CHAMBER OF PROGRESS

January 31, 2023

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland,

As Republican lawmakers across the country introduce and enact anti-content moderation laws, we write to request that the Department of Justice file a brief urging the Supreme Court to grant cert in *NetChoice & CCIA v. Moody* and *NetChoice & CCIA v. Paxton,* to preserve the ability of online platforms to moderate content and ensure healthy online communities.

Last week, the Supreme Court invited the Department to weigh in on whether the Court should grant cert in two cases challenging anti-content moderation laws in Florida and Texas.[1] Though both laws are nearly identical in substance, the Eleventh and Fifth Circuits split in their rulings.[2] As a result, social media companies are now facing an existential question: does the First Amendment protect their ability to keep consumers safe online through content moderation? If left unanswered, the consequences could be dire.

The anti-content moderation laws passed by Republican legislators in Florida and Texas require Internet services to treat all user-created content equally. Put differently, these laws force Internet services to publish content they would not choose to publish otherwise; a form of censorship in itself.

Content moderation is a critical function of the modern Internet, empowering Internet services to create safe and productive spaces for their audiences. Much like the editorial guidelines employed by traditional publishers, Internet services moderate according to their own 'house rules' to protect their brands, promote healthy online communities, and keep their audiences (and advertisers) happy.[3]

But by requiring websites to treat all First Amendment protected speech equally, Florida, Texas, and their copycats, threaten to eviscerate content moderation. These laws threaten severe harm to online services and their users.

[1] Fla. S.B. 7072 (2021); Tex. H.B. 20 (2021).
[2] While the 11th Circuit upheld the transparency provision in S.B. 7072, it affirmed the injunction against the rest of the content moderation provisions on First Amendment grounds. The 5th Circuit, however, arrived at a starkly different conclusion, upholding the entirety of H.B. 20.
[3] See Goldman, Eric and Miers, Jess, Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules (August 2021). 1 Journal of Free Speech Law 191 (2021), Santa Clara Univ. Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3911509.

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Speech protected by the First Amendment typically diverges from the kind of content permitted under an online service's house rules. This is by design, as most 'lawful but awful' content—such as election misinformation, hate and harassment, and violent extremism—is not enjoyed by the majority of online users, nor championed by the services themselves.

Indeed, the publication decisions that Internet services make about the content they choose to host is an expressive activity of the service itself. For example, by prohibiting hateful content targeted at LGBTQ+ users, the service affirmatively conveys to the world that they welcome and value queer communities. A service that allows hateful content to proliferate sends a much different message to its users and advertisers about the service's principles, or lack thereof.

If the Florida and Texas laws are allowed to stand, online communities will fill with more hate, hoaxes, and harrassment. For example, under these laws, a service could not remove or down-rank speech glorifying racially motivated violence. Depraved racist ideologies would find safe harbor under state anti-content moderation laws.

Absent definitive guidance from SCOTUS, Republican legislators are increasingly eager to follow the censorial path paved by Florida and Texas lawmakers. For example, laws currently introduced in Arizona, Oklahoma, and South Carolina mirror the anti-speech measures—restricting online services from enforcing their house rules—described by the same laws actively under petition to the Supreme Court.[4]

Worse, this frenzy of anti-content moderation legislation isn't limited to Republican lawmakers. For example, the recently enacted anti-hate speech law in New York significantly conflicts with the broader red state laws.[5] State-by-state content moderation is neither a viable business approach nor technically possible. Hence, this emerging patchwork of anti-content moderation laws ensures only one realistic outcome: the state with the broadest and most restrictive content regulations will effectively control all of our online experiences.

We acknowledge the heightened attention surrounding the Court's upcoming decision in *Gonzalez v. Google*, but any resolution in that case will not adequately address the First Amendment concerns described above. Accordingly, we urgently call on the Department of Justice to support the grant of certiorari in *NetChoice & CCIA v. Moody* and *NetChoice & CCIA v. Paxton*, as any further delays will guarantee a race to the bottom.

Sincerely,

Jess Miers
Legal Advocacy Counsel at Chamber of Progress

[4] AZ S.B. 1106; OK S.B. 730; SC S.B. 268 ("Stop Social Media Censorship Act").
[5] NY S.B. S4511A ("The Social Media Accountability Act").