, the Court should formally establish that the lower courts have been correct to apply *Zauderer*'s sound analysis beyond the narrow confines of disclosure laws meant to prevent deceptive commercial advertising.

See, e.g., *CTIA,* 928 F.3d at 845. Rather, the Court labeled the compelled disclosure "controversial" because it effectively required certain clinics to "t[ake] sides in a heated political controversy, forcing the clinic[s] to convey a message [about abortion] fundamentally at odds with its mission." *Id.* However, hotly debated political topics appears to be at the extreme end of when compelled speech could be considered controversial, and it is unclear at what point a compelled disclosure would cross the line from uncontroversial to controversial.

B. The Individualized Explanation Provisions at Issue Here Must Be Reviewed and Struck Down Under *Zauderer*.

As discussed above, *Zauderer* requires that mandated disclosures be "purely factual and uncontroversial," "reasonably related to the state's interest," and not "unjustified or unduly burdensome." Thus, *Zauderer* appears appropriate for reviewing government requirements that social media companies divulge information about their content moderation policies and practices. These requirements are generally employed to inform social media users of the platforms' rules and how they are enforced, which is "purely factual and uncontroversial."[7] However, even applying this standard to the individualized explanation provisions at issue here, the Court should strike down such provisions as the unjustified and undue burden of abiding by these provisions is far greater than any interest the states can have in promoting consumer transparency.

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7. Though it is unclear specifically what the Court meant by the requirement that compelled disclosures be "purely factual and uncontroversial," it is clear that the disclosures at issue in the individualized explanation provisions meet this standard. Although some of the individualized explanations that S.B. 7072 and H.B. 20 require might invoke platform content standards that some people might consider controversial—for example, requiring platforms to explain what constitutes "hate speech"—these provisions would not force platforms to take "sides in a heated political controversy." *CTIA*, 928 F.3d at 845. Therefore, the individualized explanation provisions would likely be properly categorized as "uncontroversial" for purposes of *Zauderer* analysis. And, in any event, this Court need not address this issue because, as explained below, the individualized explanation provisions of S.B. 7072 and H.B. 20 are so clearly "unduly burdensome."

Under Florida's S.B. 7072, platforms must provide users with individualized explanations containing a "thorough rationale" for removing the users' content and "a precise and thorough explanation" of how it "became aware of the posts in question" within seven days of such removal. Fla. Stat. §§ 501.2041(2)(d)(1), 501.2041(3). If a platform's rationale is not sufficiently "thorough" or its explanation is not sufficiently "precise and thorough," it could be subject to "[u]p to $100,000 in statutory damages" in a private action. *Id.* § 501.2041(3)(c)-(d), (6)(a). More onerously, Texas's H.B. 20 requires platforms to "notify the user" "concurrently with the removal" of their content, "explain the reason the content was removed," and then provide the user with the right to appeal the removal, which must be addressed within 14 days. Tex. Bus. & Com. Code Ann. §§ 120.103(a)(1)-(2); 120.104.

In practice it is simply not feasible for platforms to comply with these requirements for the millions of actions they each take on a daily basis to remove, alter, or demote users' content. In fact, the Court need not look any further than one of the examples offered by NetChoice to illustrates this point: "Over a single three-month period in 2021, YouTube removed 9.5 million videos and *1.16 billion comments*," while "Facebook removed over 40 million pieces of bullying, harassing, and hateful content" over a similar timeframe. Writ of Cert. of Petitioner NetChoice, L.L.C. at 32, *NetChoice, L.L.C. v. Paxton*, No. 22-555 (Dec. 15, 2022). (emphasis in original). The administrative difficulties that would accompany providing individualized explanations for each of the millions, if not billions, of daily instances of content removal, alteration, or demotion are self-evident. *See Att'y Gen., Fla.*, 34 F.4th at 1230 (explaining the undue burden that S.B. 7072's individualized explanation provisions would impose on

social media platforms by requiring explanations for millions of daily content removal decisions and significant implementation costs).

Florida's and Texas' only real rebuttal to the infeasibility of their laws is that the individualized explanation mandates are not unduly burdensome because the affected platforms already supported implementation of procedures to provide varying types of notice and opportunities for user appeals. *See* Petition for Writ of Cert. of Petitioner Attorney General, State of Florida at 27, *Moody v. NetChoice L.L.C.*, No. 22-277 (Sept. 21, 2022); Brief of Appellant Ken Paxton at 38-39, *NetChoice, L.L.C. v. Paxton*, No. 21-51178 (5th Cir. Mar. 2, 2022). This is unavailing. The major platforms' voluntary support for and/or implementation of such procedures do not include the sort of extensive "precise" and/or "thorough" rationales and explanations within extremely tight deadlines that Florida and Texas mandate. Likewise, the appeal procedures that platforms currently offer are less extensive than those mandated by the states.[8] In any event, voluntary disclosures are a far cry from government-mandated requirements enforced, in the case of Florida, with the threat of millions, or even billions, of dollars in damages.

As this Court recognized in *Zauderer*, "unjustified or unduly burdensome disclosure requirements might offend

8. YouTube, for example, "currently provides appeals for only *video* deletions, but not *comment* deletions. As a result, YouTube would have to expand its existing appeals process more than 100-fold, "'from a volume of millions of removals to over a billion removals.'" Writ of Cert. of Petitioner NetChoice, L.L.C. at 32-33, *NetChoice, L.L.C. v. Paxton*, No. 22-555 (Dec. 15, 2022) (emphasis in original).

the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. That is precisely what will happen here if this Court allows the individualized explanation provisions of S.B. 7072 and H.B. 20 to stand. The infeasibility of providing individualized explanations that comply with Florida's and Texas' parameters will likely lead social media companies to eliminate broad categories of speech, such as all expression related to politics and public affairs, in order to avoid liability, especially in Florida where there is a risk of significant monetary liability. As a result, online expression would be significantly chilled as platforms would limit their content curation and many individual users would lose their ability to discuss large categories of topics. Accordingly, the Court should invalidate these provisions to promote the aim of the First Amendment.

III. WHEN DEFINING THE BREADTH OF THE FIRST AMENDMENT AS APPLIED TO SOCIAL MEDIA PLATFORMS, THE COURT SHOULD LEAVE ROOM FOR CONGRESS TO REGULATE THESE PLATFORMS WITH NARROWLY TAILORED LAWS

As established above, and detailed at length in NetChoice's briefing and the 11th Circuit's decision, the First Amendment unquestionably protects the content curation and moderation that social media platforms provide. But protecting the First Amendment rights of social media companies to determine what content to host and how to display it does not require the Court to insulate this industry from all regulation. Therefore, in addition to resolving the two questions presented in these cases—namely, whether the content moderation provisions and the individualized explanation provisions violate the First

Amendment—the Court must also necessarily determine the extent to which the First Amendment shields social media platforms from regulation. In doing so, the Court should exercise significant caution, discretion, and care to ensure that it does not construe the First Amendment's applicability to social media companies in a manner that forecloses Congress' and states' ability to enact narrowly tailored laws that regulate social media companies' conduct, rather than their speech.

In particular, below are some areas in which regulation of social media companies is not only necessary, but would also promote the First Amendment's goals:

Data Privacy. As of late, there has been an increased focus on data privacy and cybersecurity, with Congress and states increasingly trying to regulate the manner in which companies, including social media platforms, utilize, share, and protect consumers' personal data. *See, e.g.* Me. Rev. Stat. tit. 35-A § 9301(3)(B)(2); Cal. Civ. Code § 1798.99.29; Colo. Rev. Stat. § 6-1-1302; American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022).[9] Within the context of social media platforms,

9. In fact, the American Data Privacy and Protection Act was approved by the House of Representatives Energy and Commerce Committee by a 53-2 vote in July 2022, but fell short of receiving a full House vote. *See* Wendy Davis, *Senate Urged To Tackle AI Privacy Threats By Curbing Data Collection*, MediaPost (Nov. 9, 2023), https://www.mediapost.com/publications/article/390951/senate-urged-to-tackle-ai-privacy-threats-by-curbi.html. However, with the recent focus on artificial intelligence, interest in passing a federal data privacy law remains strong, with the House Energy and Commerce Committee acknowledging at an October 18, 2023 hearing on AI and data privacy that "the bedrock of any AI regulation must be privacy legislation." *See* Gabby Miller, *Transcript: House Hearing*

the data that companies collect can include personally identifying information (such as name, date of birth, gender, and occasionally address), content browsing data and preferences, voice and facial recognition data, phone numbers, and even geolocation data. Although social media users agree to provide most, if not all, of this data by using the platform, they do not reasonably expect that their personal data will be used by platforms in a way that harms them or sold to other entities that will use such data in a way that harms users. But sometimes social media and other technology companies do just that by gathering intimate data about race, gender, health, finance, and location that are used for targeting advertising at users, including impressionable minors. Incorporating complex algorithms, these commercial surveillance systems allow the companies to profit from this kind of personal data by transferring or selling it to third parties, typically without the explicit permission of users. Additionally, data breaches are becoming increasingly common and, given the amount of personal data in social media companies' possession, they are a prime target for malicious actors to go after in data leaks.[10]

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on Safeguarding Data and Innovation, Tech Policy Press (Oct. 27, 2023), https://techpolicy.press/transcript-house-hearing-on-safeguarding-data-and-innovation/. The House Energy and Commerce Committee's subcommittee on Innovation, Data and Commerce also held a hearing on data privacy in March 2023. *See* Justin Hendrix, *Transcript: Innovation, Data, and Commerce Subcommittee Hearing on Data Privacy*, Tech Policy Press (Mar. 2, 2023), https://techpolicy.press/transcript-innovation-data-and-commerce-subcommittee-hearing-on-data-privacy/.

10. *See, e.g.*, Emma Bowman, *After Data Breach Exposes 530 Million, Facebook Says It Will Not Notify Users*, NPR (Apr. 9, 2021), https://www.npr.org/2021/04/09/986005820/after-data-

In turn, between the growing emphasis by companies on using personal data as a commodity—particularly in advertising—and the ever increasing risk of data breaches on a large scale, it is reasonable and justified for Congress and states to enact narrowly tailored laws that ensure social media companies are both appropriately using their users' sensitive data and protecting it in a manner that adequately protects users' privacy interests. Such regulations, so long as they are narrowly tailored, would not impose any unconstitutional restriction on social media companies' First Amendment rights. Indeed, these types of data-privacy regulations would merely be dictating the manner in which social media platforms could use their users' personal data and how they must protect such data.

To the extent that such laws do in fact restrict or compel speech in some fashion, at most the speech would be in the form of either the type of general disclosure regulation discussed below—such as by requiring disclosure of data-privacy policies to users—or narrowly tailored restrictions warranting intermediate scrutiny. Moreover, by ensuring that users' data is being protected and used appropriately, such regulations would promote the goals of the First Amendment by fostering confidence in the security of social media platforms, which would lead to more widespread use and public expression.

Despite data privacy laws such as those enacted by Maine, California, and Colorado benefiting consumers, including social media users, and imposing only narrowly tailored restrictions on speech, there have been several

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breach-exposes-530-million-facebook-says-it-will-not-notify-users.

instances in which internet industry plaintiffs have sought to block the enactment or application of data privacy laws under the guise of the First Amendment. *See, e.g.*, Complaint ¶¶3-6, *ACA Connects – Am.'s Commc'ns Ass'n v. Frey*, No. 1:20-cv-00055 (D. Me. Feb 14, 2020), Dkt. No. 1 (arguing that statute placing restrictions on the ability of internet service providers ("ISPs") to use, disclose, sell, or access customers' personal information infringed ISPs' First Amendment rights); *Boelter v. Hearst Commc'ns, Inc.*, 269 F. Supp. 3d 172, 179-82, 196-98 (S.D.N.Y. 2017) (rejecting First Amendment challenge to Michigan law as applied to plaintiff magazine publisher, which restricted plaintiff from disclosing consumers' identifying information to third-party data mining companies under intermediate scrutiny); *NetChoice, L.L.C. v. Bonta*, No. 22-cv-08861-BLF, 2023 WL 6135551 at *6, --- F. Supp. 3d --- (N.D. Cal. Sept. 18, 2023) (granting preliminary injunction to enjoin California statute that restricts "the collection, sale, sharing, or retention of children's personal information" and mandates that online providers create an impact assessment of the material risks their data management practices pose to children, based on a broad construction of the First Amendment to data use and collection).

This litigation underscores the need for the Court to be cautious in how it construes the application of the First Amendment to social media companies. If the Court were to hold, as NetChoice advocates, that the First Amendment requires strict scrutiny for any regulation that even remotely governs social media companies' editorial judgment, then Congress and states conceivably could be foreclosed from enacting data privacy laws that, for instance, limit the manner in which users' personal

information can be collected or used or restrict the types of entities to which personal information can be sold, transferred, or licensed. Inhibiting legislative attempts to protect personal privacy is not the sort of outcome that the First Amendment is designed to promote. *See, e.g.*, *Sosa v. Onfido, Inc.*, 600 F. Supp. 3d 859, 880, 882-84 (N.D. Ill. 2022) (upholding regulation restricting the collection of individuals' "biometric identifier or biometric information" because it does not restrict plaintiff's speech and, even if it did restrict speech, such restriction passes intermediate scrutiny)

Disclosure Requirements. Though *Amicus* is cognizant that the Court declined to review the general disclosure provisions of S.B. 7072 and H.B. 20 (and is in no way advocating for the Court to consider those provisions here), it is hard to ignore that such provisions, and other narrowly drawn general disclosure provisions like them, promote the goals of the First Amendment by providing greater transparency to social media users. Specifically, general mandated disclosure regulations act to ensure that users are informed about how their content will be treated by social media platforms, what rights they have with respect to such content, and how their content is consumed by others on the platform.

By way of example, S.B. 7072 requires social media companies to publish their content moderation standards, inform users of changes to these standards and other terms of service, inform users how many other users viewed their content, Fla. Stat. § 501.2041(2)(a), (c), (e), and, disclose any free political advertising it provides to candidates, *id.* S 106.072(4). Similarly, H.B. 20 requires social media companies to disclose how they "curate[]

and target[] content to users," "moderate[] content," and use algorithms to prioritize content. Tex. Bus. & Com. Code Ann. § 120.051(a)(1), (3), (4). They also must "publish an acceptable use policy," *id.* § 120.052(a), and issue a "biannual transparency report" on their content-moderation activities, *id.* § 120.053

In general, these disclosure requirements relate to purely factual and uncontroversial information about the services that platforms offer—*i.e.*, what content is permitted, what happens when posts violate platform rules, and how platforms use automated systems (algorithms) to rank or amplify certain content— that, in most instances companies already routinely gather and, in some instances, make available to its users voluntarily. *See, e.g.* YouTube, *Community Guidelines*, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Nov. 30, 2023). And there is ample justification for mandating that social media companies make these disclosures so as to ensure that users are well informed in their choices of platforms. This is akin to disclosure requirements to promote transparency in the campaign finance and lobbying contexts, which this Court has already upheld and which this Court has noted can promote the goals of the First Amendment by providing public access to information about political donations and special interests, respectively. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010); *United States v. Harriss*, 347 U.S. 612 (1954); *see also Doe v. Reed*, 561 U.S. 186 (2010) (upholding mandatory disclosure of referendum signatories to protect integrity of referenda).

General disclosure provisions applicable to social media companies do not need to be bolted together with problematic mandates controlling content moderation

policies, as is the case with S.B. 7072 and H.B. 20. Requiring disclosure can be done without reshaping such policies or the practices used to enforce them. Instead, legislation can mandate disclosure of whatever policies social media companies have already adopted. When discussing the Florida and Texas content-moderation and individualized explanation provisions, this Court should be careful not to suggest that the First Amendment defects marring these parts of the state laws similarly raise constitutional questions about content-neutral, non-burdensome general-disclosure requirements. By doing so, the Court would preserve for Congress and states the leeway needed to seek to balance the expressive benefits of social media with the goal of fostering greater transparency related to how platforms operate.

In sum, the First Amendment does not provide for the insulation of social media companies from any and all regulation just because they exercise editorial judgment by curating and arranging third-party content. Governments may regulate social media businesses under content-neutral laws aimed at conduct rather than speech—such as data privacy laws and general disclosure laws—without danger of violating the First Amendment. When clarifying in this case how the First Amendment applies to social media businesses, the Court should leave open the opportunity for governments, especially Congress, to consider narrowly drawn regulations, including but not limited to, disclosure requirements and data privacy laws, that promote both free speech and democracy by protecting social media users and ensuring their confidence in the platforms they use.

CONCLUSION

For the foregoing reasons, *Amicus* urges the Court to (1) strike down the content moderation provisions of S.B. 7072 and H.B. 20 under strict scrutiny; (2) formally establish that the *Zauderer* standard applies to disclosure laws beyond the deceptive commercial advertising context and strike down the individualized explanation provisions of S.B. 7072 and H.B. 20 under such standard; and (3) exercise caution in clarifying how the First Amendment applies to social media platforms to ensure that governments may enact narrowly drawn regulations such as disclosure requirements and data privacy laws.

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Respectfully Submitted,

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