

Nos. 22-277 and 22-555

In The
Supreme Court of the United States

—◆—
ASHLEY MOODY, in her official capacity
as Attorney General of Florida, et al.,

Petitioners,

v.

NETCHOICE, LLC; and Computer &
Communications Industry Association,

Respondents,

—◆—
NETCHOICE, LLC; and Computer &
Communications Industry Association,

Petitioners,

v.

KEN PAXTON, in his official capacity
as Attorney General of Texas,

Respondent.

—◆—
**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Fifth And Eleventh Circuits**

—◆—
**BRIEF OF AMICUS CURIAE DISCORD INC.
IN SUPPORT OF RESPONDENTS IN NO. 22-277
AND PETITIONERS IN NO. 22-555**

—◆—
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INTERESTS OF THE AMICUS¹

Discord is a real time messaging service with over 150 million active monthly users who communicate within a huge variety of interest-based communities, or “servers.” Discord’s services are very different from legacy social media like Facebook and X that the Florida and Texas legislatures likely had in mind when enacting these laws—Discord users are in control of their experience, without newsfeeds or algorithms to drive engagement, and they decide with whom they interact and what communities and conversations they join. But the laws themselves are broad enough to likely sweep Discord into their purview.

Discord brings people together around shared experiences and seeks to create a safe, welcoming, and inclusive space online. Discord emphasizes real time interaction and connection among friends and encourages creativity and community around shared interests, and Discord’s approach to moderation is aligned with this goal. Discord invests in both centralized moderation *and* tools for groups using the service to manage and organize themselves. Discord’s Community Guidelines govern all user interaction and content on Discord. In addition, many groups that gather on Discord maintain specific guidelines that apply only to their own group, and that are designed to protect the

¹ No party other than Amicus authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of the brief.

integrity of the particular discussion that the group intends to pursue.

The central purpose of Discord’s moderation policies, both those administered centrally by the company and those administered by the communities for themselves—with Discord’s assistance, and often using tools provided by Discord—is to protect the *association rights* of Discord’s communities; i.e., the ability of those communities to come together themselves around their shared interests and to be able to exclude speech that is hostile to a particular community’s purpose. While the Texas and Florida laws undoubtedly threaten Discord’s First Amendment rights, they also undermine the association rights of Discord communities. By requiring those communities to host speech that is inconsistent with and even hostile to a particular community’s purpose these laws are harmful to Discord as a community of communities. But more importantly, invading the association rights of Discord communities, as the Texas and Florida laws do, will inevitably impair the ability of those communities to organize, and to speak.



SUMMARY OF ARGUMENT

Florida and Texas, in an attempt to limit large platforms’ moderation activities, enacted laws that not only harm those platforms’ own speech and associational interests, but the speech and association interests of communities of citizens online. Discord’s

individual communities often lack the resources, experience, and scale to moderate on their own. But if every act of moderation attributable to Discord risks expensive litigation and potentially six-figure damages, Discord will be unable to assist these communities in protecting themselves from harmful or irrelevant content. This will cause the communities themselves to deteriorate, hampering the important associational benefits they offer, much in the way that withdrawing garbage collection from a community causes it to deteriorate. Where the “garbage” is hateful, dangerous, or even merely unwanted content, that harm has First Amendment weight. A proliferation of that content—forced by the government—drives off communities, and community members, who would otherwise be strengthening their associations through interaction and discussion within mutually agreed-upon boundaries.

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ARGUMENT

I. Introduction to Discord

Discord is a real time messaging service for people to talk and hang out online with their friends and communities. When Discord was first launched in 2015, its initial user base drew primarily from friends leveraging Discord’s blend of voice and text chatting features to play video games together. Discord has since grown to include a broad and diverse range of people who use the service to talk about a variety of topics, from sports

and travel to personal finance and mental health. Today, more than 150 million people log onto Discord each month. While Discord’s services are very different from traditional social media, they may still be captured by the breadth of the Texas and Florida laws at issue before this Court, and it is possible (if not probable) that a plaintiff will assert as much, whether or not that was the legislatures’ intent.²

As a messaging service, Discord differs from traditional social media in several important respects. First, Discord’s users interact with their chosen communities via “servers,” peer-to-peer spaces that enable conversation and sharing. Servers are made up of “channels” where users communicate by text, voice, and video—a more organized and powerful messaging experience. Text channels allow users to interact via text-based messages, as well as use images, videos, GIFs, emoji, and other files. Voice channels allow users to communicate in real time by voice and/or video. Users are also able to chat one-on-one via direct messages (“DMs”) or in small groups (“GDMs”).

Second, Discord users can always decide with whom they interact and what communities and conversations they join. There is no news feed, no endless scrolling, no counting of likes, and no “going viral.” Discord is not a service designed to maximize engagement by an algorithm picking and choosing the content

² Discord runs on the Windows, macOS, Android, iOS, and Linux operating systems, and also on web browsers. Users must be at least 13 years old to create an account on Discord.

users see; rather, Discord emphasizes real time interaction and connection among friends and encourages creativity and community around shared interests. Messages are displayed in the order in which they are sent.

The vast majority of Discord servers are invite-only spaces, somewhat akin to modern-day social clubs, for small groups of friends and communities. There are also larger, more open communities, generally centered around specific topics such as popular video games, music artists, and hobbies. The most public of these servers are “discoverable”—i.e., they can be found by anyone on Discord using the service’s search tool, but these public spaces represent a small percentage of the total servers on Discord.

Finally, Discord does not depend upon an ad-based business model. Discord is free to use, and currently the vast majority of Discord’s users do not pay for the service. Discord focuses on building premium features that users want to buy (e.g., higher quality audio and video streaming, larger file-sharing capabilities, animated rather than static emoji), providing access to them via a monthly subscription. Because Discord’s business does not rely on ads, the service is the product, not the people who use it. Discord takes care to collect limited information about its users, which among other things means it does not collect users’ geolocation data, or demographic data like gender or family income. And Discord doesn’t sell the limited user information it collects to anyone—not to data brokers or other outside companies. In other words,

although likely swept up by Florida’s and Texas’s attempts to control editorial discretion, Discord simply bears little resemblance to the respective legislatures’ assumptions about large social media services.

II. Discord’s Approach to Safety

Discord’s mission is to bring people together around shared experiences. In order to fulfill that mission, Discord works hard to create a safe, welcoming, and inclusive space online—especially for teens. Discord believes that online communications services are essential to the creation of community in the digital age. In order to fully realize that potential, service providers must establish—and be permitted to enforce—rules and practices to prevent, detect, and remove harmful content.

Discord invests in both centralized moderation *and* tools for groups using Discord to manage themselves. Approximately 15% of Discord’s employees focus on supporting safety and the service’s content policies. This includes Trust and Safety agents, who enforce Discord’s rules, and engineers who develop and build moderation tools for both Discord and its users.

Discord’s Community Guidelines³ govern all user interaction and content on Discord to help create safe online communities. These Guidelines, informed by guidance from policy experts and legal counsel, set out rules that (a) clarify for users the legal limits on the

³ Available at <https://discord.com/guidelines>.

types of speech Discord is permitted to host and (b) reflect Discord's own perspective regarding the kinds of communities, content, and activity that Discord is prepared to welcome on its service. Under Discord's Community Guidelines, users are prohibited, among other things, from promoting, coordinating, or engaging in harassment; using hate speech or engaging in other hateful conduct; threatening to harm another individual or group of people; organizing, promoting, or supporting violent extremism; soliciting, sharing, or making attempts to distribute content that depicts, promotes, or attempts to normalize child sexual abuse; sharing content that glorifies, promotes, or normalizes suicide or other acts of physical self-harm; sharing real media depicting gore, excessive violence, or animal harm; or sharing content that violates anyone's intellectual property or other rights. Additionally, minors are prohibited from engaging in sexual conduct, or any conduct that puts their online or physical safety at risk.

Defenders of the Texas and Florida laws claim that platforms barely moderate and therefore prominent instances of moderation represent discrimination against specific groups. But moderation is central to platforms like Discord, and is achieved at great cost, both monetary and in human effort. Enforcement of the Community Guidelines requires significant proactive and reactive work to limit harmful content. In the first quarter of 2023 alone, Discord received 117,042 user reports, of which 18,200, or 15.5% of the reports received, identified violations of Discord's Community

Guidelines leading to action taken. Discord also took action on its own initiative to enforce its Community Guidelines, issuing warnings in the first quarter of 2023 to 17,931 individual accounts and 2,143 servers, and disabling 173,745 individual accounts and removing 34,659 servers for policy violations during that period. As part of its proactive enforcement efforts, Discord has continued to invest in improving image classifiers for content such as sexually explicit material, gore, and violent media. In Q2 2023, Discord was able to proactively remove 99% of servers found to be hosting child sexual abuse material (CSAM), without waiting for third-party reporting.⁴ Discord has also embraced an ethic of transparency and knowledge sharing across a range of trust and safety issues. Discord continues to educate users, join coalitions, build relationships with experts, and publish our safety learnings, including in our quarterly Transparency Reports.

Discord sets and enforces these Community Guidelines because it does not wish to become a haven for child sexual abuse, advocacy of violence, hate speech, and a range of speech adjacent to illegal conduct, even

⁴ Although CSAM is indisputably illegal and the Florida and Texas laws purport to exempt anti-CSAM enforcement from their scope, CSAM is still highly relevant to the analysis of these laws for two reasons: (1) A server removed by Discord for having CSAM may well contain substantial amounts of legal content, whose removal could trigger a lawsuit against Discord; (2) Not all servers should be held responsible for CSAM posted by a user thereof. As discussed below, it is possible to attack a server by posting content that harms other users. But Discord's attempts to identify responsible parties could also easily trigger a lawsuit claiming disparate treatment of the same content in two different servers.

if the speech itself does not satisfy the legal requirements for incitement, conspiracy, or other unlawful acts. Discord’s Community Guidelines reflect the company’s own values, and those of Discord’s employees. But Discord’s Community Guidelines *also reflect the expectations of Discord’s users*: users demand that platforms establish rules that create and protect an environment where online discussion is not undermined by harassment, trolling, doxing, threats, advocacy of violence, and other forms of abuse. Online services that fail to maintain appropriate guidelines suffer in the marketplace. *See, e.g.,* Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* 35 (2018) (discussing platforms that have collapsed when they no longer served users’ interests); Jonathan Vanian, *IBM suspends advertising on X after report says ads ran next to antisemitic content*, CNBC (Nov. 16, 2023), <https://www.cnbc.com/2023/11/16/ibm-stops-advertising-on-x-after-report-says-ads-ran-by-nazi-content.html>.

In addition to Discord’s centralized Community Guidelines, many groups that spend time together on Discord maintain specific guidelines that apply only to their own group. For example, the “Christ Centered Christianity” religious community has rules that are designed to protect the integrity of the Christian religious discussion that the group is organized to pursue. That aim is reflected in Christ Centered Christianity’s Rule 9: “The spreading/attempt to convert people to faiths other than Christianity is prohibited. This is a

Christian server and we do not want the promotion of other faiths here.” Another example is “Conservative,” a group of political conservatives who run a discussion of conservative politics. That group’s Rule 4 provides that “Harassment, threats, intrusive direct messages, and trolling are not welcome here.” Nor is the determination to avoid dissension within the group restricted to Christians, or to conservatives. The “Progressive Muslim” server enforces the following as its Rule 8: “Keep this server a safe community for progressive Muslims. This is not the place to debate against progressive Muslims. Targeting Muslims for their views is strictly forbidden, even if it occurs in another server.”

For each of the groups mentioned, and for many others on Discord, violations of these rules can result in revocation of the violator’s group membership and loss of access to the group’s server. And this is not surprising. The members of InviteChrist are interested in having a discussion about Christian religion among believers. The purpose of that particular group is not to debate God’s existence, or to argue with atheists. The members of Conservative are interested in having a discussion among conservatives of conservative politics. The purpose of that particular group is not to engage in flame wars with liberals. The same logic also applies to the “Progressive Muslim” server. In all three cases, the groups’ own rules help ensure the kind of discussion that the groups’ members wish to engage in. What is happening on Discord, in short, is a 21st Century continuation of the practice that Alexis de Tocqueville, writing in 1835, characterized as particularly

American—that of forming associations to pursue a common interest:

Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds—religious, moral, serious, futile, extensive, or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found establishments for education, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; and in this manner they found hospitals, prisons, and schools. If it be proposed to advance some truth, or to foster some feeling by the encouragement of a great example, they form a society. Wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

Alexis de Tocqueville, *Democracy In America*, Volume 2, p. 106 (Vintage Books 1840). Now, as then, a vibrant culture of speech rests on a vigorously protected freedom of association—i.e., the freedom of groups to promote speech that supports their viewpoint and goals, and to exclude speech that does not.

III. Discord’s Provision of Services Creates Significant Associational Rights

Discord’s moderation efforts cannot be separated from the association interests of the groups that self-organize on Discord. Discord—likely swept up by but not accounted for under the Texas and Florida laws—enables the digital equivalents of parades, book clubs, worship circles, and other communities that have important communicative and associational interests that rely on Discord’s service-wide moderation services. Centralized moderation by Discord allows communities to focus on the things that matter to them, rather than being overwhelmed by unwanted, or even harmful, content. Gillespie, *supra*, at 207 (“[M]oderation is the essence of platforms, it is the commodity they offer. . . . Anyone could make a website on which any user could post anything he pleased, without rules or guidelines. Such a website would, in all likelihood, quickly become a cesspool and then be discarded.”).

The Court has long recognized that the right to associate entails a right to exclude: A group may need to be able to limit its membership in order to carry out its expressive purposes. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984) (explaining that “intrusion into the internal structure or affairs of an association,” such as a “regulation that forces the group to accept members it does not desire,” can unconstitutionally burden associational rights; “[f]reedom of association . . . plainly presupposes a freedom not to associate”).

Even when important anti-discrimination principles justify public accommodations laws, this Court has recognized that admitting a *person* is very different from requiring an organization to allow its members to behave in particular ways or to allow any and all viewpoints. An animal rights organization may be barred from discriminating on the basis of race, but does not need to remain open to the viewpoint that wearing fur is good when discussing how to prioritize its activities; a Catholic discussion group need not allow proselytization by members of other religions. Thus, prohibitions on discriminating against people on the basis of their membership in protected classes are generally permitted, but the Court has protected groups against requirements that “impair the ability of the group to express those views, and only those views, that it intends to express.” *Dale*, 530 U.S. at 648. The question is whether the government mandate “affects in a significant way the group’s ability to advocate public or private viewpoints.” *Id.* (citing *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13 (1988)); *Roberts*, 468 U.S. at 627 (upholding antidiscrimination law applied to private association because prohibition on gender discrimination imposed “no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members”).

Discord’s enforcement of its centralized Community Guidelines is designed to encourage and support the creation and enforcement of more server-specific rules by the communities themselves. Discord and its

users value the ability to create spaces that cannot easily be overrun by hostile or irrelevant speech, whether Holocaust denial in a history-focused group or pro-anorexia advocacy in an eating disorder recovery group. (Yes, there is an organized “pro-anorexia” movement. See Carmela Mento et al., *Psychological Impact of Pro-Anorexia and Pro-Eating Disorder Websites on Adolescent Females: A Systematic Review*, 18(4) *Int. J. Environ. Res. Public Health* 2186 (2021)). This can include moderation that a court might deem viewpoint-based or inconsistent. But as this Court explicitly held in *Dale*, 530 U.S. at 651, “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent” (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) (“[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational”); see also *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”)).

Separately, because of the scale of platforms such as Discord, a “consistency” requirement is as unachievable as a requirement that all public school teachers in the U.S. use the exact same standards in grading English essays, on pain of monetary sanctions if a factfinder decides that two similar essays from students in different states were graded differently. See Gillespie,

supra, at 74 (quoting trust and safety expert: “Given the scale that Twitter is at, a one-in-a-million chance happens 500 times a day. It’s the same for other companies dealing at this sort of scale.”). Even if a factfinder were allowed to tolerate an error rate (something the laws at issue do not explicitly provide for), the burdens of potential discovery into millions of actions to look for “consistency” will chill even the most basic content moderation. This is especially true if, as the states contemplate, factfinders will be asked to examine whether different viewpoints were treated in the same way. Gillespie, *supra*, at 77 (“What to do with a questionable photo or a bad actor changes when you’re facing not one violation but hundreds exactly like it, and thousands much like it, but slightly different in a thousand ways. This is not just a difference of size, it is fundamentally a different problem.”); James Grimmelman, *The Platform Is the Message*, 2 *GEO. L. TECH. REV.* 217, 221-22 (2018) (explaining that a post that decries eating Tide Pods and one that encourages eating Tide Pods can be indistinguishable from the outside, given varied ways in which people communicate: “The difficulty of distinguishing between a practice, a parody of the practice, and a commentary on the practice is bad news for any legal doctrines that try to distinguish among them, and for any moderation guidelines or ethical principles that try to draw similar distinctions.”) (citations omitted).⁵

⁵ Defenders of the laws at issue here contend that all platforms will have to do to comply is to follow their own rules. But because of the scale of user-supplied content, and the infinite

A prohibition on centralized moderation that limits the enforcement of policies against hate speech or other generally unwanted content would likely expose both Discord’s users and communities to a torrent of discordant, disruptive speech. The Texas and Florida laws force users to spend their limited time and local moderation resources to focus on the worst problems—problems that are better suited to centralized moderation—rather than shaping the specific kind of expressive communities they want to have.⁶ Indeed, *only*

inventiveness of humans seeking to make mischief, platforms will risk punishing discovery and potential liability no matter what they do. Given the scale and the entire range of human communication, there is no such thing as a fully specified content policy:

No guideline can be stable, clean, or incontrovertible; no way of saying it can preempt competing interpretations, by users and by the platform. Categorical terms like “sexually explicit” or “vulgar or obscene” do not close down contestation, they proliferate it: what counts as explicit? Vulgar to whom? All the caveats and clarifications in the world cannot make assessment any clearer; in truth, they merely multiply the blurry lines that must be anticipated now and adjudicated later. This is an exhausting and unwinnable game to play for those who moderate these platforms, as every rule immediately appears restrictive to some and lax to others, or appears either too finicky to follow or too blunt to do justice to the range of human aims to which questionable content is put.

Gillespie, *supra*, at 72-73. And under the laws at issue here, a factfinder’s disagreement with Discord’s level of detail, either in its policies or its enforcement explanations, could expose Discord to strict liability.

⁶ For example, bad actors sometimes coordinate “raids” on servers, trying to overwhelm them with unwanted content. Discord’s policies and tools are more efficient and effective to protect

Discord can identify certain kinds of service-wide problems, such as coordinated action by harmful actors across multiple servers, which is invisible to individual users and servers. Discord’s centralized content moderation identifies and acts on systemic harms so that users can focus on more productive conversations.

A community forced to spend its limited time and energy on keeping out hate speech and speech that is unwanted because of its viewpoint cannot develop its own, affirmative vision for its expression. Functionally, the effect would be like barring garbage collection in a city: every individual community would have to devote its own resources to hauling its own garbage, diverting those resources from more productive and more individualized curation. *See Dale*, 530 U.S. at 653 (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”); *cf. Gillespie, supra*, at 93 (noting that, in general, only a “relatively small” percentage of community members are willing to do the work of moderation); Brian Butler et al., *Community Effort in Online Groups: Who Does the Work and Why*, in *LEADERSHIP AT A DISTANCE: RESEARCH IN TECHNOLOGICALLY SUPPORTED GROUPS*, 346 (ed. Suzanne Weisband, 2007) (similar findings).

Proponents of the Texas and Florida laws argue that, by hosting so much speech about so many

against raids than relying solely on individual moderators and individual servers.

different topics, platforms like Discord lack any expressive interest in excluding (some of) the rest. But this Court has already rejected this argument, and for good reason: Expressive associations regularly allow some, but not total, viewpoint diversity; they need not convince outsiders they reflect a coherent ideology. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), for example, the Court addressed and rejected the argument that the protected parade had no coherent expressive theme, and that it let most groups march with their chosen banners. “[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” *Id.* at 569-70; *see also Dale*, 530 U.S. at 655 (noting that “the purpose of the St. Patrick’s Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless” and that “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be “expressive association”).⁷

⁷ For similar reasons, neither *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (“*FAIR*”), nor *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), suggest that Texas and Florida have the power to force Discord to host speech expressing a specific viewpoint to which it, or the members of a particular Discord community, object. Both *FAIR* and *PruneYard* involved the constitutionality of federal (*FAIR*) and state (*PruneYard*) rules creating some right of access for

What the Court said of the parade in *Hurley* is true both of Discord as a whole and of many individual Discord servers:

Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

515 U.S. at 574-75.

speakers to private property. In *FAIR*, the Court upheld the federal government's conditioning of law schools' receipt of federal funding on providing equal access to military recruiters—the law regulated conduct, the Court held; any speech regulation was incidental. 547 U.S. at 60 (“As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.”) (emphasis in original). Likewise, in *PruneYard* the Court upheld state constitutional provisions granting access to private property (a shopping center) to exercise free speech and association rights. As the *PruneYard* Court noted, “no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message.” 447 U.S. at 87. In neither of these cases does the challenged regulation offend First Amendment association rights in the way that the Texas and Florida viewpoint-based speech mandates do.

Even more than in *Hurley*, the Florida and Texas laws change the message of Discord’s own speech—its standards for what it allows and prohibits—treating Discord’s speech itself as a public accommodation. *Id.* at 573. They substitute the states’ judgments about what Discord should allow for Discord’s own. But “[u]nder this approach any contingent of protected individuals with a message would have the right to participate in petitioners’ speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. This use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Id.* at 573.

The problem can be illustrated with a tragic example mentioned earlier: pro-anorexia content. “Pro-ana” groups have, in the past, converged on platforms that allow them. Gillespie, *supra*, at 67-68. Discord has no desire to promote anorexia.⁸ And online eating disorder recovery and support groups in general can be life-saving for their members, meaning that Discord should not, and does not, attempt to screen out all

⁸ Discord states in a public-facing resource regarding its policies against promoting suicide and self-harm content that Discord will take action against users who, *inter alia*, give “advice on how to commit an act of self-harm,” “[n]ormaliz[e] or encourag[e] self-harming behaviors,” or “[d]iscourag[e] individuals from seeking treatment for self-harming behaviors.” Discord, Suicide and Self-Harm Explainer, <https://discord.com/safety/suicide-self-harm-policy-explainer>.

eating-disorder-related content. But under the Florida and Texas laws, Discord would only be able to allow eating disorder recovery groups if it also allowed pro-anorexia groups. Under Florida's law, it would also have to allow pro-anorexia content from or about political candidates and "journalistic organizations." This would fundamentally change the nature of the communities that Discord wishes to nurture. And it would fundamentally impair the mission of eating disorder support groups on Discord (and elsewhere).

IV. Discord's Structure Is Incompatible with the Texas and Florida Laws

As explained above, moderation by Discord assists individual communities' associational interests. By assuming public access and purely centralized moderation, Florida and Texas are interfering not just with "public" speech but with a large number of invitation-only or limited-access speech forums. The states aimed at what they saw as the new public square, but legislated covering the new coffee shops, living rooms, and bowling alleys. Put differently, the Florida and Texas laws will interfere with the countless associations that, as Tocqueville recognized, have always been crucial to American democracy.

Given the costs and risks involved with forcing Discord into the Facebook-shaped provisions of the Florida and Texas laws, future services will be understandably hesitant to risk anything but copying the legislators' models of a "social media" service. Helping

communities moderate their own portions of a service—much less building tools and training programs to support community moderation—would be risky because that service could be held liable for encouraging or allowing “censorship” by the communities it hosts. This will suppress new forms of communication and association to the detriment of viewpoint diversity, both in the public square and in smaller communities.

Moderation by Discord is important to individual communities in a variety of situations, mundane and unexpected. One common problem is that a server’s owner or active moderators may not be online to monitor their community—a real risk with volunteer, unpaid hobby positions—and the only way to enforce either Discord’s rules or a particular community’s rules is for Discord to step in. Without active moderation, off-topic and abusive content can easily take over. Without Discord’s assistance, users who don’t have moderator permissions in that server would quickly find it unusable, losing the benefits of the speech and association found in that server, because no one else has the power to enforce the previously set rules.

Nor are volunteer moderators necessarily aligned with the interests of the community on a particular server. As reporter Casey Newton has explained:

[M]embers of the [Discord] team had to decide who was responsible for what happened in a server gone bad. If your first thought was “the server’s owner,” that was mine too. But sometimes moderators get mad at server owners, and retaliate against them by posting content

that breaks Discord’s rules—a kind of scorched-earth policy aimed at getting the server banned.

. . . Some users are automatically given moderator permissions when they join a server. If the server goes rogue and the “moderator” has never posted in the server, why should they be held accountable?

Moreover, team members said, some server owners and moderators . . . weren’t actually aware of the bad behavior in a server—either because it’s too big and active to read every post, or because they haven’t logged in lately.

Casey Newton, Inside Discord’s reform movement for banned users, Platformer (Oct. 19, 2023), <https://www.platformer.news/p/inside-discords-reform-movement-for-florida-s-and-texas-s-laws-remove-the-kind-of-case-by-case-discretion-needed-to-manage-these-situations-and-threaten-discord-with-a-lawsuit-for-any-move-that-it-makes-to-rein-in-a-rogue-server-or-moderator-that-might-be-deemed-inconsistent-with-past-moderation>.⁹

⁹ That is not the end of the mismatch between the laws at issue and Discord’s design. Discord also allows third party developers to build “apps” that can add functionality to Discord’s services, and some of the most popular apps are moderation-oriented. These apps can be found through Discord’s “App Directory,” and Discord allows certain verified apps to monetize user subscriptions. Under the laws at issue here, Discord could risk liability for authorizing or verifying those apps, which allow moderators to implement viewpoint-based rulesets (e.g., against categories of words deemed offensive by the community, against “spoilers” for specific media, against support for an entity that a particular Discord community is set up to oppose, and so on). Or,

While most Discord servers are nonpublic, it is common for many of the largest servers to make themselves discoverable on Discord and other spaces on the internet, which for example, helps an artist build a community for their fans. But as a server acquires more and more users, so too does its reliance on Discord’s own moderation. Discord acts as a backstop against coordinated and harmful activity, while its tools also support a given community’s unique moderation practices. Discord’s platform guidelines require groups to police themselves if they want to be broadly discoverable; Florida’s and Texas’s laws threaten to make that impossible.

Because the laws were not written with an understanding of how large platforms vary, multiple traps abound for services that don’t work the way Texas’s and Florida’s laws assume. For example, Florida’s law allows journalistic organizations and political candidates to sue platforms if they “limit . . . the exposure [of the plaintiff’s] content or material . . . to other users[.]” Fla. Stat. §501.2041(1)(f); §501.2041(2)(j). But all Discord servers limit the exposure of a user’s content or material to other users in that server, by Discord’s design. Unlike with Facebook or X, there is no Discord “homepage” where all Discord content is available to the world by default, nor does a given Discord

because Discord allows apps that exclude certain offensive terms, it could be forced to allow and verify apps that enforce pro-segregation, pro-anorexia, or any other harmful viewpoints. And such apps would be publicly available, affecting the environment even for users who didn’t choose to be part of such toxic communities.

user have her own “homepage” where her public content is available to the world by default. Because each Discord server is a separate community, Discord could even be sued for refusing to allow journalistic organizations or political candidates to join every server, since the laws at issue do not immunize design decisions of this type.

Likewise, both Texas and Florida seek to require detailed disclosure of all individual moderation decisions, which presumes that there is only centralized moderation. *See* Tex. Sec. 120.103; Fla. Stat. §501.2041(2)(d). But Discord does not track moderators’ decisions across all its servers, nor does it set the full policies that moderators may enforce. It is unable to notify users, whether in advance or after the fact, of changed rules that it does not set or violations of individual server policies. It does not define terms used by individual servers. This hub-and-spoke model allows custom policies for each community, supporting their own rules along with Discord’s baseline Community Guidelines, but it also precludes any full listing of policies across the Discord platform. And once again, even if Discord explains itself thoroughly, it is subject to litigation, discovery, and potentially strict liability for each act of moderation if a factfinder disagrees with the level of detail it provides.

Texas (though not Florida) attempts to distinguish between platform and user actions, but again in a way that fails to account for the associational design of platforms such as Discord. *See* Texas Sec. 143A.006 (“This chapter may not be construed to prohibit or

restrict a social media platform from authorizing or facilitating a user’s ability to censor specific expression on the user’s platform or page at the request of that user.”). A member of a Discord server does not have a “platform” or “page.” Even if courts treated server owners as “users” and servers as “platforms,” moderators are not necessarily, and often aren’t, owners of the server. Thus, their use of moderation tools like apps—even if done to protect the community and enforce its specific rules—does not seem to fall within this exclusion, because it would be “censoring” *other* users.

What these specific examples demonstrate is that intervening in community moderation is a zero-sum game: Expanded rights against moderation can come only at the expense of contracted community free association rights. The communities do not own the service and cannot effectively police or clean up their servers by themselves; Discord must support a server’s moderation decisions and track wrongdoers across the entire Discord service. In other words, the association rights of Discord communities depend on the backstop of centralized moderation. Communities can get hijacked, and Discord’s intervention can be necessary to restore control to the members. But in such cases, there are always at least two views of what the server is “about,” and therefore it will always be possible to accuse Discord of making a viewpoint-based or “inconsistent” determination.

Because the laws do not contemplate Discord’s structure, they are also murky enough that Discord could be forced to restore content removed by a

community moderator. For example, Reddit has been sued under Texas HB 20, for a volunteer moderator’s decision to ban a user who called the fictional character Wesley Crusher a “soy boy” in the r/StarTrek subreddit. *See Petition: Small Claims Case, Cox v. Reddit, Inc.*, No. S22-87J1 (Just. Ct. Denton Cnty., Tex. May 17, 2022) (plaintiff claimed to have been “banned and/or de-platformed from r/StarTrek for posting a lawful opinion about a fictional character”); *cf. Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045 (9th Cir. 2017) (finding that unpaid moderators could have been acting as site’s agents). An allegation that Discord engaged in viewpoint discrimination in supporting different moderators or focusing enforcement efforts on specific servers, for example, could force Discord to engage in costly discovery and litigation if it didn’t restore content that a community’s own members had decided not to tolerate.

Discord is not very much like more open social media sites like Facebook or X, the focus of the states’ ire. Discord serves groups that are trying to foster associational benefits: in many ways, users are not members of “Discord” as a whole, but of particular servers. Interfering with Discord’s ability to remove speech inimical to those groups’ purposes frustrates their ability to organize their own conversations. The laws at issue therefore harm both Discord’s own associational interests in curating the kinds of groups it wants to foster and the associational interests of its user communities.



CONCLUSION

For the foregoing reasons, Discord respectfully urges this Court to reverse the decision of the Fifth Circuit, and to affirm the decision of the Eleventh Circuit as to the issues on which the Court has granted review.

Respectfully submitted,

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