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 U.S. SENATOR BEN RAY LUJÁN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

J. MICHAEL SHOWALTER
Counsel of Record
BRADLEY S. ROCHLEN
ARENTFOX SCHIFF LLP
233 S. Wacker Drive, Suite 7100
Chicago, IL 60606
(312) 258-5500
j.michael.showalter@afslaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae is United States Senator Ben Ray Luján. *Amicus* submits this brief in his capacity as a member of Congress for three reasons: first, to underscore that regulation of the Internet, including social media platforms, is primarily a federal matter; second, to emphasize the important role that social media sites have in the lives of his constituents, particularly marginalized communities; and three, to emphasize the important role the legislative branch has in evaluating the constitutionality of legislation under consideration.

Amicus has a duty to ensure that well-settled constitutional rights are protected and preserved at the federal, state, and local levels. The Texas and Florida laws at issue were passed in clear and knowing conflict with well-settled constitutional protections of free speech. Moreover, the laws at issue seek to shape the future of communication via the Internet—an inherently interstate and federal issue.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In 2021, Florida and Texas each enacted laws attempting to regulate large social media platforms such as Facebook, Twitter (now called X), and YouTube. 2021- 32, Laws of Fla. (S.B. 7072); 2021 Tex. Gen. Laws 3904 (H.B. 20). To curtail what each state legislature saw as social media censorship, the legislatures created laws allowing for significant fines against social media companies that demonstrate (in their words) "unfair censorship" or that "deplatform" political candidates.

Although presented as attempts to enforce the First Amendment, these laws themselves violate its protections. Companies that run social media platforms are in the business of curating the speech of others and in fact express themselves through acts of editorial discretion. Content moderation and selection is inherent to the process of curation because the format, quality, and type of content serve as essential indicators of a platform's brand identity. As this Court has held, these essential editorial tools are themselves protected speech. By passing laws allowing the state to penalize what it perceives as "unfair" speech, the legislatures in Florida and Texas breached their sworn obligation to uphold the Constitution.

Content moderation serves an indispensable role for organizations to ensure that their platforms remain viable forums for a diverse range of voices—from those in marginalized populations to those holding minority opinions. Social media companies have vital

roles enabling the organization of marginalized communities, bridging gaps of time and distance to make it easier than ever for people to come together. Without appropriate moderation, social media platforms can become hotbeds for hate speech and radicalization. Recent history provides numerous examples of these forms of harmful speech leading to real-world violence. Content moderation is an essential tool for social media platforms to ensure that vulnerable communities can express their own views without fear of harm. Without it, companies risk seeing their social networks become viable platforms for only the most extreme fringes, restricting their potential userbase and ensuring that only the loudest, most abrasive speech is heard.

Content moderation is a vital part of running an effective, open, welcoming social media platform. For social media companies, moderation policies are as central to their brands as their user interface or the format of content they host. Some organizations may choose to moderate their forums minimally, accepting the risks inherent to that choice. Some may choose to tailor moderation policies to ensure the widest possible range of voices are heard. Either way, the Constitution requires that decision be left to the private companies running these platforms or federal law—not to the States.

ARGUMENT

I. CONTENT MODERATION IS A FEDERAL—NOT STATE—ISSUE.

In its passage of the Telecommunications Act of 1996, 47 U.S.C., and the Communications Decency Act (CDA), 47 U.S.C. § 501, Congress exercised its authority over the Internet as a stream of commerce. These laws made it the policy of the United States "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to encourage the development of technologies which maximize user control over what information is received by individuals." 47 U.S.C. § 230(b)(1), (3). By doing so, Congress demonstrated its willingness to regulate the Internet as appropriate.

Given its ubiquitous nature, the need for minimum standards in Internet regulation is apparent. The Internet, which includes social media platforms, transcends the physical boundaries innate in state-by-state regulations—even more so than interstate commerce which is strictly governed by Congress. U.S. Const. art. I, § 8, cl. 3. By passing laws such as the CDA, 47 U.S.C. § 501, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, Congress recognized the need for consistency in this developing arena. State-by-state regulation is both infeasible and can lead to state laws in conflict with well-established federal legislation. For example, the Communications Decency Act expressly prohibits "abuse, threat[s], and harass[ment]"—the type of conduct Texas and Florida

legislatures seek to protect under the guise of the First Amendment. To be clear, states may still regulate certain Internet-related matters, including online privacy or disclosure requirements. *See*, *e.g.*, Cal. Bus. & Prof. Code § 22575. But the legislation at issue here goes far beyond state prerogatives and thereby encroaches on the federal protections against harmful online conduct already put in place.

Moreover, the laws at issue seek to shape the future of communication via the Internet—an inherently federal issue. Several federal legislative interests that have shaped Internet regulation conflict with the laws at issue. Congress has acknowledged that the Internet "represents an extraordinary advance in the availability of educational and informational resources," it "offer[s] a forum for a true diversity of political discourse," and individuals increasingly "rely[] on" the Internet "for a variety of political, educational, cultural, and entertainment services." 47 U.S.C. § 230(a)(1), (3), (5). With 72 percent of the American public utilizing social media platforms,[2] social media has a unique role in promoting social discourse. As explained below, the laws at issue will have impacts far beyond the states in which they were enacted, and *Amicus* respectfully requests that this Court affirm the judgment of the Eleventh Circuit and reverse the judgment of the Fifth Circuit.

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[2] *Demographics of Social Media Users and Adoption in the United States*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/#which-social-media-platforms-are-most-common.

II. UNMODERATED HATE SPEECH ON SOCIAL MEDIA PLATFORMS SERVES TO SUPPRESS AND DRIVE OUT VOICES FROM VULNERABLE MINORITY COMMUNITIES.

A. Social media and the Internet enable the organization of marginalized communities.

The modern Internet allows disconnected individuals to come together and form communities. For the historically marginalized, social media platforms serve as a particularly powerful tool for community organization and engagement. A Pew study conducted in 2020 found that about 75 percent of those surveyed from minority communities said that social media "highlight[s] important issues that may not get a lot of attention otherwise" and helps "give a voice to underrepresented groups."[3] Similarly, nearly 80 percent believed that social media platforms are effective tools for "creat[ing] sustained social movements."[4] For organizations whose products are almost entirely built on user-generated content, user beliefs about the importance and impact of the content they create are

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[3] Brooke Auxier, *Social Media Continue to Be Important Political Outlets for Black Americans*, PEW RSCH. CTR. (Dec. 2020), https://www.pewresearch.org/short-reads/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/ (surveying Black, Hispanic, Asian, and White social media users on their views regarding the usefulness of social media platforms).

[4] *Id.*

self-fulfilling; the more social media users from marginalized populations believe platforms are a hospitable forum for building communities, the more likely they will be to build such communities on those platforms.

Unmoderated social media can be harmful, however. During the COVID-19 pandemic, social media became a key source of public health information, with studies showing that many migrant and ethnic minority groups "turned to social media as a result of a need for connection and to acquire accessible information from people they considered to be reliable sources."[5] While research shows that this reliance was driven in part by the aforementioned positive sentiments with respect to social media platforms' usefulness for community building, several studies also "highlight concerns that some migrant and ethnic minority groups were unable to find official information in their host country in their native language about various aspects of COVID-19."[6] For these communities, social media was necessary for community organization and communication. Absent proper moderation, however, this reliance also led to the proliferation of misinformation, with membership in an ethnic minority group and

[5] Lucy P. Goldsmith et al., *Use of Social Media Platforms by Migrant and Ethnic Minority Populations during the COVID-19 Pandemic: A Systematic Review*, BMJ OPEN (Sep. 2022).

[6] *Id.*

socioeconomic disadvantage correlating with exposure to misinformation about public health measures.[7]

Aside from misinformation, the increased levels of harassment faced by certain marginalized communities creates a market need for safe and inclusive spaces online—a need that private companies cannot fill without the freedom to implement content moderation policies commensurate with that end. Studies have long shown that LGBTQ+ users face more discrimination on social media than their non-LGBTQ+ peers.[8] These communities have—and exercise—the right to publicly advocate for companies that operate social media platforms to change their content moderation policies. Platforms have been receptive to this advocacy, with social media giant Meta moderating its advertisement targeting in response to backlash from, among others, LGBTQ+ activists.[9] Other spaces on the internet explicitly seek to create safe and inclusive spaces with policies and user agreements that support LGTBQ+ and other marginalized communities. Spaces such as

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[7] Elise Paul et al., *Attitudes towards Vaccines and Intention to Vaccinate against COVID-19: Implications for Public Health Communications*, LANCET REG. HEALTH EUR. (2021).

[8] *See* Press Release, GLAAD, Glaad's Third Annual Social Media Safety Index Shows All Five Major Social Media Platforms Fail on LGBTQ Safety and Underscores How Online Hate And Misinformation Manifest into Real-World Harm For LGBTQ People (Jun. 15, 2023); ANTI-DEFAMATION LEAGUE, ONLINE HATE AND HARASSMENT: THE AMERICAN EXPERIENCE (2022).

[9] Press Release, Meta Platforms, Inc., Removing Certain Ad Targeting Options and Expanding Our Ad Controls (Nov. 9, 2021).

LGBTQ+ advocacy organization The Trevor Project's TrevorSpace are ostensibly social media platforms even though they are not operated by traditional social media companies. Under what is now the law in Florida and Texas, these sites would be severely limited in their abilities to implement the moderation policies necessary to maintain these spaces. The government should not force these platforms to host speech that would erode the stated policy and purpose of these platforms.

For social media platform operators, the implication is clear: their forums can and do act as important spaces for marginalized communities to gather, organize, and communicate, but their ability to moderate the content on these forums is essential for maintaining the trust of those in such communities. Without the ability to protect their users from misinformation, harassment, and hate, platforms risk losing their places as safe havens for those in marginalized communities. This carries commercial consequences for these organizations, potentially shrinking their userbase. More importantly, it risks exacerbating the marginalization of the most vulnerable members of society, taking away a vital resource for building and maintaining their communities.

B. Content moderation is a powerful form of expression used by social media platforms to ensure vulnerable communities can express their views without fear of harm.

The public has an interest in social media functioning as a marketplace of ideas. Companies that run major social media platforms are in the business of providing such a marketplace through curating the speech of others. The decisions these companies make with respect to what content they disallow is therefore just as critical to their function from both a philosophical and commercial perspective as decisions made about the format and type of content they do allow. The content companies host is integral to both their brand and the public's perception of their platforms. Users or members of the public who disagree with the policies of social media companies are free to form independent companies. As much as a platform like Instagram is known for centering on photographic content, platforms centered around lax moderation policies, such as Gab or Parler, are known for the misinformation and extremism that often runs rampant on them.[10] These

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[10] Galen Stocking et al., *The Role of Alternative Social Media in the News and Information Environment*, PEW RSCH. CTR. (2022), https://www.pewresearch.org/journalism/2022/10/06/the-role-of-alternative-social-media-in-the-news-and-information-environment/ ("When asked to name the first thing that comes to mind when they think of alternative social media sites, adults who have heard about these alternative social media sites but do not get news on them most commonly voice thoughts of inaccuracy and misinformation. . . .").

public perceptions directly impact a platform's appeal to advertisers, as companies' reluctance to have their advertisements appear next to hateful content directly threatens platforms' bottom lines.[11] These platforms are private actors whose speech—including their fundamental content moderation and curation practices—is speech protected by the First Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) ("[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."). As such, companies have the right to host mostly or entirely unmoderated forums, accepting the risk that their platforms will likely turn into spaces exclusively used by those with fringe or extreme views. But States should not—and under the Constitution cannot—force companies to host unmoderated platforms at the cost of excluding diverse viewpoints and backgrounds. In attempting exactly that, the States suppress social media platforms' expression through editorial discretion under the guise of promoting the First Amendment rights of their citizens. This itself is an attack on the First Amendment rights of these platforms.

Beyond preserving their right of expression, maintaining the right to curate the content published on their forums enables social media companies to ensure that a diverse range of viewpoints exist on their

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[11] Aisha Counts & Eari Nakano, *Harmful Content Has Surged on Twitter, Keeping Advertisers Away*, TIME (July 19, 2023), https://time.com/6295711/twitters-hate-content-advertisers/.

platforms. When state governments seek to impose their own preferred moderation policies onto companies for whom those policies may not fit, the functional availability of the platform to marginalized communities can shrink or disappear. Accordingly, content moderation is necessary to preserve freedom of speech and expression on social media.

C. Unchecked digital hate speech and bigotry increases instances of real-world violence against those in vulnerable communities.

State interference with private companies' content-moderation policies risks exacerbating the proliferation of real-world harm suffered by those in vulnerable communities. Data connects digital hate speech with physical violence and intimidation: "the preponderance of studies conducted during the recent upsurge of . . . populism" show "a well-evidenced link between defamatory attacks online . . . and an escalation to physical attacks on individuals and their families."[12] The United States has seen this play out in recent years, as 2020 saw an increase in social media anti-Asian conspiracy theories coincide with a 149 percent spike in anti-Asian hate crimes, even as hate crimes declined overall.[13] Hateful speech has been

[12] Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029 (2021).

[13] *Anti-Asian Prejudice March 2020*, CTR. FOR THE STUDY OF HATE & EXTREMISM (2020).

found to "spur negative emotions towards the target community among listeners," an effect which is enhanced by the relative ease of reaching a wide audience on social media platforms.[14] Recent history provides numerous examples of individuals who are radicalized online committing hate crimes:

> Several incidents in recent years have shown that when online hate goes offline, it can be deadly. White supremacist Wade Michael Page posted in online forums tied to hate before he went on to murder six people at a Sikh temple in Wisconsin in 2012. Prosecutors said Dylann Roof "self-radicalized" online before he murdered nine people at a black church in South Carolina in 2015. Robert Bowers, accused of murdering 11 elderly worshipers at a Pennsylvania synagogue in October, had been active on Gab, a Twitter-like site used by white supremacists.[15]

In addition to measurable increases in physical violence, companies must consider the chilling effect on speech created by the *risk* of experiencing that physical violence. When a group of users is targeted by hate speech on a specific platform, they are incentivized to express themselves less or remove their voices

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[14] Dylan L. Byman, *How Hateful Rhetoric Connects to Real-World Violence*, BROOKINGS (2021), https://www.brookings.edu/articles/how-hateful-rhetoric-connects-to-real-world-violence/.

[15] Rachel Hatzipanagos, *How Online Hate Turns into Real-Life Violence*, WASH. POST (2018), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/.

from the platform entirely.[16] As much as social media is a product of the 21st century, this stifling effect is not new—as far back as 1859, John Stuart Mill recognized that "society's power to strip individuals of their freedom and autonomy can be far more devastating than the state's."[17] The implications for social media organizations loom large: unmoderated or insufficiently moderated platforms risk becoming niche spaces for radical fringe communities, narrowing their appeal and further shrinking their potential userbase.

In addition to commercial incentives to avoid driving away a platform's primary users, the impacts of inadequate moderation create a perverse incentive structure for bad actors whose targeted hate speech becomes an effective weapon against the expression of those whose speech they wish to suppress. This raises serious First-Amendment concerns. For example, in March 2015, Reddit—a social media platform which moderated content relatively sparsely at the time—announced that it was "seeing [its] open policies stifling free expression; people avoid participating for fear of their personal and family safety."[18] With the risk of empowering a potent digital form of the heckler's veto in mind, subsequent moderation policies adopted by Reddit and similarly-situated platforms must be seen as

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[16] Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018).

[17] Mary Anne Franks, *Censoring Women*, 95 B.U. L. REV. ANNEX 61 (2015).

[18] Langvardt, *supra* note 16.

measures taken to ensure freedom of expression rather than attempts to stifle speech.

D. Discrimination against protected classes is not protected by the First Amendment and private social media companies have an obligation to ensure the infrastructure facilitating content moderation does not discriminate.

Private companies operating social media platforms have a legal responsibility to ensure the infrastructure they develop does not discriminate based on an individual or group's race, color, religion, sex, or national origin. Neither politicians nor political viewpoints are a protected class as the State laws attempt to establish. Social media platforms rely on digital infrastructure to curate content, decide how content is displayed to users, and enforce content moderation policies. This includes machine learning to keep users on the platform and to develop algorithms to identify violating content. The design and function of this infrastructure can unintentionally discriminate against protected classes, contributing to a disparate impact.

Social media platforms' content moderation has demonstrated a disparate impact on non-English speakers in the United States and internationally.[19] Of the 5 billion people using the Internet today, 75 percent

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[19] Layla Mashkoor, *Moderating Non-English Content: Transparency and Local Contexts Are Critical*, ATL. COUNCIL (Jun. 2022).

are from the global south, where well over 6,000 languages are spoken.[20] For many of these languages, most platforms have no automated moderation infrastructure in place, with the geographic imbalance contributing to "tragic offline consequences and grave human rights abuses in Myanmar in 2018 and in Ethiopia in recent months."[21] Even where platforms are able to use more advanced automated natural language processing systems, bias is not eliminated, as some automated hate speech classifiers have been shown to be twice as likely to label posts by Black users as offensive compared to others.[22] To address the existing inequity created by current moderation infrastructures, social media companies will need to proactively enact measures that ensure users are treated fairly—a process that may be unnecessarily limited by the Florida and Texas laws.

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[20] Jacqueline Rowe, *Marginalised Languages and the Content Moderation Challenge*, GLOB. PARTNERS DIG. (Mar. 2022), https://www.gp-digital.org/marginalised-languages-and-the-content-moderation-challenge/ (referring to Facebook's role in promoting violence against persecuted minority communities).

[21] *See id.* ("For example, Twitter's new Bodyguard tool, which protects users from hate speech, is only available in English, French, Italian, Spanish and Portuguese. Twitch's Community Guidelines are available in just 28 languages. And 87% of Facebook's global budget for time spent on classifying misinformation is allocated to US users, who make up just 10% of the platform's community.").

[22] Maarten Sap et al., *The Risk of Racial Bias in Hate Speech Detection*, UNIV. OF WASH. (2019), https://homes.cs.washington.edu/~msap/pdfs/sap2019risk.pdf.

The federal government maintains the authority to ensure company infrastructure and policies do not discriminate against vulnerable minority communities. "Moving governance of online communication into the [digital] infrastructure need not entail abandonment of free speech values and anti-censorship imperatives."[23] In January 2023, the Justice Department reached an agreement with Meta Platforms Inc. (formerly known as Facebook Inc.), "requiring Meta to change its advertisement delivery system to prevent discriminatory advertising."[24] Measures to limit social media platforms' abilities to adjust their content curation and moderation to address the shortcomings in existing infrastructure fly in the face of both the companies' autonomy and the Federal government's authority to ensure vulnerable minority communities are not subject to discrimination.

III. STATE LEGISLATURES SHOULD NOT PASS FACIALLY UNCONSTITUTIONAL LEGISLATION.

State legislatures should not pass facially unconstitutional legislation. In enacting the laws at issue, the Texas and Florida legislatures overstepped their legislative prerogatives. Legislatures must review the

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[23] Julie E. Cohen, *Infrastructuring the Digital Public Sphere*, 25 YALE J.L. & TECH. (2023).

[24] Press Release, U.S. Dep't of Just., Justice Department and Meta Platforms Inc. Reach Key Agreement as They Implement Groundbreaking Resolution to Address Discriminatory Delivery of Housing Advertisements (Jan. 9, 2023).

laws they pass to ensure compliance with, and respect for, the federal Constitution. This responsibility is a shared one—it cannot be avoided by relying exclusively on the judicial branch to consider constitutional questions. Here, the state legislatures of Florida and Texas failed to uphold their obligation under the Constitution because the laws at issue are plainly unconstitutional.

A. The laws at issue are plainly unconstitutional because content curation is speech protected by the First Amendment.

Companies' content moderation, curation, forum creation, and formatting policies represent speech that is protected by the First Amendment. This Court's precedent supports that contention. *See*, *e.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (finding that a statute requiring newspapers to publish a political candidate's reply infringes on the First Amendment rights of the press); *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) (holding that cable operators and programmers engage in and transmit speech, entitling them to First Amendment protections); *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (finding that the hosting of others' speech on a platform is not a "traditional, exclusive public function" and is therefore subject to First Amendment protections). Holding otherwise would "intrud[e] into the function of editors," *Tornillo*, 418 U.S. at 25 ("The choice of material to go into a newspaper, and the

decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."), and strip social media companies of their independence in a free market. Editorial decisions—including content moderation—allow social media companies to foster vibrant online communities and they do so by exercising their First Amendment rights.

As the Eleventh Circuit correctly found, social media platforms are not "common carriers." *NetChoice, LLC v. Florida*, 34 F.4th 1196 (11th Cir. 2022). Common carriers have been described as companies that offer goods or services to the general public in a uniform and passive manner. Common examples from this Court's precedent include transportation providers, such as railroad companies, *Michigan Pub. Utilities Commission. v. Duke*, 266 U.S. 570 (1925), and telephone service providers, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005). Unlike traditional common carriers that play a passive role by simply providing a vehicle for communication, social media platforms actively monitor and regulate their users' activity. *NetChoice*, 34 F. 4th at 1220-21. Congress itself recognized this distinction when amending the Communications Act of 1934 to account for the rise of the digital era: "Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers." 47 U.S.C. § 223(e)(6). Neither Texas nor Florida offers any way to circumvent this clearly established precedent.

See Reno, 521 U.S. at 868-69 ("Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

B. State and federal legislators have an independent duty to ensure that the Constitution is upheld.

State and federal legislators have an obligation to support and uphold the Constitution. Federally, the legislative Oath of Office is a constitutional mandate for every member of Congress to "support and defend the Constitution of the United States." 5 U.S.C. § 3331. Article VI of the Constitution extends this obligation to state legislators: "[T]he Members of the several State Legislatures . . . shall be bound by Oath or Affirmation to support this Constitution." U.S. Const. art. VI, cl. 3. A plain-language reading of the Oath suggests that lawmakers are thus "obligated to *strengthen the position* of . . . *uphold the authority of* . . . and *stand by* the Constitution."[25]

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[25] Anant Raut & J. Benjamin Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe to Be Unconstitutional*, 10 N.Y. CITY. L. REV. 511, 515 (2007):

> The obligation embodied in the Congressional oath is to "support" the Constitution. The Oxford English Dictionary defines "support" as "[t]o endure without opposition or resistance," or "[t]o strengthen the position of by one's assistance, countenance, or adherence; to uphold the rights, claims, authority, or status of; to stand by, back up." . . . It is this commonsense reading of the

The Oath was passed as the first official act by the First Congress in 1789. *See* An Act to Regulate the Time and Manner of Administering Certain Oaths, Sess. 1, ch. 1, 1 Stat. 23 (1789). Given its presence in the Constitution and its early enactment, the Oath was likely regarded by the Framers as essential to responsible lawmaking.[26] Thomas Jefferson pointedly discussed his view of the branches of government as "independent guardian[s] of the Constitution."[27]

This implicit obligation is further supported by courts' presumption of constitutionality when reviewing legislation. For example, in *Ogden v. Saunders*, Justice Thompson demonstrated this presumption when explaining that the Court cannot presume Congress "would have expressly ratified and sanctioned laws which they considered unconstitutional." 25 U.S. 213, 312 (1827) (Thompson, J., dissenting). More recently, this presumption was restated in *U.S. v. Munoz-Flores*: "Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is

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> Oath that lays the foundation for the widely held belief that Senators and Representatives are obligated not to vote in favor of unconstitutional laws.

Id. (footnotes omitted).

[26] *See* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 587-88 (1983) (citing 1 THE JEFFERSON ENCYCLOPEDIA 190 (J. Foley ed. 1900)).

[27] *Id.* at 587. *See also* The Federalist No. 51 (Alexander Hamilton or James Madison) ("The interests of man must be connected with the constitutional rights of the place.").

constitutional."[28] 495 U.S. 385, 391 (1990). Inherent in this presumption is that legislators have a responsibility to not pass facially unconstitutional laws. In passing laws that restrict social media companies' First Amendment rights to curate and moderate the content that appears on their platforms, the Florida and Texas legislatures failed to uphold that responsibility.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully request that this Court affirm the judgment of the Eleventh Circuit and reverse the judgment of the Fifth Circuit.

Respectfully submitted,

J. MICHAEL SHOWALTER
Counsel of Record
BRADLEY S. ROCHLEN
ARENTFOX SCHIFF LLP
233 S. Wacker Drive, Suite 7100
Chicago, IL 60606
(312) 258-5500
j.michael.showalter@afslaw.com

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[28] *See also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (first quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927); then citing *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); then citing *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); and then citing *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-07 (1924)).