

Nos. 22-277 and 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*

**Brief of Amici Curiae Chamber of Progress; Access  
Now; Consumer Technology Association; HONR  
Network; Information Technology & Innovation  
Foundation; Information Technology Industry  
Council; Interactive Advertising Bureau; IP  
Justice; LGBT Tech; Stop Child Predators; TechNet;  
and Washington Center for Technology Policy  
Inclusion in Support of NetChoice**

JESS MIERS  
CHAMBER OF PROGRESS  
1390 Chain Bridge Rd.,  
#A108  
McLean, VA 22101

MARK W. BRENNAN  
*Counsel of Record*  
HOGAN LOVELLS US LLP  
555 Thirteenth St., N.W.  
Washington, DC 20004  
(202) 637-5600  
mark.brennan@  
hoganlovells.com

---

---

*Additional Counsel Listed on Inside Cover*

SUZANNA KANG  
CONSUMER TECHNOLOGY  
ASSOCIATION  
1919 S. Eads Street  
Arlington, VA 22202

CARLOS GUTIERREZ  
LGBT TECH  
123 W. Frederick St.,  
#214  
Staunton, VA 24401

NICHOLAS WACHINSKI  
STOP CHILD PREDATORS  
5185 MacArthur Blvd.,  
N.W., #575,  
Washington, DC 20016

WASHINGTON CENTER  
FOR TECHNOLOGY  
POLICY INCLUSION  
2000 Pennsylvania Ave.,  
N.W., Suite 7000  
Washington, DC 20006

EBBIE YAZDANI  
TECHNET  
1420 New York Ave.,  
N.W., Suite 825  
Washington, DC 20005

MARK W. BRENNAN  
J. RYAN THOMPSON  
THOMAS B. VEITCH  
KHAOSARA A. AKAPOLAWAL  
HOGAN LOVELLS US LLP  
555 Thirteenth St., N.W.  
Washington, DC 20004

*Counsel for Amici  
Chamber of Progress;  
Access Now; HONR  
Network; Information  
Technology & Innovation  
Foundation; Interactive  
Advertising Bureau; IP  
Justice*

JOHN S. MILLER  
INFORMATION TECHNOLOGY  
INDUSTRY COUNCIL  
700 K St., N.W., Suite 600  
Washington, DC 20001



## TABLE OF CONTENTS

|                                                                                                                                                                                |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| TABLE OF AUTHORITIES.....                                                                                                                                                      | iii |
| STATEMENT OF INTEREST .....                                                                                                                                                    | 1   |
| SUMMARY OF ARGUMENT.....                                                                                                                                                       | 1   |
| ARGUMENT .....                                                                                                                                                                 | 3   |
| I.    THE COURT SHOULD AFFIRM WEBSITES’<br>RIGHT TO CURATE CONTENT. ....                                                                                                       | 3   |
| A. The First Amendment Protects Online<br>Speech.....                                                                                                                          | 3   |
| B. Websites Engage in Online Speech by<br>Exercising Editorial Discretion. ....                                                                                                | 4   |
| C. The Florida and Texas Statutes Violate the<br>First Amendment Rights of Online<br>Publishers.....                                                                           | 6   |
| II.  UPHOLDING LAWS THAT RESTRICT<br>CONTENT MODERATION WILL AMPLIFY<br>THE MOST EXTREME VOICES, SHUTTING<br>OUT MARGINALIZED COMMUNITIES AND<br>SPREADING MISINFORMATION..... | 7   |
| A. Social Media Websites Help People Find<br>Community and Connection. ....                                                                                                    | 7   |
| B. The Statutes Will Promote Divisive and<br>Damaging Material, Polluting Online<br>Communities and Endangering Vulnerable<br>Groups. ....                                     | 9   |

C. The Statutes Will Also Compel Websites to  
Make Difficult Content Decisions,  
Endangering Diverse and Niche Online  
Spaces in Favor of More Commercially  
Viable Content.....13

D. Allowing These Statutes to Take Effect  
Will Initiate a Race to the Bottom, with  
States Vying to Implement Similar yet  
Increasingly Restrictive Content  
Regulations.....16

CONCLUSION ..... 19



## TABLE OF AUTHORITIES

### Cases:

|                                                                                                               |                  |
|---------------------------------------------------------------------------------------------------------------|------------------|
| <i>303 Creative LLC v. Elenis</i> ,<br>600 U.S. 570 (2023).....                                               | 6                |
| <i>ACLU v. Reno</i> ,<br>929 F. Supp. 824 (E.D. Pa. 1996) .....                                               | 5, 7, 15         |
| <i>Boy Scouts of Am. v. Dale</i> ,<br>530 U.S. 640 (2000).....                                                | 6                |
| <i>DeLima v. YouTube, LLC</i> ,<br>2018 WL 4473551 (D.N.H. 2018) .....                                        | 10               |
| <i>Domen v. Vimeo, Inc.</i> ,<br>991 F.3d 66 (2d Cir. 2021), amended, 2021 WL<br>3072778 (2d Cir. 2021) ..... | 11               |
| <i>Fed. Agency of News LLC v. Facebook, Inc.</i> ,<br>432 F.Supp.3d 1107 (N.D. Cal. 2020) .....               | 11               |
| <i>Mia. Herald Publ’g. Co. v. Tornillo</i> ,<br>418 U.S. 241 (1974).....                                      | 4                |
| <i>Murphy v. Twitter, Inc.</i> ,<br>274 Cal. Rptr. 3d 360 (2021) .....                                        | 11               |
| <i>Prager University v. Google LLC</i> ,<br>951 F.3d 991 (9th Cir. 2020) .....                                | 11               |
| <i>Reno v. ACLU</i> ,<br>521 U.S. 844 (1997).....                                                             | 1, 2, 3, 4, 5, 7 |
| <i>Turner Broad. Sys., Inc. v. FCC</i> ,<br>512 U.S. 622 (1994).....                                          | 3                |

|                                                                                                                                                                                                                                        |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| <i>Wilson v. Twitter, Inc.</i> ,<br>2020 WL 3256820 (S.D. W. Va. 2020).....                                                                                                                                                            | 11 |
| <i>Yahoo! Inc. v. La Ligue Contre Le Racisme et<br/>L'Antisemitisme</i> ,<br>433 F.3d 1199 (9th Cir. 2006) .....                                                                                                                       | 17 |
| <b>Constitution:</b>                                                                                                                                                                                                                   |    |
| U.S. CONST. amend. I.....                                                                                                                                                                                                              | 2  |
| <b>Statutes:</b>                                                                                                                                                                                                                       |    |
| 47 U.S.C. § 230 .....                                                                                                                                                                                                                  | 2  |
| N.Y. Gen. Bus. Law § 394-ccc .....                                                                                                                                                                                                     | 16 |
| Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1).....                                                                                                                                                                                      | 16 |
| Tex. Civ. Prac. & Rem. Code § 143A.002(a)(3).....                                                                                                                                                                                      | 17 |
| <b>Other Authorities:</b>                                                                                                                                                                                                              |    |
| Alexander Cheves, <i>The Queer Sex Panic Is Just<br/>Beginning</i> , <i>The ADVOCATE</i> (Jan. 30, 2019),<br><a href="https://bit.ly/3uILrsO">https://bit.ly/3uILrsO</a> .....                                                         | 14 |
| Ashley Austin et al., <i>It's my safe space: The life-<br/>saving role of the internet in the lives of<br/>transgender and gender diverse youth</i> , 21 INT'L J.<br>OF TRANSGENDER HEALTH 33 (2020) .....                             | 8  |
| Brian Cheung, <i>'Stop Asian Hate' drove a funding<br/>surge for AAPI startups and nonprofits. What<br/>comes next?</i> , <i>NBC NEWS</i> (May 24, 2023),<br><a href="https://nbcnews.to/47YETVo">https://nbcnews.to/47YETVo</a> ..... | 9  |

- Brian Fung et al., *Major advertisers flee X, deepening crisis at Elon Musk’s social media site*, CNN BUSINESS (Nov. 18, 2023), <https://cnn.it/46OQm92> .....14
- Brooke Auxier, *Social media continue to be important political outlets for Black Americans*, Pew Rsch. Ctr. (Dec. 11, 2020), <https://pewrsr.ch/4a1uhqw> ....8
- Char Adams, *Animated Frederick Douglass calls slavery a ‘compromise’ in conservative group’s video*, NBC NEWS (Aug. 10, 2023), <https://nbcnews.to/47ZGUjW>.....11
- Christopher St. Aubin & Galen Stocking, *Key facts about Gab*, Pew Rsch. Ctr. (Jan. 24, 2023), <https://bit.ly/47VPoc4> .....10
- Damien Fisher, *Keene Conspiracy vlogger sues Google, Twitter for blocking her videos*, Manchester Ink Link (Nov. 4, 2020), <https://bit.ly/46GlXcJ> ....10
- Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 CHICAGO J. OF INT’L L. 115 (2023)17
- Emma Roth, *Online age verification is coming, and privacy is on the chopping block*, THE VERGE (May 15, 2023), <https://bit.ly/3NdMKq9>.....17
- Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH 191 (2021).....5

|                                                                                                                                                                                                              |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Eric Goldman, <i>Content Moderation Remedies</i> , 28<br>MICH. TECH. L. REV. 1 (2021) .....                                                                                                                  | 5  |
| Eric Goldman, <i>The UK Online Harms White Paper<br/>and the Internet’s Cable-ized Future</i> , 16 OHIO ST.<br>TECH. L.J. 351 (2020).....                                                                    | 13 |
| Heather Chen and Alex Stambaugh, <i>ISIS claims<br/>deadly blast at Catholic mass in southern<br/>Philippines</i> , CNN (Dec. 3, 2023),<br><a href="https://cnn.it/41bVWkv">https://cnn.it/41bVWkv</a> ..... | 18 |
| Herbert J. Gans, DECIDING WHAT’S NEWS: A STUDY<br>OF CBS EVENING NEWS, NBC NIGHTLY NEWS,<br>NEWSWEEK, AND TIME (2004).....                                                                                   | 4  |
| Ivana Saric, All U.S. extremist mass killings in 2022<br>linked to far right, report says, Axios (Feb. 23,<br>2023), <a href="https://bit.ly/3T8C2Vt">https://bit.ly/3T8C2Vt</a> .....                       | 12 |
| Josh Quittner, <i>The War Between alt.tasteless and<br/>rec.pets.cats</i> , WIRED (May 1, 1994),<br><a href="https://bit.ly/3GxrJCJ">https://bit.ly/3GxrJCJ</a> .....                                        | 5  |
| Kendra Albert et al., <i>FOSTA in Legal Context</i> , 52<br>COLUM. HUM. RTS. L. REV. 1084 (2021).....                                                                                                        | 14 |
| Lisa Guernsey, <i>Welcome to the World Wide Web.<br/>Passport, Please?</i> , N.Y. TIMES (Mar. 15, 2001),<br><a href="https://nyti.ms/3Rw2NIK">https://nyti.ms/3Rw2NIK</a> .....                              | 17 |
| Mark A. Lemley, <i>The Splinternet</i> , 70 DUKE L.J. 1397<br>(2021).....                                                                                                                                    | 16 |

- Mark Jenssen & Claire Park, *The Rising Red Tide of Digital Censorship: How a Conservative Wave of Content Bans is Moving from Schools to Online*, Chamber of Progress (Sept. 19, 2023), <https://bit.ly/3R5X1G1> .....15
- Megan Burbank, *Abortion Activists Rely on Social Media More Than Ever After Roe—and That Has Risks*, THE NEW REPUBLIC (Sept. 29, 2022), <https://bit.ly/49TFPw1> .....9
- Michael Murney, *LGBTQ community facing increased threat from extremists, DHS warns*, HOUS. CHRON. (May 25, 2023), <https://bit.ly/3GopQZ3> .....12
- Mike Masnick, *State Legislators Are Demanding Websites Moderate Less AND Moderate More; Federal Law Prohibits Both*, TECHDIRT (Apr. 8, 2022), <https://bit.ly/46KYOFW> .....16
- Philip Elmer-Dewitt, *Online Erotica: On a Screen Near You*, TIME (July 3, 1995), <https://bit.ly/3Gqtce9> .....5
- r/AbortionDebate*, Reddit, <https://bit.ly/46H9plt> (last visited Dec. 3, 2023).....9
- r/AuntieNetwork*, Reddit, <https://bit.ly/3T5JrVt> (last visited Dec. 3, 2023).....9
- r/Baking*, Reddit, <https://bit.ly/418ezFW> (last visited Dec. 3, 2023).....8
- r/CarpetsForAirports*, Reddit, <https://bit.ly/3uFVnTZ> (last visited Dec. 3, 2023) .....8

|                                                                                                                                                                                                                    |        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>r/ChangeMyView</i> , Reddit, <a href="https://bit.ly/481COI3">https://bit.ly/481COI3</a><br>(last visited Dec. 3, 2023) .....                                                                                   | 9      |
| <i>r/EatingDisorders</i> , Reddit, <a href="https://bit.ly/3T4lTk0">https://bit.ly/3T4lTk0</a><br>(last visited Dec. 3, 2023) .....                                                                                | 8      |
| <i>r/mentalhealth</i> , Reddit, <a href="https://bit.ly/411J4x7">https://bit.ly/411J4x7</a> (last<br>visited Dec. 3, 2023).....                                                                                    | 8      |
| <i>r/ProChoice</i> , Reddit, <a href="https://bit.ly/47J8OBc">https://bit.ly/47J8OBc</a> (last<br>visited Dec. 3, 2023).....                                                                                       | 9      |
| <i>r/ProLife</i> , Reddit, <a href="https://bit.ly/3sU10xk">https://bit.ly/3sU10xk</a> (last visited<br>Dec. 3, 2023).....                                                                                         | 9      |
| <i>r/stopdrinking</i> , Reddit, <a href="https://bit.ly/3T8spGj">https://bit.ly/3T8spGj</a> (last<br>visited Dec. 3, 2023).....                                                                                    | 8      |
| Ray Everett-Church, <i>The Spam That Started It All</i> ,<br>WIRED (Apr. 13, 1999), <a href="https://bit.ly/3GpDsmT">https://bit.ly/3GpDsmT</a> .....                                                              | 5      |
| Rohit Shewale, <i>Internet User Statistics In 2023 —<br/>(Global Demographics)</i> , Demandsage (Aug. 21,<br>2023), <a href="https://bit.ly/4a0NOHw">https://bit.ly/4a0NOHw</a> .....                              | 3      |
| Ryan Mac and Kate Conger, <i>X May Lose Up to \$75<br/>Million in Revenue as More Advertisers Pull Out</i> ,<br>N.Y. TIMES (Nov. 24, 2023),<br><a href="https://nyti.ms/3T4W9DR">https://nyti.ms/3T4W9DR</a> ..... | 13     |
| Steven J. Vaughn-Nichols, <i>Before the Web: Online<br/>Services of Yesteryear</i> , ZDNET (Dec. 4, 2015),<br><a href="https://zd.net/3RsiUjT">https://zd.net/3RsiUjT</a> .....                                    | 14     |
| Tyler B. Valeska, <i>Speech Balkanization</i> , 65 B.C. L.<br>REV. (forthcoming 2024) .....                                                                                                                        | 16, 18 |

*White Lives Matter*, Anti-Defamation League,  
<https://bit.ly/3QYFvTK>.....13

## STATEMENT OF INTEREST<sup>1</sup>

Amici focus on the enormous practical consequences if HB 20 and SB 7072—and similar laws enacted or under consideration elsewhere—are allowed to take effect. Websites rely on content moderation to help millions of Americans work, play, learn, shop, connect, and express themselves free from harassment, disinformation, and incendiary content. But, by foreclosing any meaningful ability of websites to engage in content curation, HB 20 and SB 7072 erase their very utility, denying them editorial control over the speech and ideas they publish and threatening severe harm to websites and their users.

Amici are organizations that are all deeply interested in ensuring that Americans may participate in healthy online environments. Amici and their members thus have a strong interest in ensuring that HB 20 and SB 7072, and similar laws around the country, are not permitted to threaten, disrupt, or destroy vibrant and diverse online communities.

## SUMMARY OF ARGUMENT

The Internet has flourished under the strong First Amendment protections affirmed in *Reno v. ACLU*, 521 U.S. 844 (1997). Citing what would now be considered rudimentary “[w]eb pages, mail exploders, and newsgroups,” *Reno* noted that anyone could be-

---

<sup>1</sup> No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Amicus LGBT Tech attorney Carlos Gutierrez submitted a declaration in the HB 20 district court litigation.



come a next-generation “pamphleteer,” *id.* at 870. Rejecting arguments that the Internet should receive weaker First Amendment protections, the Court held that, “unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity.” *Id.*

In the nearly three decades since, the Internet has become even more robust, less scarce, and used far more heavily. With strong, speech-affirming protections under the First Amendment and 47 U.S.C. § 230, websites large and small have thrived, supporting communities that span the globe. U.S. CONST. amend. I; 47 U.S.C. § 230. From support networks for LGBTQ+ youth to parental support groups, there is a place for everyone.

The Florida and Texas statutes, SB 7072 and HB 20, threaten all of this. Websites’ ability to exercise editorial discretion and the existence of varying websites upholding diverse rules are major reasons for the Internet’s success. Upholding either law would upend the Internet as we know it.

With the government regulating how online communities interact, websites would either need to allow divisive viewpoints like hate speech, restrict the topics that can be discussed, or a combination of both. Both prospects are likely to undermine civil discourse online and shut out speakers of all sorts, but particularly from vulnerable groups. Further, these laws would balkanize Internet regulation, permitting each state to dictate how websites operate. It may not even be technically or practically feasible for websites to

geofence compliance along state lines, leading to potential conflicts between state laws or allowing single states to dictate national Internet policy.

All in all, upholding HB 20 or SB 7072 as constitutional would be a travesty for the Internet and the hundreds of millions of Americans who use it every day. The Court should reverse the Fifth Circuit and affirm the Eleventh Circuit.

## **ARGUMENT**

### **I. The Court Should Affirm Websites' Right to Curate Content.**

#### **A. The First Amendment Protects Online Speech.**

The Court has stressed that the medium of speech matters for determining its level of First Amendment protection and has concluded that Internet speech should be protected by applying robust standards, similar to the rules for print media. *Reno*, 521 U.S. at 868-70.

Historically, the Court has permitted the government to impose tailored restrictions on broadcast and radio content due to the scarcity of broadcast spectrum and the need for diverse viewpoints and public access to the airways. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994). But the Internet stands apart. It offers unprecedented accessibility and abundance to the average consumer. Roughly 4.9 billion people use a variety of social media websites throughout the world. Rohit Shewale, *Internet User Statistics In 2023 — (Global Demographics)*, Demand-sage (Aug. 21, 2023), <https://bit.ly/4a0NOHw>. Almost anyone can sign up for an account and participate on

a variety of social media sites. Websites like Reddit cater to nearly 140,000 active communities.

That is why there is “no basis for qualifying the level of First Amendment scrutiny that should be applied” to online speech. *Reno*, 521 U.S. at 870. Nearly thirty years ago, the Court explained: “It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.” *Id.*

This foresight acknowledged the Internet’s unique ability to empower *anyone* to communicate with vast audiences affordably and easily. And this has only grown truer as the Internet now supports an even broader array of voices and information. Consequently, reinforcing First Amendment protections for the Internet is as vital now, if not more so, than before.

### **B. Websites Engage in Online Speech by Exercising Editorial Discretion.**

Even without cost or space concerns, the First Amendment’s boundary is crossed when laws intrude upon editorial functions. “It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.” *Mia. Herald Publ’g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). A journalist’s job is not to report every occurrence of “news” but to discern and highlight content they find most relevant for readers. See Herbert J. Gans, *DECIDING WHAT’S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME 5* (2004).

Today’s social media websites excel at content curation. Their success comes from tailored “house rules”

that govern user-generated content and mirror the editorial strategies of traditional publishers. See Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH 191, 194-95 (2021). The 1990s digital landscape was full of spam and unwanted pornography. In fact, a staggering 83.5% of Usenet newsgroup content then was pornographic.<sup>2</sup> Early Internet users often stumbled upon unwelcome content, which brought the issue of digital communication and its regulation to the attention of this Court for the first time. *ACLU v. Reno*, 929 F. Supp. 824, 838-42 (E.D. Pa. 1996); *Reno*, 521 U.S. at 862. Since then, modern Internet users have come to benefit from sophisticated content curation tools, making encounters with unwanted content rare. See Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 23-40 (2021).

This careful crafting of guidelines shapes the website's identity, creating a brand and attracting an audience. To illustrate, it is unremarkable that a children's magazine would choose not to publish stories about a Hollywood sex scandal. This is a standard exercise of editorial discretion. Likewise, popular social media companies have built their websites by considering the content that they would like to distribute and the audience they would like to reach.

---

<sup>2</sup> Philip Elmer-Dewitt, *Online Erotica: On a Screen Near You*, TIME (July 3, 1995), <https://bit.ly/3Gqtce9>; see also Josh Quittner, *The War Between alt.tasteless and rec.pets.cats*, WIRED (May 1, 1994), <https://bit.ly/3GxrJCJ>; Ray Everett-Church, *The Spam That Started It All*, WIRED (Apr. 13, 1999), <https://bit.ly/3GpDsmT>.

For example, LinkedIn has set itself apart by building a website for professional connections and “requir[ing] professional expression.” *Professional community policies*, LinkedIn, <https://bit.ly/3uIP7L8> (last visited Dec. 3, 2023). YouTube offers a separate option called YouTube Kids with children’s content that is curated using different standards. *See Parent Resources*, YouTube Kids, <https://bit.ly/3RrrgYb> (last visited Dec. 3, 2023).

These are but a few more prominent examples of the sorts of editorial content curation that online websites engage in when publishing user-generated content.

### **C. The Florida and Texas Statutes Violate the First Amendment Rights of Online Publishers.**

Florida’s SB 7072 and Texas’s HB 20 intrude on websites’ editorial discretion by forcing them to publish content that they might otherwise not. In other words, these laws tell private companies what they must say and how to say it—even if it is inconsistent with their values and unwelcome to their audiences.

This is an affront to the First Amendment. “The framers designed the Free Speech Clause . . . to protect the ‘freedom to think as you will and to speak as you think.’” *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660-61 (2000)). Absent the most exceptional circumstances, “the government may not compel a person to speak its own preferred message,” which is true no matter if “the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other

ideas with his own speech that he would prefer not to include.” *303 Creative LLC*, 600 U.S. at 584.

Florida and Texas have no constitutionally acceptable justification for imposing their political agendas on private media companies. As the Internet continues to expand at a staggering pace, *Reno* rings truer now more than ever: “[There is] no basis for qualifying the level of First Amendment scrutiny that should be applied” to online speech. *Reno*, 521 U.S. at 870.

## **II. Upholding Laws that Restrict Content Moderation Will Amplify the Most Extreme Voices, Shutting Out Marginalized Communities and Spreading Misinformation.**

### **A. Social Media Websites Help People Find Community and Connection.**

Since its early days, the Internet has brought people together, supporting a bustling marketplace of ideas and allowing diverse communities to thrive. *See Reno*, 521 U.S. at 885.<sup>3</sup> Many Internet users rely on websites to find support based on shared interests and experiences. For example, Reddit houses communities for every interest under the sun, from baking to admiring

---

<sup>3</sup> *See also ACLU*, 929 F. Supp. at 872 (“One of the plaintiffs here, Stop Prisoner Rape, Inc., has as its core purpose the issue of prison rape. The organization creates chat rooms in which members can discuss their experiences. Some amici have also organized Web sites dedicated to survivors of rape, incest, and other sexual abuse. These Web sites provide fora for the discussion and contemplation of shared experiences.”).

airport carpets.<sup>4</sup> Users with personal struggles also turn to Reddit groups like r/stopdrinking (479,000+ members), r/mentalhealth (427,000+ members), and r/EatingDisorders (88,000+ members).<sup>5</sup>

For marginalized groups, the Internet offers a way to associate and can be a catalyst for social change. LGBTQ+ youth find solace in online spaces, reducing feelings of isolation, anxiety, and suicide risk. Ashley Austin et al., *It's my safe space: The life-saving role of the internet in the lives of transgender and gender diverse youth*, 21 INT'L J. OF TRANSGENDER HEALTH 33 (2020). A significant proportion of Black (45%) and Hispanic (46%) users use social media websites to find details about political events, a rate noticeably higher than the 29% observed among White social media users. Brooke Auxier, *Social media continue to be important political outlets for Black Americans*, Pew Rsch. Ctr. (Dec. 11, 2020), <https://pewrsr.ch/4a1uhqw>. In response to the surge of hate crimes against Asian-Americans and Pacific Islanders and the vandalization of local businesses during the COVID-19 pandemic, communities galvanized support on social media using the #StopAAPIHate hashtag. This movement created a robust support network, offering solidarity and assistance to Asian Americans. Brian Cheung, *'Stop Asian Hate' drove a funding surge for*

---

<sup>4</sup> *r/Baking*, Reddit, <https://bit.ly/418ezFW> (last visited Dec. 3, 2023); *r/CarpetsForAirports*, Reddit, <https://bit.ly/3uFVnTZ> (last visited Dec. 3, 2023).

<sup>5</sup> *r/stopdrinking*, Reddit, <https://bit.ly/3T8spGj> (last visited Dec. 3, 2023); *r/mentalhealth*, Reddit, <https://bit.ly/411J4x7> (last visited Dec. 3, 2023); *r/EatingDisorders*, Reddit, <https://bit.ly/3T4lTk0> (last visited Dec. 3, 2023).

*AAPI startups and nonprofits. What comes next?*, NBC NEWS (May 24, 2023), <https://nbcnews.to/47YETVo>.

Similarly, the Internet has been a place for people to discuss society’s most complex issues. On X, formerly Twitter, journalists, academics, politicians, students, and people from all walks of life join in a global dialogue about hot topics in the news. On Reddit, forums allow people to learn about different perspectives, such as through the popular *r/ChangeMyView* page with 3.5 million members. *r/ChangeMyView*, Reddit, <https://bit.ly/481COI3> (last visited Dec. 3, 2023). For any political issue, there are numerous Reddit forums dedicated to discussing more specific ideas. For example, Reddit houses *r/ProLife*, *r/ProChoice*, *r/AbortionDebate*, and *r/AuntieNetwork*, through which users share information about access to reproductive health services.<sup>6</sup>

**B. The Statutes Will Promote Divisive and Damaging Material, Polluting Online Communities and Endangering Vulnerable Groups.**

Although SB 7072 and HB 20 ostensibly promote “equal treatment” for all voices, by indiscriminately

---

<sup>6</sup> *r/ProLife*, Reddit, <https://bit.ly/3sU10xk> (last visited Dec. 3, 2023); *r/ProChoice*, Reddit, <https://bit.ly/47J8OBc> (last visited Dec. 3, 2023); *r/AbortionDebate*, Reddit, <https://bit.ly/46H9plt> (last visited Dec. 3, 2023); *r/AuntieNetwork*, Reddit, <https://bit.ly/3T5JrVt> (last visited Dec. 3, 2023); see also Megan Burbank, *Abortion Activists Rely on Social Media More Than Ever After Roe—and That Has Risks*, THE NEW REPUBLIC (Sept. 29, 2022), <https://bit.ly/49TFPw1>.



amplifying all content, they will enable extremist content to thrive at the expense of civil discourse and space for marginalized voices. Of course, there are places for lawful-but-extreme voices online, but HB 20 and SB 7072 would force these voices on everyone, including in spaces where the harms will fall most on marginalized groups. *See, e.g.*, Christopher St. Aubin & Galen Stocking, *Key facts about Gab*, Pew Rsch. Ctr. (Jan. 24, 2023), <https://bit.ly/47VPoc4>.

This list of recent cases brought against websites illustrates the legal challenges that might be successful under SB 7072 and HB 20. In each case, litigants invoked discrimination laws, seeking to compel websites to disseminate speech inconsistent with their community guidelines. Although speakers have a First Amendment right to say these things, requiring private media companies to carry these messages would transform each website's character and make them unwelcoming to groups that have been targets of frightening and demoralizing rhetoric, leaving those groups with fewer options to connect on the Internet.

- Google and Twitter demonetized and removed a user's content that showcased QAnon conspiracy theories and accused "prominent Jewish families" of controlling the world. *DeLima v. YouTube, LLC*, 2018 WL 4473551, at \*2 (D.N.H. Sept. 18, 2018); Damien Fisher, *Keene Conspiracy vlogger sues Google, Twitter for blocking her videos*, Manchester Ink Link (Nov. 4, 2020), <https://bit.ly/46GIXcJ>.
- Facebook removed an account and page suspected of Russian interference in the 2016 U.S. Presiden-

tial Election. *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F.Supp.3d 1107, 1111-12 (N.D. Cal. 2020).

- Twitter suspended a user for promoting hateful speech against LGBTQ+ members of the Twitter community. *Wilson v. Twitter, Inc.*, 2020 WL 3256820, at \*1 (S.D. W. Va. June 16, 2020).
- YouTube demonetized videos posted by Prager University that purportedly disseminated misinformation on topics like climate change, gender, sexuality, and slavery. One video depicted abolitionist Frederick Douglass describing slavery as a necessary evil for America’s foundation. *Prager University v. Google LLC*, 951 F.3d 991, 995-96 (9th Cir. 2020); Char Adams, *Animated Frederick Douglass calls slavery a ‘compromise’ in conservative group’s video*, NBC NEWS (Aug. 10, 2023), <https://nbcnews.to/47ZGUjW>.
- Vimeo terminated a user who posted videos about sexual orientation conversion in violation of Vimeo’s house rules on gender and sexuality. *Domen v. Vimeo, Inc.*, 991 F.3d 66, 69 (2d Cir. 2021), amended, 2021 WL 3072778 (2d Cir. 2021).
- Twitter permanently banned a user for persistently “misgendering” and “deadnaming” transgender individuals. *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360, 366 (2021).

Each case represents an instance in which a website was shielded from liability for First Amendment-protected speech. But if the Court allows HB 20 or SB 7072 to stand as constitutional, similar cases may result in dramatically different results.

American politics has seen a rise in extreme rhetoric, often targeting specific communities and ideologies, leading to discrimination, isolation, and violence. All ideologically driven mass killings in the United States in 2022 were connected to domestic political ideologies. Ivana Saric, *All U.S. extremist mass killings in 2022 linked to far right, report says*, AXIOS (Feb. 23, 2023), <https://bit.ly/3T8C2Vt>. And with political candidates increasingly resorting to violent rhetoric in the lead-up to the presidential primaries, the role of social media in moderating and guiding public discourse assumes a heightened significance.

By emboldening bad actors, hateful political rhetoric can have real-world consequences. According to a report by the Department of Homeland Security on increasing anti-LGBTQ violence, “factors that could mobilize individuals to commit violence include their perceptions of the 2024 general election cycle and legislative or judicial decisions pertaining to sociopolitical issues.” Michael Murney, *LGBTQ community facing increased threat from extremists, DHS warns*, HOUS. CHRON. (May 25, 2023), <https://bit.ly/3GopQZ3>. Affirming either of the laws at issue here will only make the risk worse.

**C. The Statutes Will Also Compel Websites to Make Difficult Content Decisions, Endangering Diverse and Niche Online Spaces in Favor of More Commercially Viable Content.**

Laws like SB 7072 and HB 20 would require social media companies to disseminate viewpoints whether or not companies support those views—even if those views conflict with their established norms and alienate users and advertisers. For instance, if a website allows content that condemns terrorism, it may be required to publish content that supports terrorism, including pro-Hamas content. A website that endorses “Black Lives Matter” could be compelled to showcase opposing rhetoric associated with intolerance and racism. *See, e.g., White Lives Matter, Anti-Defamation League*, <https://bit.ly/3QYFvTK>. Consequently, these laws will likely compel websites to avoid certain topics entirely, chilling speech and resulting in less speech.

Overrun by unwanted content, websites risk losing users and advertisers, placing them in a precarious position. *See, e.g., Ryan Mac and Kate Conger, X May Lose Up to \$75 Million in Revenue as More Advertisers Pull Out*, N.Y. TIMES (Nov. 24, 2023), <https://nyti.ms/3T4W9DR>. They may shift toward creating “brand-safe” spaces that favor professionally produced content over the unpolished, spontaneous contributions of the user community. Websites might also limit user-generated content, forsake entire community segments, or exit the market entirely. *See Eric Goldman, The UK Online Harms White Paper and the Internet’s Cable-ized Future*, 16 OHIO ST. TECH. L.J. 351, 362 (2020) (“Internet giants like

Google and Facebook will absorb the costs of regulation; other services will publish only professional content to avoid those regulatory costs; and other services will exit the industry.”). The result would be a smaller, less diverse, and less democratic Internet, akin to the 1990s walled gardens of AOL, CompuServe, and Prodigy. See Steven J. Vaughn-Nichols, *Before the Web: Online Services of Yesteryear*, ZDNET (Dec. 4, 2015), <https://zd.net/3RsiUjT>.

For example, when Section 230’s protections were selectively withdrawn as to some kinds of disfavored speech involving sex trafficking, online websites reacted by shuttering entire portions of their websites to avoid the possibility of being held liable for even still-legal speech. Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1088-89 (2021). Microblogging website Tumblr banned all adult content to avoid violating the law. As one observer noted, “SESTA and FOSTA are written in such vague terms that any website, app, or platform that seems to foster sexual meetups is put under scrutiny.” Alexander Cheves, *The Queer Sex Panic Is Just Beginning*, THE ADVOCATE (Jan. 30, 2019), <https://bit.ly/3uILrsO>.

If states are allowed to adopt laws that prevent websites from moderating content, users may also decide to leave those websites altogether rather than face an onslaught of content that would otherwise be removed. Recent events at X, formerly Twitter, show how changes in content moderation standards can impact usage. Brian Fung et al., *Major advertisers flee X, deepening crisis at Elon Musk’s social media site*, CNN BUSINESS (Nov. 18, 2023), <https://cnn.it/46OQm92>.

This looming threat of a digital exodus is not unprecedented. It echoes the concerns that once fueled challenges to the Communications Decency Act.<sup>7</sup> The Internet’s strength lies in its capacity for dialogue—a global conversation enriched by diverse speakers, websites, and topics. Any interference with this vibrant exchange diminishes the Internet’s unique power, threatening to silence the voices that make it a remarkable and unparalleled medium for global communication.

Allowing either HB 20 or SB 7072 to take effect would have a far more profound effect on diverse online communities. Nuanced discussions around issues like reproductive rights, gender-affirming healthcare, critical race theory, the Israel-Hamas conflict, and LGBTQ+ experiences would face a grim future. SB 7072 and HB 20 seem designed to push such conversations into the shadows, paralleling the oppressive tactics seen in classroom censorship. Mark Jessen & Claire Park, *The Rising Red Tide of Digital Censorship: How a Conservative Wave of Content Bans is Moving from Schools to Online*, Chamber of Progress (Sept. 19, 2023), <https://bit.ly/3R5X1G1>.

---

<sup>7</sup> *ACLU*, 929 F. Supp. at 879 (“The CDA’s wholesale disruption on the Internet will necessarily affect adult participation in the medium. As some speakers leave or refuse to enter the medium, and others bowdlerize their speech or erect the barriers that the Act envisions, and still others remove bulletin boards, Web sites, and newsgroups, adults will face a shrinking ability to participate in the medium. Since much of the communication on the Internet is participatory, i.e., is a form of dialogue, a decrease in the number of speakers, speech fora, and permissible topics will diminish the worldwide dialogue that is the strength and signal achievement of the medium.”).

**D. Allowing These Statutes to Take Effect Will Initiate a Race to the Bottom, with States Vying to Implement Similar yet Increasingly Restrictive Content Regulations.**

Permitting states to adopt laws like HB 20 and SB 7072 is likely to result in a patchwork of Internet regulations that balkanize the Internet as we know it. See Mike Masnick, *State Legislators Are Demanding Websites Moderate Less AND Moderate More; Federal Law Prohibits Both*, TECHDIRT (Apr. 8, 2022), <https://bit.ly/46KYOFW>; Tyler B. Valeska, *Speech Balkanization*, 65 B.C. L. REV. (forthcoming 2024); see also Mark A. Lemley, *The Splinternet*, 70 DUKE L.J. 1397 (2021). Thus, ironically, laws ostensibly meant to support additional online speech may reduce the amount of speech and distort the environment for public discourse.

To illustrate, one state might prohibit websites from declining to disseminate certain content while another state might require websites to take it down. For example, HB 20 prohibits websites from removing content based on viewpoint—including hate speech—and New York’s AB A7865A requires websites to adopt content moderation policies on hate speech. Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1); N.Y. Gen. Bus. Law § 394-ccc.<sup>8</sup> The only way for websites

---

<sup>8</sup> U.S. state law may also conflict with international law, adding another layer of complexity for websites. For example, the European Union’s Internet regulations will require large website operators to moderate harmful and illegal content. See Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on*

to comply with both laws would be to somehow tailor their content moderation practices by geolocating users. Such tailoring may not be technically feasible, especially in scenarios involving adjacent states with conflicting laws or users that travel or use multiple devices. Developing and implementing these capabilities would also likely require privacy-invasive tools and the collection of additional personal data, raising new conflicts with data protection laws.<sup>9</sup>

Faced with this dilemma, websites might be forced to eliminate access in one of the conflicting jurisdictions (or all of them). This, of course, would be speech-limiting because users' reach and access to content would be geographically constrained. Some would-be websites may decide that it is not even worth entering a fractured Internet marketplace with an ever-evolving set of speech regulations.

Further complicating matters, some laws—like HB 20—may purport to forbid websites from leaving the market. Tex. Civ. Prac. & Rem. Code § 143A.002(a)(3)

---

*Platform Content Moderation*, 24 CHICAGO J. OF INT'L L. 115, 118-19 (2023).

<sup>9</sup> See Emma Roth, *Online age verification is coming, and privacy is on the chopping block*, THE VERGE (May 15, 2023), <https://bit.ly/3NdMKq9>; Lisa Guernsey, *Welcome to the World Wide Web. Passport, Please?*, N.Y. TIMES (Mar. 15, 2001), <https://nyti.ms/3Rw2N1K>; *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1246-47 (9th Cir. 2006) (Fisher, J., concurring) (“Vinton Cerf, a 1997 recipient of the United States National Medal of Technology for co-designing the architecture of the Internet, disavowed relying on users’ self-identification at all, concluding that ‘it does not appear to be very feasible to rely on discovering the geographic locations of users for purposes of imposing filtering . . . .’”).



“A social media platform may not censor a user . . . based on . . . a user’s geographic location in this state or any part of this state.”). This increases the pressure on websites to develop tools that risk user privacy to remain open as channels for speech.

Websites might also respond to conflicting legal obligations by eliminating any discussion that could be construed as having a viewpoint on hate speech. This, too, would be speech-limiting because certain topics would be wholly foreclosed from discussion on the websites. For example, Reddit may decide to remove any discussion of reproductive rights or the views advanced by the Islamic State of Iraq and Syria (ISIS). *See* Heather Chen and Alex Stambaugh, *ISIS claims deadly blast at Catholic mass in southern Philippines*, CNN (Dec. 3, 2023), <https://cnn.it/41bVWkv>.

But even with no conflicts between different state laws, speech (and its reach) may still be encumbered. For example, websites may have practically no choice but to adopt a nationwide compliance regime that follows the most robust speech regulations adopted by any state. *See* Valeska, *supra*. This may mean that certain content must be carried while other content cannot. It also means that a single state, like Texas, Florida, or California, could effectively dictate Internet policy nationwide.

While it is unclear which of these potential results is most likely to play out, there is a high risk that affirming either law will balkanize regulation of the Internet. The upshot is that the whole of the public discourse could be unilaterally warped by one state’s legislature and its legislators’ views about what speech is acceptable.

**CONCLUSION**

To ensure the First Amendment’s protection for speech endures in the digital age, the Court should reverse the Fifth Circuit and affirm the Eleventh Circuit.

DECEMBER 7, 2023

Respectfully submitted,

JESS MIERS  
CHAMBER OF PROGRESS  
1390 Chain Bridge Rd.  
#A108  
McLean, VA 22101

MARK W. BRENNAN  
*Counsel of Record*  
J. RYAN THOMPSON  
THOMAS B. VEITCH  
KHAOSARA A. AKAPOLAWAL  
HOGAN LOVELLS US LLP  
555 Thirteenth St., N.W.  
Washington, DC 20004  
(202) 637-5600  
mark.brennan@  
hoganlovells.com

SUZANNA KANG  
CONSUMER TECHNOLOGY  
ASSOCIATION  
1919 S. Eads Street  
Arlington, VA 22202

CARLOS GUTIERREZ  
LGBT TECH  
123 W. Frederick St.,  
#214  
Staunton, VA 24401

*Counsel for Amici  
Chamber of Progress;  
Access Now; HONR  
Network; Information  
Technology & Innovation  
Foundation; Interactive  
Advertising Bureau; IP  
Justice*

NICHOLAS WACHINSKI  
STOP CHILD PREDATORS  
5185 MacArthur Blvd.,  
N.W., #575,  
Washington, DC 20016

JOSEPH S. MILLER  
WASHINGTON CENTER  
FOR TECHNOLOGY POLICY  
INCLUSION  
2000 Pennsylvania Ave.,  
N.W., Suite 7000  
Washington, DC 20006

JOHN S. MILLER  
INFORMATION TECHNOLOGY  
INDUSTRY COUNCIL  
700 K St., N.W., Suite 600  
Washington, DC 20001

EBBIE YAZDANI  
TECHNET  
1420 New York Ave.,  
N.W., Suite 825  
Washington, DC 20005