Nos. 22-277, 22-393 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.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., CROSS-PETITIONERS

v.

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., PETITIONERS

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND ELEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

These cases concern laws enacted by Florida and Texas to regulate major social media platforms like Facebook, YouTube, and X (formerly known as Twitter). The two laws differ in some respects, but both restrict platforms' ability to engage in content moderation by removing, editing, or arranging user-generated content; require platforms to provide individualized explanations for certain forms of content moderation; and require general disclosures about platforms' content-moderation practices. The questions presented are:

1. Whether the laws' content-moderation restrictions comply with the First Amendment.

2. Whether the laws' individualized-explanation requirements comply with the First Amendment.

3. Whether the laws' general-disclosure provisions comply with the First Amendment.

4. Whether the laws violate the First Amendment because they were motivated by viewpoint discrimination.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, this Court should grant the petitions for writs of certiorari in *Moody* v. *NetChoice*, *L.L.C.*, No. 22-277, and *NetChoice L.L.C.* v. *Paxton*, No. 22-555, limited to questions 1 and 2 as formulated in this brief, and deny the conditional cross-petition in *NetChoice*, *L.L.C.* v. *Moody*, No. 22-393.

STATEMENT

These cases concern two state laws enacted in 2021 to regulate large social media platforms like Facebook, YouTube, and X (formerly known as Twitter): Ch. 2021-32, Laws of Fla. (S.B. 7072), and 2021 Tex. Gen. Laws 3904 (H.B. 20). The details of the two laws differ, but each law includes: (1) content-moderation provisions restricting platforms' choices about whether and how to present user-generated content to the public; (2) individualized-explanation provisions requiring platforms to explain particular content-moderation decisions to affected users; and (3) general-disclosure provisions requiring platforms to disclose information about their content-moderation practices.

Two trade associations representing platforms (collectively, NetChoice) challenged the laws and sought preliminary injunctions. In the Florida case, the Eleventh Circuit affirmed a preliminary injunction in part. The court held that S.B. 7072's content-moderation and individualized-explanation provisions likely violate the First Amendment, but that NetChoice is unlikely to succeed in its pre-enforcement challenge to the general-disclosure provisions or its claim that S.B. 7072 was motivated by viewpoint discrimination. In the Texas case,

in contrast, a divided panel of the Fifth Circuit reversed a preliminary injunction because it concluded that NetChoice is unlikely to succeed in any of its challenges to H.B. 20. In so doing, the Fifth Circuit rejected key aspects of the Eleventh Circuit's analysis of the content-moderation and individualized-explanation provisions.

A. Background

Major social media platforms like Facebook, YouTube, and X "collect speech created by third parties" in the form of "text, photos, and videos"; aggregate, curate, and organize that third-party content; and make it "available to others" on their websites and apps. *Moody* Pet. App. 4a.[1] The platforms thus differ from "traditional media outlets" like newspapers because they do not "create most of the original content on [their] site[s]." *Id.* at 5a.

At the same time, the platforms also differ from "internet service providers" or other communications services that simply "transmit[] data from point A to point B." *Moody* Pet. App. 5a-6a. Instead, a user who visits a site like Facebook "sees a curated and edited compilation of content" that reflects the platform's editorial choices in at least two ways. *Id.* at 6a. First, the platform "will have removed posts" and excluded users "that violate its terms of service or community standards." *Ibid.* Second, the platform "will have arranged [the] available content by choosing how to prioritize and display posts," often using algorithms or other automated tools. *Ibid.*; see *Twitter, Inc.* v. *Taamneh*, 143 S. Ct. 1206, 1216 (2023). Those choices determine "which

[1] This brief cites the petition appendix in No. 22-277 as "*Moody* Pet. App." and the appendix in No. 22-555 as "*Paxton* Pet. App."

users' speech the viewer will see, and in what order." *Moody* Pet. App. 6a.

By setting terms of service and adopting and implementing content-moderation standards, the major platforms foster particular forms of "online communities" and "promote various values and viewpoints." *Moody* Pet. App. 7a. For example, YouTube reserves the right to remove or place age restrictions on content that uses "excessive profanity" or "sexually explicit language," YouTube, *Community Guidelines*, https://perma.cc/J2TR-DJXK, and X prohibits posts that "glorify or express desire for violence," X, *The Twitter Rules*, https://perma.cc/KS5H-PGW9.

B. The Florida Litigation

1. Florida enacted S.B. 7072 in May 2021. *Moody* Pet. App. 7a. The law regulates "[s]ocial media platform[s]" that have "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants." Fla. Stat. § 501.2041(1)(g)(4) (2022).

S.B. 7072 addresses forms of content moderation that it calls censoring, shadow banning, deplatforming, and post-prioritization. The law defines "[c]ensor" to "include[] any action taken" to "restrict, edit, alter" or "post an addendum to any content or material posted by a user." Fla. Stat. § 501.2041(1)(b). A "[s]hadow ban" is an action "to limit or eliminate the exposure of a user or content or material posted by a user." *Id.* § 501.2041(1)(f). "Deplatform[ing]" means banning a user or deleting her posts for "more than 14 days." *Id.* § 501.2041(1)(c). And "[p]ost-prioritization" includes any action "to place, feature or prioritize certain content or material" on the platform. *Id.* § 501.2041(1)(e).

S.B. 7072's legislative findings state that platforms "have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians." S.B. 7072, § 1(9). S.B. 7072 responds to that perceived unfairness by imposing three sets of requirements on covered platforms.

Content-moderation restrictions. S.B. 7072 broadly prohibits platforms from engaging in the defined types of content moderation with respect to certain users and topics. It provides, for example, that "[a] social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." Fla. Stat. § 501.2041(2)(j). It further provides that a platform "may not willfully deplatform a candidate" for public office, *id.* § 106.072(2), or use "post-prioritization or shadow banning algorithms for content and material posted by or about" a candidate. *Id.* § 501.2041(2)(h).

More broadly, S.B. 7072 provides that a platform must "apply censorship, deplatforming, and shadow banning standards in a consistent manner." Fla. Stat. § 501.2041(2)(b). It prohibits platforms from changing their terms of service more than "once every 30 days." *Id.* § 501.2041(2)(c). And the law requires platforms to allow users to "opt out" of post-prioritization algorithms and instead choose to see posts in "sequential or chronological" order. *Id.* § 501.2041(2)(f)(2) and (g).

Individualized-explanation requirement. S.B. 7072 requires a platform to provide an individualized explanation to a user if it removes or alters her posts. Fla. Stat. § 501.2041(2)(d)(1). The notice must be delivered within seven days and must contain "a thorough rationale" for the action and an explanation of how the platform "became aware" of the post. *Id.* § 501.2041(3).

General-disclosure requirements. S.B. 7072 requires platforms to make general disclosures about their operations and policies. Platforms must publish their "standards" for "determining how to censor, deplatform, and shadow ban." Fla. Stat. § 501.2041(2)(a). They must inform users "about any changes to" their "rules, terms, and agreements." *Id.* § 501.2041(2)(c). Upon request, a platform must tell a user how many other users viewed her content. *Id.* § 501.2041(2)(e). And if a platform "willfully provides free advertising for a candidate," it "must inform the candidate of such in-kind contribution." *Id.* § 106.072(4).

S.B. 7072's provisions related to political candidates are enforced by the Florida Elections Commission, which can impose fines of up to $250,000 per day. Fla. Stat. § 106.072(3). The law's other provisions can be enforced either by the State or through private suits for damages and injunctive relief. *Id.* § 501.2041(5) and (6).

2. NetChoice brought a pre-enforcement challenge to S.B. 7072 in the Northern District of Florida. The court granted a preliminary injunction barring enforcement of the statute in its entirety. *Moody* Pet. App. 68a-95a. As relevant here, the court concluded that the law likely violates the First Amendment. *Id.* at 82a-93a.

3. The Eleventh Circuit affirmed in part and reversed in part. *Moody* Pet. App. 1a-67a.

a. The Eleventh Circuit first held that "social-media platforms' content-moderation activities" are "'speech' within the meaning of the First Amendment," *Moody* Pet. App. 48a; see *id.* at 19a-48a, such that S.B. 7072's "content-moderation restrictions are subject to either strict or intermediate First Amendment scrutiny, depending on whether they are content-based or content-neutral." *Id.* at 55a. And the court concluded that it is

"substantially likely that none of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny." *Id.* at 57a. Among other things, the court reasoned that "S.B. 7072's content-moderation restrictions do not further any substantial governmental interest." *Id.* at 58a.

b. The Eleventh Circuit also determined that NetChoice is likely to succeed in its challenge to S.B. 7072's individualized-explanation requirement. *Moody* Pet. App. 64a-65a. The court explained that under *Zauderer* v. *Office of Disciplinary Council*, 471 U.S. 626 (1985), a "commercial disclosure requirement must be 'reasonably related to the State's interest in preventing deception of consumers' and must not be 'unjustified or unduly burdensome' such that it would 'chill protected speech.'" *Moody* Pet. App. 63a (brackets and citation omitted). Given the sheer volume of content-moderation actions taken by the major platforms, the court deemed it "substantially likely" that S.B. 7072's "requirement that platforms provide notice and a detailed justification" for each such action would chill "platforms' exercise of editorial judgment." *Id.* at 64a-65a.

c. The Eleventh Circuit held, however, that NetChoice is unlikely to succeed in its challenge to S.B. 7072's general-disclosure requirements. *Moody* Pet. App. 62a-64a. The court explained that those requirements advance "[t]he State's interest" in "ensuring that users * * * who engage in commercial transactions with platforms" are "fully informed." *Id.* at 63a. And the Court concluded that NetChoice had not shown that those general requirements are "unduly burdensome or likely to chill platforms' speech." *Id.* at 63a-64a.

d. Finally, the Eleventh Circuit rejected NetChoice's assertion that S.B. 7072 is unconstitutional

because it was enacted for the impermissible purpose of suppressing the viewpoints of the largest social media platforms. *Moody* Pet. App. 50a-54a. The court explained that "when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a constitutionally impermissible purpose." *Id.* at 50a-51a (citation omitted). The court also determined that NetChoice could not establish an inference of impermissible viewpoint discrimination based on S.B. 7072's coverage. *Id.* at 54a. The court reasoned that the law's focus on the largest platforms "might be viewpoint motivated," but could also be based on another characteristic of the largest platforms, such as "their market power." *Ibid.*

C. The Texas Litigation

1. Texas H.B. 20 regulates social-media platforms that have "more than 50 million active users in the United States in a calendar month." Tex. Bus. & Com. Code Ann. § 120.002(b) (West 2023). Although H.B. 20 differs in some respects from Florida's law, the provisions at issue here fall into the same three categories.

Content-moderation restrictions. With certain exceptions, H.B. 20 prohibits "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person" based on "(1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in [Texas]." Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a) (West Supp. 2022); see *id.* § 143A.006 (exceptions). The law defines "[c]ensor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against." *Id.* § 143A.001(1).

Individualized-explanation requirement. H.B. 20 generally requires that "concurrently with the removal" of user content, the platform shall "notify the user" and "explain the reason the content was removed." Tex. Bus. & Com. Code Ann. § 120.103(a)(1). H.B. 20 also goes further than S.B. 7072, requiring platforms to "allow the user to appeal the decision to remove the content to the platform," *id.* § 120.103(a)(2), and compelling platforms to address those appeals within 14 days, *id.* § 120.104.

General-disclosure requirements. Under H.B. 20, platforms must disclose how they "curate[] and target[] content to users," how they "moderate[] content," and how they use algorithms to prioritize the ranking or frequency with which content appears. Tex. Bus. & Com. Code Ann. § 120.051(a)(1), (3), and (4). They must also "publish an acceptable use policy." *Id.* § 120.052(a). And they must issue a "biannual transparency report" on their content-moderation efforts. *Id.* § 120.053.

H.B. 20 can be enforced in suits for declaratory or injunctive relief by users and by the Texas Attorney General. Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.007, 143A.008.

2. NetChoice brought a pre-enforcement challenge to the relevant provisions of H.B. 20 in the Western District of Texas, and the district court issued a preliminary injunction against the enforcement of those provisions. *Paxton* Pet. App. 143a-185a. The Fifth Circuit stayed the injunction pending appeal, but this Court vacated the stay. 142 S. Ct. 1715.

3. A partially divided Fifth Circuit panel reversed the preliminary injunction. *Paxton* Pet. App. 1a-142a.

a. Unlike the Eleventh Circuit, the Fifth Circuit held that platforms' content-moderation activities are

"not speech." *Paxton* Pet. App. 113a; see *id.* at 35a-55a. Instead, the Fifth Circuit declared those activities to be "censorship" that States may freely regulate without implicating the First Amendment. *Id.* at 55a. The Fifth Circuit further held that, even if content moderation warrants First Amendment protection, H.B. 20's content-moderation restrictions "satisf[y] intermediate scrutiny." *Id.* at 91a. The Fifth Circuit noted that H.B. 20 differs from S.B. 7072 in some respects, but it acknowledged that it was "part[ing] ways with the Eleventh Circuit" on "key" aspects of the First Amendment analysis. *Id.* at 102a; see *id.* at 103a-110a.

b. The Fifth Circuit also parted ways with the Eleventh Circuit in analyzing H.B. 20's individualized-explanation requirement. *Paxton* Pet. App. 95a-96a. The court acknowledged NetChoice's argument that the explanation and appeal process mandated by H.B. 20 could pose significant burdens, noting that YouTube removed over a billion comments in just three months. *Id.* at 95a. But the court stated that covered platforms "already provide[] an appeals process substantially similar" to what H.B. 20 requires "for most other categories of content." *Id.* at 96a. The court thus concluded that NetChoice had not shown that the individualized-explanation provision is facially invalid. *Ibid.*

c. Like the Eleventh Circuit, the Fifth Circuit held that NetChoice was unlikely to succeed in its facial pre-enforcement challenge to the general-disclosure requirements. *Paxton* Pet. App. 91a-99a. The court concluded that, at least on their face, those requirements "easily pass[] muster under *Zauderer*." *Id.* at 97a. But it also acknowledged that NetChoice might have "meritorious as-applied challenges." *Id.* at 98a.

d. Finally, and also like the Eleventh Circuit, the Fifth Circuit rejected NetChoice's argument that H.B. 20 "impermissibly targeted the largest social media platforms" based on viewpoint. *Paxton* Pet. App. 85a.

e. All three members of the panel wrote separately. In a portion of the majority opinion speaking only for himself, *Paxton* Pet. App. 2a n.*, Judge Oldham explained his view that H.B. 20's content-moderation provisions are "permissible common carrier regulation." *Id.* at 55a; see *id.* at 55a-80a. Judge Jones concurred to emphasize her view that platforms' content-moderation activities are not protected by the First Amendment. *Id.* at 114a-116a. And Judge Southwick concurred in the court's analysis of the individualized-explanation and general-disclosure provisions, but dissented from its analysis of the content-moderation provisions. *Id.* at 117a-142a. Judge Southwick agreed with the Eleventh Circuit that "a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment." *Id.* at 119a-120a (citation omitted). And he would have held that H.B. 20's restrictions on those decisions do not withstand constitutional scrutiny. *Ibid.*

DISCUSSION

This Court should grant certiorari to decide whether the content-moderation and individualized-explanation requirements of S.B. 7072 and H.B. 20 comply with the First Amendment. The courts below disagreed on those questions; the questions are undeniably important; and all parties agree that they warrant this Court's review. The Court should therefore grant the petitions for writs of certiorari in *Moody* (No. 22-277) and *Paxton* (No. 22-555), limited to questions one and two as formulated in

this brief. And on the merits, the Court should affirm the Eleventh Circuit and reverse the Fifth Circuit: The platforms' content-moderation activities are protected by the First Amendment, and the content-moderation and individualized-explanation requirements impermissibly burden those protected activities.

The Court should not, however, take up NetChoice's separate contentions that the laws' general-disclosure provisions violate the First Amendment and that the laws were motivated by viewpoint discrimination. Both the Fifth and Eleventh Circuits rejected those arguments; these pre-enforcement challenges, in this preliminary posture, would not be suitable vehicles for considering those issues; and adding more questions would further complicate what would already be unusually complicated merits briefing and argument. The Court should therefore deny NetChoice's conditional cross-petition in *Moody* (No. 22-293) and deny NetChoice's petition in *Paxton* to the extent it raises issues that go beyond questions one and two in this brief.

I. THE FIFTH AND ELEVENTH CIRCUITS' CONFLICTING HOLDINGS ON THE CONTENT-MODERATION PROVISIONS WARRANT REVIEW

A. As all parties agree, this Court should grant certiorari to resolve the lower courts' disagreement about States' authority to restrict a business's ability to select, edit, and arrange the third-party content that appears on its social-media platform. *Moody* Pet. 8-18; *Moody* Br. in Resp. 31-34; *Paxton* Br. in Resp. 13-15. The decisions below create a square and acknowledged circuit split on that important First Amendment question. And even before that conflict emerged, this Court recognized that the question presented would likely warrant review by vacating the Fifth Circuit's stay of the

preliminary injunction in the Texas case. 142 S. Ct. 1715; see *id.* at 1716 (Alito, J., dissenting from grant of application to vacate stay) ("This application concerns issues of great importance that will plainly merit this Court's review.").

In the government's view, the Court should grant review in both the Florida and Texas cases. Although the cases turn on the same fundamental question about the First Amendment status of the platforms' content-moderation activities, S.B. 7072 and H.B. 20 target different types of content moderation and impose different obligations. Those differences ultimately may not be material to the Court's First Amendment analysis, but considering the two laws together would give the Court the fullest opportunity to address the relevant issues.

B. On the merits of the content-moderation provisions, this Court should affirm the Eleventh Circuit and reverse the Fifth Circuit. When a social-media platform selects, edits, and arranges third-party speech for presentation to the public, it engages in activity protected by the First Amendment. That activity, and the platforms' business practices more generally, are not immune from regulation. But here, the States have not articulated interests that justify the burdens imposed by the content-moderation restrictions under any potentially applicable form of First Amendment scrutiny.

1. "The question at the core" of these cases is whether major social-media platforms like Facebook, YouTube, and X "are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate." *Moody* Pet. App. 3a; see *Paxton* Pet. App. 2a-3a. The Eleventh

Circuit correctly recognized that the answer to that question is yes.

In a variety of contexts, this Court has held that "the presentation of an edited compilation of speech generated by other[s]" is protected by the First Amendment. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 570 (1995). Such activity "is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security." *Ibid.* (citing *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974)). And the Court has applied the same principle to a parade organizer's choice of participants, *ibid.*; a cable operator's selection of programming, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994); and even a utility's selection of materials to include in its billing envelopes, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 11-12 (1986) (plurality opinion).

Like publishers, parade organizers, and cable operators, the companies that run the major social-media platforms "are in the business of delivering curated compilations of speech" created by others. *Moody* Pet. App. 26a. And when the major platforms select, exclude, arrange, or otherwise moderate the content they present to the public, they are exercising the same sort of "editorial discretion" this Court "recognized in *Miami Herald*, *PG&E*, *Turner*, and *Hurley*." *Paxton* Pet. App. 129a-130a (Southwick, J., concurring in part and dissenting in part).

Indeed, given the torrent of content created on the platforms, one of their central functions is to make choices about which content will be displayed to which users, in which form and which order. The act of culling and curating the content that users see is inherently

expressive, even if the speech that is collected is almost wholly provided by users. A speaker "'does not forfeit constitutional protection simply by combining multifarious voices' in a single communication." *303 Creative LLC* v. *Elenis*, 143 S. Ct. 2298, 2313 (2023) (quoting *Hurley*, 515 U.S. at 569). And especially because the covered platforms' only products are displays of expressive content, a government requirement that they display different content—for example, by including content they wish to exclude or organizing content in a different way—plainly implicates the First Amendment.

In arguing otherwise, the States and the Fifth Circuit have asserted that the platforms' content-moderation activities are unprotected conduct akin to that of the shopping center that sought to exclude pamphleteers in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), and the law schools that sought to exclude military recruiters in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*). See *Paxton* Pet. App. 34a-48a; *Moody* Pet. 18-21; *Paxton* Br. in Resp. 18-19. But that analogy is inapt because the parties in *PruneYard* and *FAIR* were not presenting speech to an audience. The shopping center in *PruneYard* was providing a space for retail transactions; there was no concern that leafletting might affect the "owner's exercise of his own right to speak," and "the owner did not even allege that he objected to the content of the pamphlets." *Hurley*, 515 U.S. at 580 (citation omitted). In *FAIR*, the Court likewise emphasized that allowing recruiters to access law schools' buildings "does not affect the law schools' speech, because the schools are not speaking when they host interviews." 547 U.S. at 64.

The States and the Fifth Circuit have also emphasized that although the major platforms prioritize and arrange all of the content that appears on their sites, they do not moderate most of it; do not endorse the messages expressed by users; and are shielded from liability for third-party content under 47 U.S.C. 230(c). See *Moody* Pet. 15; *Paxton* Br. in Resp. 22-23; *Paxton* Pet. App. 35a, 48a-55a. But what makes the platforms' content-moderation choices expressive is not that the platforms adopt as their own or assume legal responsibility for each individual piece of content posted by users; it is that they choose whether and how to present that content by selecting, curating, and arranging it.

2. The conclusion that the First Amendment protects content-moderation activities does not mean that those activities are immune from regulation. Content-neutral laws that target conduct rather than speech generally pose no First Amendment problem even when they impose "incidental" burdens on expression. *FAIR*, 547 U.S. at 62. The First Amendment thus does not exempt social-media platforms from antitrust laws, public-accommodations laws, or other generally applicable regulations targeting conduct. Cf. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951). But the content-moderation restrictions of S.B. 7072 and H.B. 20 are not general regulations of conduct that only incidentally burden speech; instead, the laws are "*directed at* the communicative nature" of the major platforms' editorial activities and thus must be "justified by the substantial showing of need that the First Amendment requires." *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) (citation omitted); see, *e.g.*, *303 Creative*, 143 S. Ct. at 2318.

The Eleventh Circuit correctly held that S.B. 7072's content-moderation provisions do not satisfy intermediate scrutiny for reasons that apply equally to the relevant provisions of H.B. 20. Most fundamentally, there is no "substantial governmental interest in enabling users" to "say whatever they want on privately owned platforms that would prefer to remove their posts." *Moody* Pet. App. 59a. In *Hurley*, this Court emphatically rejected such an interest as "exactly what the general rule of speaker's autonomy forbids." 515 U.S. at 578. And, more broadly, this Court's decisions reject the suggestion that the government may "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

The States and the Fifth Circuit have argued that, like the challenged federal law in *Turner*, the content-moderation provisions serve an interest in "assuring that the public has access to a multiplicity of information sources." *Turner*, 512 U.S. at 663; see *Moody* Pet. 25-26; *Paxton* Br. in Resp. 26-28; *Paxton* Pet. App. 86a-87a. But the interest recognized in *Turner* was in ensuring the "survival" of an important medium of communication—broadcast television. 512 U.S. at 647; see *Paxton* Pet. App. 135a-136a (Southwick, J., concurring in part and dissenting in part). Here, in contrast, the States are not seeking to ensure the survival of a particular medium or pursuing a comparable objective "unrelated to the suppression of free expression." *Turner*, 512 U.S. at 662 (citation omitted). Instead, the States seek to enhance their citizens' ability to express their views on social media platforms by suppressing the platforms' ability to express their own views through the selection and curation of the content they

present to the public. The platforms' scale and reach may make them "'enviable' outlet[s] for speech," *303 Creative*, 143 S. Ct. at 2315 (citation omitted), but the States' asserted interest in favoring some speakers over others is inconsistent with the First Amendment.

II. THE FIFTH AND ELEVENTH CIRCUITS' CONFLICTING HOLDINGS ON THE INDIVIDUALIZED-EXPLANATION REQUIREMENTS WARRANT REVIEW

A. The Fifth and Eleventh Circuits' rulings on the individualized-explanation requirements likewise warrant review because the two courts reached conflicting results on an important First Amendment question. The Eleventh Circuit held that S.B. 7072's requirement to provide a "'thorough rationale'" for certain content-moderation decisions would "'chill protected speech'" by discouraging the "exercise of editorial judgment." *Moody* Pet. App. 64a-65a (brackets and citations omitted). The Fifth Circuit reached the opposite conclusion, holding that H.B. 20's even more burdensome requirement to provide an explanation and an appeal does not chill speech. *Paxton* Pet. App. 96a.

This Court should grant certiorari to resolve that conflict, which is rooted in the courts' conflicting views about whether the covered platforms' content-moderation activities are protected by the First Amendment at all. And as with the content-moderation provisions, the Court should review both the Florida and Texas laws so that it may consider any potentially relevant differences between their requirements.

B. On the merits of the individualized-explanation requirements, this Court should affirm the Eleventh Circuit and reverse the Fifth Circuit. Like the content-moderation provisions, the individualized-explanation requirements impose heavy burdens on the platforms'

expressive activity that the States have failed to justify. The laws compel platforms to provide an individualized explanation each time they exercise their editorial discretion by removing user content—in Florida, a "thorough rationale" for the action and "a precise and thorough explanation of how the * * * platform became aware" of the content in question, Fla. Stat. § 501.2041(3)(c) and (d); and in Texas, an explanation of "the reason the content was removed," Tex. Bus. & Com. Code Ann. § 120.103(a)(1). As the Eleventh Circuit explained, the sheer volume of content removal that the platforms undertake makes it impracticable for the businesses to comply with those mandates: "The targeted platforms remove millions of posts per day" under their content-moderation policies; "YouTube alone removed more than a billion comments in a single quarter of 2021." *Moody* Pet. App. 64a.

In defending the individualized-explanation requirements, the States and the Fifth Circuit have principally relied on their mistaken view that content moderation is not speech at all. See pp. 13-18, *supra*. They also assert that even if content moderation is protected speech, requiring individualized explanations is not unduly burdensome because the platforms already provide some notice and appeal procedures. *Moody* Pet. 27; *Paxton* Pet. App. 95a-96a. But the platforms have produced evidence that the voluntary processes they currently undertake are quite different from what the laws would require. They observe, for example, that neither Facebook nor YouTube offers the sort of detailed explanations that the Texas law contemplates, and that YouTube would have to expand its existing appeals process 100-fold to comply with the Texas requirement. *Paxton* Pet. 33. In any event, as the Eleventh

Circuit recognized, a voluntary process is very different from a state-imposed requirement backed by legal consequences, including up to $100,000 in damages per claim under the Florida law. *Moody* Pet. App. 64a.

III. NETCHOICE'S CHALLENGES TO THE GENERAL-DISCLOSURE PROVISIONS DO NOT WARRANT REVIEW

The courts of appeals agreed that NetChoice is unlikely to succeed in its facial pre-enforcement challenges to the general-disclosure requirements in S.B. 7072 and H.B. 20. NetChoice nonetheless contends (*Paxton* Pet. 28-32; *Moody* Cross-Pet. 28-34) that this Court should consider its challenges to those provisions. This Court should decline that invitation for multiple reasons.

First, the general-disclosure provisions have not been the focus of this litigation. The parties' briefs below devoted only a few pages to those provisions, and the courts of appeals did the same. See *Moody* Pet. App. 62a-64a; *Paxton* Pet. App. 91a-95a, 97a-98a. Perhaps for that reason, neither court addressed the principal argument that NetChoice presses in this Court—that the deferential standard articulated in *Zauderer* v. *Office of Disciplinary Council*, 471 U.S. 626 (1985), should apply only in "the context of correcting misleading advertising." *Moody* Cross-Pet. 30. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it should not take up issues that have received such limited attention in the lower courts.

Second, and relatedly, this Court's review of the general-disclosure provisions would be impaired by the pre-enforcement posture of these cases and the underdeveloped state of the present record. Among other things, it would be difficult to assess the burden

imposed by the general-disclosure provisions because there is no record of enforcement and because the meaning of some of those provisions remains uncertain. NetChoice observes, for example, that it does not know "whether [the covered] websites' current publicly posted editorial policies comply with [H.B. 20's] requirement to publish an 'acceptable use policy' that 'reasonably inform[s] users.'" *Paxton* Reply Br. 11 (quoting Tex. Bus. & Com. Code Ann. § 120.052(a) and (b)(1)) (third set of brackets in original).

Third, granting certiorari on the general-disclosure provisions would further complicate what would already be a complex process of merits briefing and argument. Review of the content-moderation and individualized-explanation provisions would itself require consideration of more than a half-dozen distinct provisions contained in two different state laws. If the Court took up the general-disclosure provisions as well, the total number of provisions at issue would be more than a dozen. And because each of the general-disclosure provisions imposes a distinct requirement, the Court's conclusions about the burdens and interests implicated by one provision would not necessarily carry over to the others; instead, a provision-by-provision analysis would likely be necessary.

Fourth, the lower courts' analysis of the general-disclosure provisions does not conflict with any decision of another court of appeals. NetChoice cites (*Moody* Cross-Pet. 33) the D.C. Circuit's decision in *National Association of Manufacturers* v. *SEC*, 800 F.3d 518 (2015), asserting that the D.C. Circuit has limited *Zauderer*'s application to cases involving advertising or point-of-sale product labeling. But the D.C. Circuit has rejected that understanding of its precedent, explaining

that it has "not so limited the [*Zauderer*] standard," and that it has instead applied that standard in other contexts, including "to court-mandated disclosures on websites." *American Hosp. Ass'n* v. *Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020). Nor is NetChoice correct in asserting (*Moody* Cross-Pet. 32-33) that the lower courts' application of *Zauderer* is at odds with *Comcast of Maine/New Hampshire, Inc.* v. *Mills*, 988 F.3d 607, 617 (1st Cir. 2021), and *Time Warner Entm't Co., L.P.* v. *FCC*, 56 F.3d 151, 181 (D.C. Cir. 1995) (per curiam), cert. denied, 516 U.S. 1112 (1996). Neither case involved a disclosure requirement or even cited *Zauderer*.

Finally, declining to review the general-disclosure provisions at this time would not prevent this Court from taking up some or all of those provisions if they prove to be constitutionally problematic. These cases come to the Court as facial pre-enforcement challenges in a preliminary-injunction posture. In declining to grant relief as to the general-disclosure provisions, the Fifth Circuit emphasized that the platforms "might have meritorious as-applied challenges," *Paxton* Pet. App. 98a, and the Eleventh Circuit noted that NetChoice may be able to substantiate even its facial challenge in further proceedings, *Moody* Pet. App. 64a. To the extent the disclosure provisions may raise issues warranting this Court's review, therefore, the Court can and should await a case where the record is better developed and the relevant issues have been fully aired in the lower courts.

IV. NETCHOICE'S VIEWPOINT-DISCRIMINATION CHALLENGES DO NOT WARRANT REVIEW

NetChoice also contends (*Paxton* Pet. 21-22; *Moody* Cross-Pet. 24-28) that this Court should take up its contentions that S.B. 7072 and H.B. 20 are invalid in their

entirety because they were enacted with a viewpoint-discriminatory purpose. Both courts of appeals rejected those contentions, and they do not warrant this Court's review.

NetChoice does not argue that the relevant holdings of the Fifth and Eleventh Circuits implicate a circuit conflict or otherwise satisfy this Court's traditional certiorari standards. Instead, NetChoice principally contends (*Paxton* Pet. 21-22; *Moody* Cross-Pet. 24-27) that the courts of appeals misapplied this Court's precedents to the Florida and Texas laws, and it asks the Court to reexamine the laws and their legislative records and draw the inference of viewpoint discrimination that the lower courts declined to draw.

This Court does not generally grant review to consider such case-specific and fact-intensive claims. And the present preliminary posture of these cases would make them particularly unsuitable vehicles for reviewing the viewpoint-discrimination issue because NetChoice's arguments turn in part on disputed questions about the reach of the challenged laws. NetChoice contends, for example, that S.B. 7072 and H.B 20 "target 'Big Tech,' while exempting smaller companies with a different perceived ideological bent." *Moody* Cross-Pet. 24; see *Paxton* Pet. 26. But in *Paxton*, there is a dispute as to which and how many platforms H.B. 20 reaches. Compare *Paxton* Pet. 6 (asserting the statute covers "a minimum" of six companies, some with multiple covered platforms) with *Paxton* Br. in Resp. 7 (asserting that "H.B. 20 covers only Facebook, YouTube, and Twitter").

NetChoice also asserts (*Moody* Cross-Pet. Reply 3) that this Court would have no choice but to consider the contention that the Florida law was enacted for

viewpoint-discriminatory purposes if it grants the State's petition in *Moody*, because NetChoice would be "free to raise [its] viewpoint-discrimination arguments as an alternative basis for affirming the decision below." That assertion contradicts precedent from this Court holding that, in the absence of a granted cross-petition, a respondent cannot advance an alternative argument for affirmance "[i]f the *rationale* of [the] argument would give the satisfied party more than the judgment below, even though the party is not asking for more." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.35, at 6-134 (11th ed. 2019) (citing cases); see, *e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013).

More fundamentally, this Court is not required to consider alternative arguments for affirmance and can use the terms of its grant of certiorari to identify the issues that warrant the Court's review. By denying the cross-petition in *Moody* and limiting the grant of certiorari in *Paxton* to questions one and two in this brief, the Court would ensure that the parties and amici focus their merits-stage briefs on the important legal questions that have divided the lower courts.

CONCLUSION

The petitions for a writ of certiorari in No. 22-277 and No. 22-555 should be granted, limited to the first and second questions presented on page i of this brief. The conditional cross-petition for a writ of certiorari in No. 22-393 should be denied.

Respectfully submitted.

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