

No. 22-393

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**In the Supreme Court of the United States**

NETCHOICE, LLC, and the COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION,  
*Cross-Petitioners,*

v.

ASHLEY MOODY, ATTORNEY GENERAL  
OF FLORIDA, *et al.*,  
*Cross-Respondents.*

On Cross-Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eleventh Circuit

**Brief of Chamber of Progress; Consumer  
Technology Association; Engine Advocacy; Global  
Project Against Hate and Extremism; HONR  
Network; Information Technology & Innovation  
Foundation; Interactive Advertising Bureau; IP  
Justice; LGBT Tech; Multicultural Media, Telecom  
and Internet Council; Safeguarding American  
Values for Everyone; The Software & Information  
Industry Association; Stop Child Predators;  
TechNet; and Washington Center for Technology  
Policy Inclusion as *Amici Curiae* Supporting  
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**INTRODUCTION AND INTEREST OF THE  
*AMICI CURIAE*<sup>1</sup>**

The advent of the Internet created powerful new means for people to gather socially, providing us novel ways to share our stories, to mourn and celebrate together, and to discuss—indeed, often debate—topics ranging the entire breadth of human experience. Online platforms allow friends and family not just to keep in touch, but to maintain lively conversations across time and distance. These communities have created millions of new relationships—from the professional to the romantic. Countless businesses have been built with these platforms. Many people have found celebrity online, be it for a popular video series, a newly discovered musical talent, or a simple tweet gone viral. And far more of us consume this content, enjoying the creative talents of others. We turn to social media for entertainment, for news, for education, and for self-expression.

The power of these platforms derives from their immediacy, interactivity, and diversity of content, driven by users who not just create content, but also react, share, and comment. Yet the very features that make platforms compelling also introduce risks of misuse that, if unchecked, can overrun services. Absent basic content moderation, unsolicited commercial advertisements—often referred to as “spam” in Internet vernacular—will quickly overtake a platform, drowning out the valuable content. And that is just the start. Vile, graphic videos and images can

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<sup>1</sup> All parties have consented to the filing of this brief via blanket letters of consent. No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

proliferate. Reprehensible speech—such as the glorification of terrorist attacks and the dissemination of pro-Nazi views—will target communities struggling to recover from violence and loss. Hostile foreign governments may hijack these platforms to engage in disinformation campaigns on American soil.

Recognizing these realities, online platforms exercise editorial controls to select, arrange, and curate content consistent with the messages and experiences they wish to promote. While the precise rules differ across sites according to their purposes and values, these platforms broadly seek to create experiences for their users that are safe, productive, and enjoyable.

Florida Senate Bill 7072 (S.B. 7072) threatens to eviscerate this content moderation. For only those online platforms that are the most successful—those with 100 million or more regular users, or gross revenues of over \$100 million—Florida prohibits content moderation outright in many cases, and attaches the potential for \$100,000 in statutory damages *per occurrence* in any other case, if a judge later decides that the action was “[in]consistent” with other content-moderation actions taken by the platform. For platforms that take millions, if not billions, of content-moderation actions per year, this liability is guaranteed to chill platforms’ essential expressive activity.

As cross-petitioners have demonstrated, and as the Eleventh Circuit largely held, the First Amendment does not tolerate such enormous infringement of the rights of the owners and operators of these platforms. These are privately owned spaces, and the platform operators may employ content moderation rules to curate the speech and expressive communities they wish to promote.

*Amici* focus on the enormous practical consequences that would result if S.B. 7072—and other, similar laws enacted or under consideration elsewhere—is allowed to take effect. At present, platforms rely on content moderation to help millions of Americans work, play, learn, shop, connect, and express themselves through online platforms free from harassment, disinformation, and incendiary content. But, by foreclosing any meaningful ability of platforms to engage in content curation, S.B. 7072 erases their very utility, denies them editorial control over the speech and ideas they host, and threatens severe harm to platforms and to their users. It also requires platforms to redesign their essential operations and to implement onerous notice processes for each of the billions of pieces of content moderated.

*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 Florida’s S.B. 7072, and other similar laws around the country, are not permitted to threaten, disrupt, or destroy vibrant and diverse online communities.

#### **SUMMARY OF ARGUMENT**

The Court should grant the conditional cross-petition, along with Florida’s petition in No. 22-277, to review the entirety of S.B. 7072 and confirm that the First Amendment does not tolerate such restrictions and burdens on the speech of private actors.

**I.** Any entity that hosts content of another—be it a bookstore, a magazine, or an online platform—engages in core speech activities when it chooses what content to present and how to display it. In establishing rules and procedures for content selection and moderation, these entities embed the environments

they create with their unique values and perspectives, giving voice to the platform’s own decisions as to what content warrants promotion.

Content curation is nothing new—in fact, quite the opposite. Platforms that distribute third parties’ messages have always done so. Bookstores choose which books to stock and to promote; newspapers choose which letters to the editor to publish. Online platforms are no different: They choose what types of user-generated content fit the platform—whether targeted to social interactions (like Facebook), video sharing (like YouTube), character-limited conversation (like Twitter), professional networking (like LinkedIn), travel reviews (like Tripadvisor), or product reviews (like Amazon). As part of their content-curation choices, platforms must also choose what content *not* to distribute. Platforms have long used terms and conditions and policy statements to advise users of what content is appropriate for the platform and what content is not. Through these processes, platforms engage in their own expression and protect their communities—by removing or limiting spam, scams, fraud, phishing, fake accounts, state-sponsored misinformation, hate speech, violence, threats, and abusive and offensive content.

**II.** S.B. 7072 would effectively gut platforms’ efforts at content moderation, to the ultimate detriment of their users. With a narrow exception for technical obscenity, the law flatly prohibits platforms from “censor[ing]”—to include removing, age-gating, or even posting a counter-speech disclaimer—the content of any organization with a sufficiently large audience, thus enlisting platforms to serve up to their users the messages of hostile foreign governments and conspiracy theorists, among others. Fla. Stat. § 501.2041(1)(b), (1)(d), (2)(j). It also contains a similar

prohibition on moderating content by, or about, any political candidate—and it does not take much imagination to conceive of content “about” a political candidate that is vile, hateful, threatening, and unwanted by a platform’s users. *Id.* § 501.2041(2)(h). And the law creates a private right of action, with \$100,000 in statutory damages *per instance*, for any user whose content has been moderated in an “[in]consistent” manner compared to the platform’s past moderation actions, creating enormous, chilling litigation exposure for platforms that take many millions, if not billions, of content-moderation actions each year. *Id.* § 501.2041(2)(b), (6), (7).

Apart from its substantive prohibitions, S.B. 7072 also burdens the expressive activities of platforms through onerous disclosure requirements. The law mandates that platforms provide a “thorough rationale” to the user, within seven days, for each and every one of its millions or billions of content-moderation actions each year, imposing a compliance obligation that will be practically impossible to meet. Fla. Stat. § 501.2041(2)(d), (3). And it goes even further, requiring platforms to disclose “a precise and thorough explanation” of its content-detection “algorithms” to the poster of deleted content. *Ibid.* That is, platforms must hand detailed information about their content moderation tools to the very actors attempting to evade them, crippling platforms in their constantly evolving fight against these malicious actors, to the ultimate detriment of the users—everyday Americans—that the platforms are attempting to serve.

## ARGUMENT

### I. **Platforms rely upon content moderation to create safe, productive, and enjoyable environments.**

Successful online platforms create digital spaces that their users wish to inhabit. Some are professional networks that help create new business opportunities. Other platforms allow us to share our daily thoughts in short bursts, from the profound to the silly. Yet other platforms allow us to upload and share videos or images that we create. These platforms have given life to an array of online communities, allowing us to interact in a variety of meaningful ways.

From the beginning, while allowing their users to contribute their own, individual content, platforms have formed rules governing *what* content they will allow. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*2 (N.Y. Sup. Ct. 1995) (describing “content guidelines” of an early online finance message board). And, for the content they permit, platforms choose *how* that material is displayed to users.

These content curation policies are hardly surprising, as platform owners have always chosen what content they will disseminate and the manner in which they will organize their content for users. Magazines and newspapers choose what stories they will publish, and where in the publication they will appear. They likewise choose which reader-generated letters they will print, and how and when they will print them. Bookstores and newsstands choose the material they will offer; some of their wares will be prominently displayed in the front, while other material will be kept in the rear, tucked away on a bottom shelf.

Platforms of all sorts curate the content they offer to create the specific environment that they intend to offer, consistent with the platform's key values. Just as a bookstore will organize its contents to be readily accessible to its customers, even placing some books in the front window to draw in passers-by, online platforms arrange content to entice, inform, help, and even delight their users. Some platforms organize content topically, like Reddit's "subreddits" devoted to particular subjects. Others make recommendations, like Facebook's "suggested for you" posts. Yet others highlight popular content, like Twitter's "trending" feature. These features create the very essence of the online communities.

In fact, the enormous volume of material posted online enhances the need for platforms to curate content. Users generally engage with platforms because there is content that they wish to see—be it breaking news or posts from their close friends or discussions on a topic of particular interest. Many platforms have mechanisms to individually prioritize content for each of their millions of users, finding individualized harmonies among the din of otherwise irrelevant posts. These tools are one essential form of content moderation.

Choices about what content *to* distribute necessarily require choices about what content *not* to distribute. It is unremarkable that a children's bookstore would not stock romance novels or that a home-and-garden television network would not air a baseball game. No shopper or viewer would be surprised. The same goes for online platforms. Choices about the content that a platform will not distribute are just as crucial in creating and preserving the platform's desired environment. Take, for example, YouTube. Along with its flagship online video-sharing site, the company

offers a separate application and website called YouTube Kids with content specifically curated for children. The content available on each is, of course, markedly different—and expectedly so. Those differences are the direct result of YouTube engaging in careful content moderation tailored for different audiences.

Content moderation thus empowers platforms to foster online communities that fit the specific needs and values of that particular platform and its users and advertisers. To do so, platforms have long included standard terms and conditions limiting the content that may be published on their platforms. And users have long agreed to and accepted these terms.

Consider Facebook. It began as a social community for college students and, by September 2006, for anyone over 13 years of age. See Meta, *Our History*, [about.facebook.com/company-info](https://about.facebook.com/company-info). Facebook’s November 2007 terms of service barred users from posting “any content that we deem to be harmful, threatening, unlawful, defamatory, infringing, abusive, inflammatory, harassing, vulgar, obscene, fraudulent, invasive of privacy or publicity rights, hateful, or racially, ethnically or otherwise objectionable” and warned that it might remove violative content and terminate or bar membership. Facebook, *Terms of Use* 2-3, 8 (Nov. 15, 2007), [perma.cc/T65S-63LW](https://perma.cc/T65S-63LW). Through these terms, Facebook made clear the type of community it hoped to foster. As its popularity confirms, users and advertisers liked the community that Facebook created.

LinkedIn has a purposefully different flavor. It is intended for professional connections. LinkedIn policy requires that content be kept “professionally relevant” as well as safe and trustworthy. LinkedIn, *Professional Community Policies* (visited November 4, 2022), [perma.cc/V4NX-TUDZ](https://perma.cc/V4NX-TUDZ). Violating these policies

can result in a user’s account being restricted, suspended, or terminated, and LinkedIn warns that it need not publish any particular content and can remove it with or without notice. LinkedIn, *User Agreement* ¶¶ 2.5, 3.4 (Feb. 1, 2022), [perma.cc/B8EK-5LCX](https://perma.cc/B8EK-5LCX).

Tripadvisor has different terms tailored to its community’s needs. Tripadvisor specifically prohibits posting comments “that are not relevant to travel or incite non-travel related discussions” and warns that such content will be removed. Tripadvisor, *Content & Community Guidelines* (May 4, 2022), [perma.cc/Y529-LEPL](https://perma.cc/Y529-LEPL).

Amazon similarly has policies keeping its product reviews “helpful, relevant, meaningful, and appropriate.” Amazon, *Community Guidelines* (visited November 4, 2022), [perma.cc/SLZ7-LCT8](https://perma.cc/SLZ7-LCT8). Amazon makes clear that violating the guidelines threatens the trustworthiness, safety, and utility of its community, and that content may be removed or accounts suspended or terminated for violating them. *Id.*

Through enforcing these policies, platforms foster and protect the purpose of their respective communities. Particularly in the online context, the ease of posting and reproducing content means that, absent content moderation policies, platforms would be overrun with lawful but nonetheless awful, irrelevant, low-quality, and nuisance content. Platforms thus use their policies to preclude activity that, while not in violation of the law, is destructive of the platform itself.

These harmful activities include content like spam, phishing, scams, and deceptive practices. For example, YouTube bars video spam—including videos that are excessively posted, that promote get-rich-quick schemes, or that direct viewers to sites spreading harmful software, among many other things. See

YouTube, *Spam, Deceptive Practices, & Scams Policies* (visited November 4, 2022), [perma.cc/NR5H-ZMPJ](https://perma.cc/NR5H-ZMPJ). YouTube also bars spam in its comments section, precluding users from leaving large amounts of identical or repetitive comments, comments intended to gather personal information from viewers, or comments that misleadingly direct viewers to other sites. *Ibid.* Facebook similarly has policies designed to protect against spam; for example, it bars posting content at very high frequencies, posts that direct users off the site through misleading links, or messages that offer false or non-existent services or functionality. Meta, *Facebook Community Standards: Spam* (visited November 4, 2022), [perma.cc/WD7C-ZTVF](https://perma.cc/WD7C-ZTVF).

Platforms also moderate extreme and misleading messaging—including pro-Nazi speech, support of terrorism, and misinformation campaigns. Recently, platforms have aggressively removed disinformation intended to skew public perceptions about the Russian invasion of Ukraine. See, e.g., Shannon Bond, *Facebook, YouTube and Twitter Remove Disinformation Targeting Ukraine*, Nat'l Pub. Radio (Feb. 28, 2022), [perma.cc/CM5Q-P9KT](https://perma.cc/CM5Q-P9KT). These efforts have included stemming the flow of state-backed campaigns by using warning labels and downranking Russian state-media propaganda pertaining to the Ukraine invasion. See, e.g., Taylor Hatmaker, *Instagram Warns Users Who Share Russian State Media, Hides Following Lists in Russia and Ukraine*, TechCrunch (Mar. 8, 2022), [perma.cc/4QFU-EVX5](https://perma.cc/4QFU-EVX5).

Similar actions have been taken against pro-China organizations spreading disinformation about the origins of the Covid-19 pandemic. For example, Twitter removed accounts contending that the Covid-19 virus was spread to China by the U.S. military or by a shipment of Maine lobsters. See Michelle Shen,

*Twitter Accounts Tied to China Lied that Covid Came from Maine Lobsters*, USA Today (Oct. 22, 2021), [perma.cc/9BCF-B2YN](https://perma.cc/9BCF-B2YN). Facebook removed more than 600 accounts, pages, and groups from a Chinese influence organization spreading posts alleging that the United States was pressuring the World Health Organization to blame China for the Covid-19 virus. Shannon Bond, *Facebook Takes Down China-based Network Spreading False Covid-19 Claims*, Nat'l Pub. Radio (Dec. 1, 2021), [perma.cc/SJ5A-NM48](https://perma.cc/SJ5A-NM48).

Platforms also moderate hate speech, like content that denies or distorts the Holocaust, espouses a hope that members of a certain nationality would all die, or that praises harassment of members of a particular religion. See Meta, *Removing Holocaust Denial Content* (Oct. 12, 2020), [perma.cc/WWW4-BCLZ](https://perma.cc/WWW4-BCLZ); Twitter, *Hateful Conduct Policy* (visited November 4, 2022), [perma.cc/ZBT4-PJMT](https://perma.cc/ZBT4-PJMT); Brooke Auxier, *About One-in-Five Americans Who Have Been Harassed Online Say It Was Because of Their Religion*, Pew Research Center (Feb. 1, 2021), [perma.cc/T3UT-AQHV](https://perma.cc/T3UT-AQHV).

Platforms also may restrict content promoting self-harm, especially that directed to minors. Indeed, federal lawmakers on both sides of the aisle have urged platforms to take steps to help support teen users' mental health. Amanda Silberling, *Facebook Grilled in Senate Hearing over Teen Mental Health*, TechCrunch (Sept. 30, 2021), [perma.cc/PN23-M5E6](https://perma.cc/PN23-M5E6). Platforms accordingly moderate an array of content that, although not unlawful, could nonetheless be extremely dangerous for impressionable users, including content promoting eating disorders, practices of self-mutilation, and even suicide.

Similarly, content glorifying violence or the suffering of others may be removed or subject to a content warning. See Meta, *Facebook Community Standards*:

*Violent and Graphic Content* (visited November 4, 2022), [perma.cc/T8ZU-RDZD](https://perma.cc/T8ZU-RDZD). Facebook bars non-medical videos of dismemberment, visible internal organs, human burning, and throat-slitting, but applies content warnings and age-gates to videos in the medical setting or to photos depicting these same topics. Facebook likewise applies content warnings and age-gates to content involving animal cruelty or abuse.

Platforms moderate content that attempts to groom minors for sexual encounters, celebrates child sexual abuse, and involves the non-consensual posting of another’s intimate images.<sup>2</sup> Platforms may limit publication of private information of users, or content that impersonates others.<sup>3</sup> This is all just a small sampling of the range of content subject to moderation.

Achieving content moderation at the scale of these online platforms is a herculean task. Platforms remove millions or even billions of pieces of content for violating policies every year. To put it in context, in the fourth quarter of 2021, Facebook removed 1.7 billion fake accounts—nearly the same number as it has active daily users.<sup>4</sup> Over the same period, YouTube

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<sup>2</sup> See Meta, *Facebook Community Standards: Child Sexual Exploitation, Abuse and Nudity* (visited November 4, 2022), [perma.cc/F5LM-MXDV](https://perma.cc/F5LM-MXDV); YouTube, *Child Safety Policy* (visited November 4, 2022), [perma.cc/5SHG-5DNM](https://perma.cc/5SHG-5DNM); Twitter, *Non-Consensual Nudity Policy* (Nov. 2019), [perma.cc/52DA-YR7R](https://perma.cc/52DA-YR7R); Reddit, *Never Post Intimate or Sexually Explicit Media of Someone Without Their Consent* (Mar. 7, 2022), [perma.cc/Y94G-CZFC](https://perma.cc/Y94G-CZFC).

<sup>3</sup> See Reddit, *Is Posting Someone’s Private or Personal Information Okay?* (July 13, 2020), [perma.cc/F5FP-CCF7](https://perma.cc/F5FP-CCF7); Meta, *Facebook Community Standards: Account Integrity and Authentic Identity* (visited November 4, 2022), [perma.cc/HF9T-V5QH](https://perma.cc/HF9T-V5QH).

<sup>4</sup> See Meta, *Facebook Community Standards Enforcement Report: Fake Accounts* (Feb. 2022), [tinyurl.com/3xxe8vue](https://tinyurl.com/3xxe8vue); Meta,

removed more than 1.26 billion comments, 99.5% of which were spam, and more than 3.8 million channels, 89% of which were spam.<sup>5</sup> Twitter suspends over half a million spam accounts *per day*<sup>6</sup>—more than 130 million in the first half of 2021.<sup>7</sup> As these numbers reflect, content moderation is essential to a platform’s ability to provide the community that it desires.

Platforms thus use carefully calibrated moderation policies to build the environments they wish to make available to users. These moderation decisions cut across an enormously broad range of topics. And there are a wide variety of moderation tools available, including content prioritization or demotion, suspension or removal of entire accounts, removal of certain content, age-gating, and affixing labels or warnings, among a host of other techniques.<sup>8</sup> There is simply no one-size-fits-all solution for content moderation. The variety of approaches taken by online platforms only serves to confirm that decisions about what content to distribute—and how to display it—constitute core expressive activity.

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*Meta Reports First Quarter 2022 Results* (Apr. 27, 2022), [perma.cc/3V4M-FS6H](https://perma.cc/3V4M-FS6H).

<sup>5</sup> Google, *Transparency Report: YouTube Community Guidelines Enforcement* (visited November 4, 2022), [tinyurl.com/5cp5npev](https://tinyurl.com/5cp5npev).

<sup>6</sup> Parag Agrawal (@paraga), Twitter (May 16, 2022 12:26 PM), [perma.cc/33VK-46B3](https://perma.cc/33VK-46B3).

<sup>7</sup> Twitter, *Platform Manipulation* (Jan. 25, 2022), [perma.cc/2ZQL-LMPR](https://perma.cc/2ZQL-LMPR).

<sup>8</sup> Reddit, *Reddit Content Policy* (visited November 4, 2022), [perma.cc/XMD7-92SF](https://perma.cc/XMD7-92SF) (describing “variety of ways of enforcing our rules”); Twitter, *Our Range of Enforcement Options* (visited November 4, 2022), <https://perma.cc/R48Y-HG5Y> (describing the different levels of enforcement actions, ranging from “Tweet-level” to “Account-level” enforcement).

In all, platforms craft their services to provide environments and experiences that reflect their values—including by creating safe online spaces for their audiences. Platforms remove content glorifying the most horrific violence, from school shootings to racially motivated murders. They work to eliminate disinformation campaigns, including those sponsored by foreign powers. And they seek to foster environments safe for children, working to prevent content that could cause grave injury via sexual exploitation or self-harm. In making these choices, platforms necessarily speak a message to all who choose to listen.

**II. S.B. 7072 decimates platforms’ ability to effectively and usefully curate content.**

For the select few platforms to which it applies, S.B. 7072 upends most all of the content-moderation policies that providers and users rely upon to structure their online communities. It does so through three principal provisions: It prohibits so-called “censor[ship]” altogether in many cases and attaches the threat of crippling liability in all others; it requires individualized notice-and-appeal procedures to accompany the millions—if not billions—of moderation actions taken by platforms each year; and it orders disclosure of the tools that platforms use to restrict the proliferation of malicious content.

Collectively, these requirements essentially eliminate platforms’ ability to meaningfully moderate the content they display to their users. The consequences of such a policy would be dire: Hate speech would prevail online unchecked, disinformation would bombard users, and children would be exposed to horrifically dangerous content. The law must be entirely repudiated.

**A. The Act forces disgraceful and wasteful speech onto platform users.**

S.B. 7072 contains several provisions that either directly prohibit or unduly burden platforms' content-moderation activities.

1. Most obvious is the law's flat prohibition on "censor[ing]"—to include "delet[ing], regulat[ing], restrict[ing], edit[ing], alter[ing], \* \* \* or post[ing] an addendum to—the content of a "journalistic enterprise based on the content of its publication or broadcast," with a narrow exception for content meeting the technical definition of obscenity. Fla. Stat. § 501.2041(1)(b), (2)(j). "[J]ournalistic enterprise" is defined solely by an entity's volume of content and number of users (see *id.* § 501.2041(1)(d)), making this prohibition quite sweeping. As the Eleventh Circuit observed:

[T]he provision is so broad that it would prohibit a child friendly platform like YouTube Kids from removing—or even adding an age gate to—soft-core pornography posted by Pornhub, which qualifies as a "journalistic enterprise" because it posts more than 100 hours of video and has more than 100 million viewers per year.

Pet. App. 62a. Similarly, "S.B. 7072 would seemingly prohibit Facebook or Twitter from removing a video of a mass shooter's killing spree if it happened to be reposted by an entity that qualifies for 'journalistic enterprise' status." *Id.* at 62a n.23. And it would force platforms to host and disseminate without disclaimers, for example, the lies of conspiracy theorist Alex

Jones that the Sandy Hook school shooting was a hoax.<sup>9</sup>

Less sensationally, but perhaps even more ominously, the prohibition on moderating content posted by “journalistic enterprise[s]” would surely be seized upon by foreign government-controlled media outlets to spread disinformation and intentionally sow discord in the United States, and platforms would be forced to cease their current efforts to prevent these harms.<sup>10</sup>

S.B. 7072 also flatly prohibits content-moderation activities—specifically, prioritizing or deprioritizing content, and “limit[ing] or eliminat[ing] the exposure of a user or content”—with respect to “content and material posted by *or about*” candidates for political office. Fla. Stat. § 501.2041(e), (f), (h) (emphasis added). Not only does that provision give a free pass to anyone wishing to enlist platforms in disseminating objectionable material, simply by registering as a political candidate (*id.* §§ 501.2041(h), 106.011(3)(e)), but its application to any content “about” a political candidate would seem to mean that platforms would be

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<sup>9</sup> Compare Associated Press, *Alex Jones’s Audience and Infowars’ Revenue Grew as Jones Alleged Sandy Hook School Massacre Was a Hoax*, Marketwatch (Sept. 19, 2022) (reporting audience figures for Jones’s site Infowars), [perma.cc/5VBX-NALF](https://perma.cc/5VBX-NALF), with Fla. Stat. § 501.2041(1)(d) (qualifications for “journalistic enterprise” status).

<sup>10</sup> See, e.g., Twitter, *About Government and State-Affiliated Media Account Labels on Twitter* (visited Nov. 3, 2022), [perma.cc/K7UD-QSXR](https://perma.cc/K7UD-QSXR); Jack Nassetta & Kimberly Gross, *State Media Warning Labels Can Counteract the Effects of Foreign Misinformation*, Harvard Kennedy School Misinformation Review (Oct. 30, 2020) (reporting results of peer-reviewed study showing that labeling of state-controlled media can mitigate the effects of misinformation).

powerless to “limit” its users’ “exposure” to posts, for example, advocating violence against a politician (*id.* § 501.2041(f)).

**2.** Apart from its flat bans on moderating these broad categories of content, S.B. 7072 also prohibits platforms from “censor[ing]” content—again, a term that encompasses essentially any act of content moderation (Fla. Stat. § 501.2041(1)(b)—in a way that a court later deems was not “consistent \* \* \* among its users on the platform” (*id.* § 501.2041(2)(b)). The law provides no guidance on the meaning of “consistent.” And it combines this vague prohibition with a private right of action for enforcement and draconian penalties including statutory damages of up to \$100,000 for each individual act of content moderation, plus actual damages, punitive damages, and attorney fees in certain cases. *Id.* § 501.2041(6), (7).

For platforms that moderate millions, if not billions, of pieces of content every year (see pages 12-13, *supra*), it is not difficult to see the chilling effect of \$100,000 statutory damages exposure for each and every one of those decisions, particularly when paired with a vague and undefined substantive prohibition on “[in]consistent” content moderation. This crippling exposure would force platforms to decline to enforce their policies and standards against all but the most obvious violations, with the result that users would be inundated with harmful, vile, and wasteful content, against both their own wishes and those of the platforms. Or, platforms could take the opposite tack, finding it too risky to host *any* user-generated content that has not been pre-vetted—with the similarly harmful result that their online worlds will lack much, if any, content at all.

Indeed, even the removal of obviously illegal content could be chilled by this litigation risk. Platforms

may employ automated detection technologies to identify illegal content, intellectual property infringement, or child sexual abuse. Platforms have invested substantial resources in developing sophisticated automated tools to fight child sexual abuse by quickly identifying and removing content depicting such abhorrent acts, contributing to the 29.1 million online provider reports to the National Center for Missing and Exploited Children of child sexual abuse imagery and other abuse in 2021.<sup>11</sup> They have also developed similar tools to fight piracy on a broad scale—tools like Meta’s Rights Manager and YouTube’s Content ID.<sup>12</sup> See 17 U.S.C. § 512. These measures protect intellectual property rights *millions* of times every day. That said, as sophisticated as these tools are, they come with small error rates, with each error potentially resulting in litigable claims of “censor[ship]” under this Florida law. S.B. 7072 is thus a strong disincentive for platforms to innovate and collaborate on improving automatic detection measures for illegal material, which will harm child victims of abuse and stymie content owners trying to police their rights in the Internet era.

**3.** The reality is that there is a mismatch between the speech the First Amendment protects from *government* regulation and the speech that users and platforms want as part of their online communities.

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<sup>11</sup> Gabriel J.X. Dance & Michael H. Keller, *Tech Companies Detect a Surge in Online Videos of Child Sexual Abuse*, N.Y. Times (Feb. 7, 2020), [perma.cc/CAP3-ARR3](https://perma.cc/CAP3-ARR3); Nat’l Center for Missing & Exploited Children, *CyberTipline 2021 Report* (visited November 4, 2022), [perma.cc/H3S5-5HND](https://perma.cc/H3S5-5HND).

<sup>12</sup> YouTube, *How Content ID Works* (visited November 4, 2022), [perma.cc/J22X-DFLT](https://perma.cc/J22X-DFLT); Facebook, *Rights Manager* (visited November 4, 2022), [rightsmanager.fb.com/](https://rightsmanager.fb.com/).

Compare Cong. Research Serv., *The First Amendment: Categories of Speech* (2019), [perma.cc/V6KB-5UEV](https://perma.cc/V6KB-5UEV), with Anti-Defamation League, *Online Hate and Harassment: The American Experience 2021* § 8 (2021), [perma.cc/CBV2-SQ23](https://perma.cc/CBV2-SQ23); Sophie Bertazzo, *Online Harassment Isn't Growing—But It's Getting More Severe*, Trust Magazine (June 28, 2021), [perma.cc/2259-2GX7](https://perma.cc/2259-2GX7). Platforms moderate—and users *want* them to moderate—more broadly than the First Amendment's limits on the government's regulation of speech, including:

- all manner of threats,<sup>13</sup> not merely “true threats” unprotected by the First Amendment (see *Virginia v. Black*, 538 U.S. 344 (2003));
- content that dehumanizes or discriminates against individuals based on perceived membership in a protected class<sup>14</sup>;
- content that sexualizes children,<sup>15</sup> even if it does not involve actual children (see, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding ban on virtual child pornography unconstitutional)), does not contain “visual” depictions of children (*New York v. Ferber*, 458 U.S. 747, 764 (1982)), or does not meet the technical definition of obscenity (Fla. Stat. §§ 501.2041(j), 847.001(12)).

The sad truth is that misleading, vile, hateful, graphic, or offensive content has an outsized ability to

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<sup>13</sup> See, e.g., Twitter, *Abusive Behavior* (visited November 4, 2022), [perma.cc/N8Z8-YT3Z](https://perma.cc/N8Z8-YT3Z).

<sup>14</sup> See, e.g., Meta, *Facebook Community Standards: Hate Speech* (visited November 4, 2022), [perma.cc/4G4V-HXG8](https://perma.cc/4G4V-HXG8).

<sup>15</sup> See, e.g., YouTube, *Child Safety Policy* (visited November 4, 2022), [perma.cc/5SHG-5DNM](https://perma.cc/5SHG-5DNM).

drown out other material online. Under S.B. 7072, the inevitable result is that platforms will have to choose between silencing too much content through overbroad but technically “consistent” content moderation (or, indeed, deciding that it is too risky to host any content that is not pre-vetted, leading to the same result), or serving up horrific messages and images to their users. And they will be powerless to stop entities that meet the lax definition of “journalistic enterprise”—which, again, includes entities like conspiracy theorists and foreign state-controlled media—from enlisting the platforms in disseminating whatever content they wish, no matter how hateful or vile, so long as it is not technically obscene.

The result is that platforms without any content (because of overbroad application of content moderation to ensure “consisten[cy]”) or inundated with distasteful content will be effectively unusable for most, if not all, legitimate users. The latter situation presents particular risk for vulnerable communities like children who may be exposed to age-inappropriate content, teens who may be exposed to content encouraging self-harm,<sup>16</sup> the elderly who are targets for scams,<sup>17</sup> or for groups that are repeatedly and specifically targeted for hate and harassment on account of

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<sup>16</sup> Steven Sumner et al., *Temporal and Geographic Patterns of Social Media Posts About an Emerging Suicide Game*, 65 J. Adolescent Health 94-100 (2019).

<sup>17</sup> Attorney General of Texas, *Senior Scams* (visited November 4, 2022), [perma.cc/XY4S-PAXN](https://perma.cc/XY4S-PAXN) (noting scams targeting seniors “are especially common online”); AARP, *Older Americans’ Cyber-crime Losses Soared to \$3 Billion in 2021* (Apr. 5, 2022), [perma.cc/M5FB-65JM](https://perma.cc/M5FB-65JM).

their gender, sex, race, nationality, religious affiliation, or sexual orientation.<sup>18</sup>

**B. The Act’s onerous reporting requirements would make content moderation functionally impossible.**

S.B. 7072 also imposes burdensome procedural obligations. For any broadly defined act of “censor[ship],” “shadow ban[ning],” or “deplatform[ing],” the platform must “notify[] the user” within seven days and “[i]nclude a thorough rationale explaining the reason that the social media platform censored the user.” Fla. Stat. § 501.2041(2)(d)(1), (3).

Given that some platforms—particularly those targeted by S.B. 7072—moderate hundreds of millions if not billions of pieces of content each year, there is no practical way to create the procedures required by S.B. 7072 at the necessary scale. Take, for example, the 1.7 billion fake accounts that Facebook removed in the fourth quarter of 2021. S.B. 7072 would apparently obligate Facebook to send presumably billions of notices including “a thorough rationale explaining” the action, each on a seven-day clock. The same procedures would attach to YouTube, with the 1.26 billion comments it removed (99.5% of which were spam) in the fourth quarter of 2021.

These demands exact an enormous toll on platforms, particularly when coupled with S.B. 7072’s timing requirements and multiplied across the many types of content they remove. This undue burden will require platforms to divert enormous resources away from building features and maintaining their

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<sup>18</sup> Emily A. Vogels, *The State of Online Harassment*, Pew Research Center (Jan. 13, 2021), [perma.cc/4CZN-5TGU](https://perma.cc/4CZN-5TGU) (finding that 40% of Americans have experienced online harassment).

communities in ways that users actually want—if the law’s mandates are even achievable at all. Platforms will thus again be forced to either forgo content moderation in its entirety or reduce moderation to only a shadow of the role it currently plays in curating user experiences. Either way, it is the users who will ultimately lose the services that they currently enjoy.

**C. The Act compels disclosure of monitoring methods to malicious actors.**

Apart from the “thorough rationale” requirement, S.B. 7072’s disclosure provision also mandates that a platform disclose to the poster of moderated or removed content “a precise and thorough explanation of how the social media platform became aware of the censored content or material, including *a thorough explanation of the algorithms used*, if any, to identify or flag the user’s content or material as objectionable.” Fla. Stat. § 501.2041(3)(d) (emphasis added). While many of the covered platforms and *amici* organizations support enhanced transparency, this requirement goes well beyond what is necessary for adequate content moderation.

This disclosure obligation—which essentially requires platforms to self-report the specifics of their content-filtering methods to the very users posting objectionable content—will have disastrous consequences for keeping spam, terrorist promotion, and other distasteful content off platforms. This is a problem of monumental import for platforms. Facebook took action against 1.8 billion spam postings<sup>19</sup> and 16.1 million posts supporting terrorism in Q1 of 2022

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<sup>19</sup> Meta, *Facebook Community Standards Enforcement Report: Spam* (visited Nov. 3, 2022), [tinyurl.com/4trwdkew](https://tinyurl.com/4trwdkew).

alone.<sup>20</sup> Over the same period, YouTube removed more than 3.5 million spam channels and over 100,000 channels for child safety.<sup>21</sup> In the second half of 2021, Twitter challenged more than 133 million suspected spam accounts and took action on more than 940,000 accounts involving abuse or harassment.<sup>22</sup>

As it stands now, platform operators must constantly update and refine their processes to block such content because those who seek to hijack online platforms for their own profit continually evolve their strategies to evade moderation. As one researcher put it, “[b]oth the spammers and spam filter-builders are under pressure to evolve or die.” Jean Whitmore, *The Arms Race of Models: Complexify or Die* 9 (June 24, 2021), [ssrn.com/abstract=3867464](https://ssrn.com/abstract=3867464); see also Kevin Gosschalk, *AI vs. AI: The Digital Arms Race to Fight Fraud* (Oct. 24, 2019), [tinyurl.com/9f7jb9w6](https://tinyurl.com/9f7jb9w6). Twitter’s former CEO recently explained these concepts, describing how “fighting spam is incredibly dynamic” because “[t]he adversaries, their goals, and tactics evolve constantly” in response to platforms’ efforts. Parag Agrawal (@paraga), Twitter.com (May 16, 2021), [perma.cc/33VK-46B3](https://perma.cc/33VK-46B3).

The algorithm disclosure required by S.B. 7072 would inevitably enable bad actors, spammers, and scammers to better circumvent content moderation techniques. These disclosure obligations will cause

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<sup>20</sup> Meta, *Facebook Community Standards Enforcement Report: Adult Nudity and Sexual Activity* (Visited Nov. 3, 2022), [tinyurl.com/3kye4tux](https://tinyurl.com/3kye4tux).

<sup>21</sup> Google, *Transparency Report: YouTube Community Guidelines Enforcement* (visited Nov. 3, 2022), [tinyurl.com/5cp5npev](https://tinyurl.com/5cp5npev).

<sup>22</sup> Twitter, *Platform Manipulation* (July 28, 2022), [perma.cc/UQ8R-P5C7](https://perma.cc/UQ8R-P5C7); Twitter, *Rules Enforcement* (July 28, 2022), [perma.cc/Y9HD-UH63](https://perma.cc/Y9HD-UH63).

platforms and their users to be inundated by malicious content. Rather than fix anything, S.B. 7072's disclosure obligation will only further exacerbate the problem, as it gives ill-intentioned actors insight into new tools and will have a chilling effect on the innovation of improved methods to detect and counter such content.

\* \* \*

Together, S.B. 7072's substantive prohibitions, disclosure requirements, and other provisions are designed to force a sea change in how platforms operate, against the will of both the platforms and the users who have come to rely upon them, and all because Florida does not like the content of the messages that platforms are serving to their users. As cross-petitioners ably explain—and as the Eleventh Circuit held in large part—the First Amendment does not tolerate such governmental regulation and burdening of private speech. To confirm this result, and to ensure that other States do not follow in Florida's path, the Court should grant both Florida's petition in No. 22-277 and the cross-petition here, and review the legality of S.B. 7072 in its entirety.

**CONCLUSION**

The Court should grant the conditional cross-petition.

Respectfully submitted.

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**APPENDIX: LIST OF *AMICI***

- Chamber of Progress
- Consumer Technology Association (CTA)
- Engine Advocacy
- Global Project Against Hate and Extremism (GPAHE)
- HONR Network
- Information Technology & Innovation Foundation (ITIF)
- Interactive Advertising Bureau (IAB)
- IP Justice
- LGBT Tech
- Multicultural Media, Telecom and Internet Council (MMTC)
- Safeguarding American Values for Everyone (SAVE)
- The Software & Information Industry Association (SIIA)
- Stop Child Predators (SCP)
- TechNet
- Washington Center for Technology Policy Inclusion (WashingTECH)