Nos. 22-277, 22-555

IN THE
Supreme Court of the United States

ASHLEY MOODY, in her official capacity as Attorney General of Florida, et al.,
Petitioners,
v.
NETCHOICE, LLC; and Computer & Communications Industry Association,
Respondents.

NETCHOICE, LLC; and Computer & Communications Industry Association,
Petitioners,
v.
KEN PAXTON, in his official capacity as Attorney General of Texas,
Respondent.

On Writs of Certiorari to the U.S. Court of Appeals for the Fifth and Eleventh Circuits

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and civil liberties issues.[1]

EPIC regularly participates as *amicus* in this Court and other courts in cases concerning privacy rights, harmful data practices, and platform governance. *See, e.g.*, Br. of EPIC as Amicus Curiae, *Gonzalez v. Google*, 598 U.S. 617 (May 18, 2023); Br. of Epic et al. as Amici Curiae, *NetChoice, LLC v. Bonta*, No. 22-cv-8861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023).

[1] All parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

SUMMARY OF THE ARGUMENT

These cases concern a set of laws that would impose new restrictions and obligations on social media companies with respect to their hosting and ranking of user-generated content, as well as the design and operation of their platforms. The companies argue that all these regulations should be struck down under the First Amendment because every choice they make about how to present and arrange user-generated content is protected speech. This argument, if accepted, would create a new and far-reaching right for social media companies to be free from meaningful oversight and regulation of their business practices. Much of what social media companies do involves the presentation and arrangement of user-generated content. Most of these activities are not expressive, and so regulation of them does not implicate the First Amendment. Other choices about how to present or arrange user-generated content may be protected, but regulation of these activities does not always trigger heightened scrutiny and, in many cases, is consistent with the First Amendment.

The key to distinguishing regulations that unduly interfere with expressive activities from those that are permissible regulations of business conduct is the specific context of the regulated activity. Context distinguishes walking from marching, and it distinguishes sitting from engaging in a sit-in protest. The same is true for the hundreds of constitutive activities that social media companies engage in to select, edit, and arrange user-generated content to the public.

Social media companies engage in many different practices that dictate which user-generated content they carry and how it is arranged on their platforms. These practices fall into three major categories:

hosting content, ranking content, and designing the user interface and user experience of their platforms.

Content hosting refers to practices that determine which content will be allowed to exist on a company's platform. Companies' hosting decisions about user-generated content are usually driven by their content moderation policies and legal obligations. Moderation shapes the types of content and the viewpoints that users see on a social media company's platform. These companies promulgate content guidelines, establish community standards, and set other policies that they then implement by removing user-generated content that violates the policies. In many cases companies are required to remove specific content based on obligations imposed by copyright and privacy laws.

Content ranking refers to practices that determine which content a given user will see on their feed and in what order it will be arranged. A company's decisions about how to rank content are generally driven by business considerations such as maximizing the time a user spends on the platform as well as content moderation considerations. For instance, most social media companies invest heavily in developing recommendation algorithms to rank user-generated content. These tools mine user behavioral data to predict which mixture of user-generated content will maximize the amount of time and attention users spend on the platform. These systems are largely, though not entirely, content-agnostic. Companies also incorporate content moderation considerations into their content rankings. They use automated processes to flag and "downrank," or reduce the reach of, content that may exist on the "borderline" of what their policies accept. This includes spam, clickbait, and misinformation.

The way that a social media company designs and organizes the user interfaces on its platform plays a significant role in how users experience and interact with the system. Again, these companies generally design their platforms to maximize the amount of time a user will spend on them. This can range from anodyne practices such as making the view aesthetically pleasing and functional to more aggressive practices such as intentionally modeling platform features to induce habitual use (similar to the way casinos design slot machines).

Some regulations of social media companies' hosting decisions could be analogous to the content-based must-carry laws that this Court has considered in previous cases. Must-carry laws force communications platforms to carry third-party speech. Generally, the Court has determined that content-based must-carry laws trigger heightened scrutiny unless the regulated medium has special characteristics that justify greater governmental intervention. Some of the provisions in the Florida and Texas laws could impose content-based must-carry provisions on social media companies. Some form of heightened scrutiny would likely be appropriate for these provisions, and the level would depend on whether this Court believes there are reasons why regulations of social media companies should receive a lower level of scrutiny along the lines of cable operators and broadcasters.

But many other regulations of social media companies' activities do not impose content-based restrictions on their right to free expression and should not automatically be subject to heightened scrutiny. This Court has not addressed regulations of private entities' content ranking or arrangement decisions in its communications law precedents. Regulations of

some of these activities, such as harmful design practices, do not implicate the companies' free expression rights at all. And even those that could have an indirect impact on free expression should receive intermediate scrutiny at most.

Ruling that any regulation of a social media company's content hosting, content ranking, and design practices impermissibly limits that company's right to free expression would make it nearly impossible to regulate harmful business practices online. Many laws, including copyright, privacy, and consumer protection laws, impact how social media companies host, rank, and design their platforms. The Court should avoid sweeping statements about such regulations in this case, which could be weaponized against long-standing regulatory regimes and new regulations that serve important consumer protection purposes. Many social media companies use harmful techniques, including surveillance and addictive design, to maximize user engagement. An overly broad First Amendment ruling in this case could erect a constitutional barrier to much-needed regulations of this non-expressive conduct that is, at most, only incidentally related to speech.

ARGUMENT

I. When applying the First Amendment to social media regulations, the Court should consider the context of the specific activity being regulated.

This Court has long recognized that the line between speech and conduct is contextual. "[T]he character of every act depends upon the circumstances in which it is done." *See Schenck v. United States*, 249 U.S. 47, 52 (1919). The Court would never rule, for

instance, that "walking" is protected speech generally, but it has recognized that walking in the context of a parade can be a form of protected speech. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995). First Amendment law is sensitive to context: In some cases, regulations that impact private parties' decisions about whether to present third-party speech trigger heightened scrutiny. *See, e.g.*, *Hurley*, 515 U.S. at 574; *Reno v. ACLU*, 521 U.S. 844, 879 (1997); *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion) [hereinafter "*PG&E*"]; *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974). In other cases, regulations receive lesser scrutiny or even rational basis review. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 61 (2006); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 742 (1978). The Court should exercise the same care in this case when parsing whether and to what extent the regulation of social media companies' activities is permissible.

In this case, NetChoice has urged the Court to issue the digital equivalent of a holding that all walking is protected speech. NetChoice asserts "[t]he First Amendment protects the right of private companies to exercise editorial discretion over what speech to disseminate and how" and that these activities are the same as "a private newspaper's decision about what editorials to publish or what stories to make front-page news." Resp'ts Br. on Pet. For Writ of Cert. 3, *Moody v. NetChoice, LLC*; *see also* Pet'rs Br. 5 *NetChoice, LLC v. Paxton* ("*Everything* viewers see is arranged according to websites' *editorial* policies, which reflect the community each website seeks to foster and each

website's value judgments about what expression is worthy of presentation.") (emphasis added). In other words, by declaring that everything users see is the result of editorial, viewpoint-based policies, NetChoice casts each content-hosting and content-arrangement decision as akin to a newspaper's exercise of editorial discretion. This framing is dangerously overbroad. Social media companies, in reality, engage in a wide range of activities when they host and arrange content. Some regulations of these activities could implicate the companies' free expression rights, but most do not. Many of these activities are properly the subject of neutral and generally applicable commercial regulations, including privacy, consumer protection, nondiscrimination, and other laws.

"Arranging" and "disseminating" user-generated content are vague concepts that blur the lines between many different social media company activities. There are more precise categories for these actions: hosting content, ranking content, and designing the user interface and experience ("UI/UX"). Hosting content comprises all the actions and policies that make content available on a social media platform. Ranking content refers to the actions and policies that dictate how specific pieces of content are shown to specific users in a specific order, whether they appear in different users' feeds or search results. And UI/UX design sets the visual and functional elements of a platform that shape user behavior. These three functions combine to determine what users see when they visit a platform.

Content Hosting Activities

Social media companies generally seek to host as much content as possible on their platforms because content drives views and subscribers, which are essential to the companies' profitability. These companies

design their systems to facilitate users' uploading content quickly and in large volumes. Rather than attempt to pre-screen user posts, the companies focus instead on setting and enforcing content moderation policies, community standards, security guidelines, and other rules. The two main drivers of content-hosting decisions are content moderation concerns and legal obligations.

Social media companies make decisions about which user-generated content to host based partially on content moderation considerations. Content moderation generally refers to a company's removal of content subject to its policies, such as content guidelines and community standards. For example, X, which was formerly known as Twitter, prohibits "hateful" posts because the company's content policy states that it is "committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized." *Hateful Conduct*, X.com.[2] Other large social media companies have similar policies. *See, e.g.*, *Hate Speech Policy*, YouTube;[3] *Transparency Center*, Meta.[4] One way that companies enforce these policies is to remove content that violates them. Potentially violative content is flagged by users, employees, or automated systems and removed by the employees or automated systems. Companies may also ban users who repeatedly or flagrantly violate their policies; this can be

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[2] https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last accessed Nov. 17, 2023).

[3] https://support.google.com/youtube/answer/2801939 (last accessed Nov. 17, 2023).

[4] https://transparency.fb.com/policies/community-standards/ (last accessed Nov. 17, 2023).

a deterrent to bad behavior and a prophylactic measure against future violations.

Social media companies also remove user-generated content to comply with their legal obligations. Companies have duties under copyright, privacy, and criminal laws to not host specific types of user-generated content. For example, companies may have an obligation to remove material if a party makes a legitimate claim that it violates their copyright. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A).

Content Ranking Activities

Even when a social media company does not remove user-generated content from its platform, it can still take a wide range of actions that impact the reach of that content. Not all hosted content is created equal, and platforms are constantly ranking and allocating content by determining whether and in what order it will show up in a given user's feed. In a social media ecosystem where there are billions of pieces of content being uploaded and viewed every day, the ranking of a piece of content can determine whether any meaningful number of users see or interact with it. Companies' content-ranking decisions are primarily driven by profit maximization and content moderation concerns, and many of the ranking decisions they make are content-agnostic.

Companies primarily rank content to maximize the amount of time and attention users spend on their platforms. This drives growth and advertising revenue, which is essential to the business model of these companies. The core tool most social media companies use to rank content is a recommendation algorithm. *See* Arvind Narayanan, Knight First Amendment Institute, *Understanding Social Media Recommendation*

Algorithms 18 (Mar. 9, 2023).[5] The recommendation algorithm is essentially a complicated mathematical formula that answers the question, "How did users similar to this user engage with posts similar to this post?" *Id.* To answer this question, recommendation algorithms use what the social media industry calls "engagement" as the primary variable that determines how they rank content. "Engagement" in this context has a distinct connotation from saying in other contexts that something is "engaging," as in interesting or relevant. Social media engagement is a measurement of user behavior, usually how often a user visits the website, how long they use it, and how much they interact with each piece of content, such as clicking on, commenting on, and sharing it. *Id.* at 18–19. Being engaged on a platform is therefore a description of behavior, not mental state—it is not the same as being informed, happy, or interested. Companies' main goal in deploying recommendation algorithms is to rank content in a way that maximizes the user behavior that engagement measures. *Id.*

An important corollary is that recommendation algorithms, focusing on engagement, rank content primarily based on users' previous behavior with respect to that content, not necessarily based on an analysis of what that content is about. For instance, when deciding whether two pieces of content are similar, the strongest signal is how *similar users* have engaged with that content, not any nuanced evaluation of what the content is about. *Id.* at 23-24. Companies sometimes also incorporate analyses of content in the recommendation algorithms, but "[t]he most important

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[5] https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms.

fact to keep in mind is that the behavioral record is the fuel of the recommendation engine." *Id.* at 24.

Companies also rank content pursuant to their content moderation aims. When companies downrank content or "shadowban" users as part of their content moderation activities, they have a similar aim as when they remove content or ban users: enforcing policies about content and viewpoint that shape a platform's nature. *See* Tarleton Gillespie, *Do Not Recommend? Reduction as a Form of Content Moderation*, Social Media & Society 1, 1–2 (2022). But there are also meaningful differences between content removal and downranking. Downranking is usually performed algorithmically. For instance, companies may encode their recommendation algorithm to attempt to recognize and automatically downrank hate speech. *See* Narayanan, *supra*, at 24. Downranking also is often a tool used to enforce vague or opaque policies as opposed to concrete, public content guidelines or community standards. *See* Gillespie, *supra*, at 8–9. For example, downranking is the main tool used for what social media companies call "borderline" content. *Id.* at 3. This refers to content a social media company "knows" is bad but does not know how to consistently and clearly define, such as conspiracies, misinformation, or clickbait. *Id.* at 4–6. Downranked content and the content of people who are shadowbanned is still hosted on the platform, and users may still find it by searching for it or looking at a user's personal page, but they are less likely to show up prominently in a feed or search results.

Platform Design Activities

Social media companies use UI/UX design to shape how their platform looks and how users interact with it. These design choices have a significant impact

on user behavior and can dictate, for example, whether or not most users spend more or less time interacting with different parts of the platform. Companies' primary goal in UI/UX design, similar to their goal in content ranking, is maximizing user engagement and the advertising revenue and growth that results. These UI/UX design decisions are almost always content agnostic even as they shape how and what the user sees on the platform.

Some UI/UX design decisions are relatively anodyne, such as creating an attractive and easy-to-use interface. Others are more aggressive, using practices derived from psychology to nudge users into doing what a company wants. *See* Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 Fordham L. Rev. 129, 141–42 (2019). For instance, the infinite scroll is a feature that allows users to access an endless stream of content without having to click on a button or a link. Prior to the popularization of infinite scroll, companies organized content on discrete pages, and users had to click on buttons or links to navigate between them. Vinit Joshi, *The Problem with Infinite Scrolling Feeds*, Medium (July 18, 2017).[6] Companies realized that pagination reduced engagement because changing pages functioned as a natural pause point during which users could decide whether or not they should continue using the platform. *See* Langvardt, *supra*, at 159. The infinite scroll reduces these moments for contemplation, increasing the time users spend on the platform. *Id.* at 133. For other companies such as YouTube, autoplaying the next video before a user has a chance to exit the platform serves a similar function as the infinite scroll. *See* Alex Hern, *U.S. Could Ban*

[6] https://blog.newtonhq.com/the-problem-with-infinite-scrolling-feeds-e3d1aad2c078 (last accessed Dec. 4, 2023).

"Addictive" Autoplay Videos and Infinite Scrolling Online, Guardian (July 31, 2019).[7] Some companies have users "swipe down" to refresh their feeds and inject an artificial pause before displaying new content, a design consciously modeled off of slot machines to increase anticipation and dopamine release. *See* Langvardt, *supra*, at 141. Social media company executives and whistleblowers have likened their websites to tobacco and alcohol and have explained how they personally designed UI/UX interfaces to be as addictive as possible in order to increase engagement. *Id.* at 132.

These three categories of social media companies' activities—content hosting, ranking, and UI/UX design—involve a wide range of content-sensitive and content-agnostic actions that all fall within the broad category of "disseminating" and "arranging" user-generated content. Understanding the specific practice being regulated should help the Court determine whether a law is infringing on a company's speech rights.

II. Whether a social media regulation triggers First Amendment scrutiny depends on whether it burdens speech, whether it is content-neutral, and whether social media companies are more akin to newspapers or broadcasters.

Regulations of social media companies' hosting, ranking, and UI/UX design choices should not automatically trigger heightened First Amendment scrutiny. Instead, the Court should evaluate the

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[7] https://www.theguardian.com/media/2019/jul/31/us-could-ban-addictive-autoplay-videos-and-infinite-scrolling-online (last accessed Dec. 4, 2023).

regulations with sensitivity to whether they actually impose a must-carry requirement, whether they are content-neutral, and whether the characteristics of the regulated medium—social media platforms—supports intermediate or some higher level of scrutiny. *See Reno v. ACLU*, 521 U.S. 844 (1997) (applying heightened scrutiny to a criminal prohibition on websites' distribution of indecent content to minors when the internet was a nascent communications platform); *Turner Broadcasting v. F.C.C.*, 512 U.S. 622, 655–57 (1994) (distinguishing the content-neutral must carry requirements imposed on cable operators from the content-based must carry requirements imposed on newspapers in *Tornillo*); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.")

A. Some regulations of social media company activities impose content-based must-carry requirements and thus resemble laws that have traditionally triggered heightened scrutiny.

When a law prevents companies from removing content or banning users pursuant to their content policies, it should likely be treated as a content-based must-carry law that triggers a heightened level of First Amendment scrutiny. First, such laws do regulate speech. It is hard to distinguish a social media company's removal of content pursuant to their content policies from other private entities' decisions about whether to carry third-party speech. Social media companies explain the types and viewpoints of user-generated content that they are willing to carry in their content guidelines and then enforce those guidelines through their content moderation

activities. And courts have generally applied heightened scrutiny to content-based must-carry laws.

Many provisions of the Florida and Texas laws at issue here would likely operate similarly to other must-carry laws. For example, the Texas bill defines "censor" to include typical content moderation techniques such as "block[ing], ban[ning], [and] remov[ing]" user-generated content, H.B. 20 § 143A.001(1), and prevents companies from engaging in these activities based on the "the viewpoint of a user," H.B. 20 § 143A.002(a)(1). This prohibition would likely limit the ability of social media companies to remove content based on their policies.

Because these laws would likely impose content-based must-carry provisions, the Court should carefully consider whether to apply heightened or intermediate scrutiny to them based on the nature of social media as a communicative medium.

B. Some regulations of social media company activities should not trigger heightened scrutiny either because they do not target speech, because they are not must-carry laws, or because they are content-neutral regulations that only incidentally impact speech.

Many regulations that impact how social media companies disseminate and arrange user-generated content should receive rational basis review or intermediate First Amendment scrutiny. These regulations are not equivalent to content-based must-carry laws, and so cases such as *Reno*, *Tornillo*, *Hurley*, *PG&E*, and *Turner* do not dictate that the Court apply heightened scrutiny to these types of regulations.

Social media companies' content-agnostic, engagement-maximizing activities are not expressive and in many cases can cause significant harm to users. Regulations of these business practices should be subject to rational basis review or, at most, intermediate scrutiny to the extent they impose incidental burdens on speech.

For instance, regulations of companies' addictive design practices should not trigger heightened scrutiny. Social media companies engage in addictive design practices to maximize users' engagement with their platforms. *See* Langvardt, *supra*, at 131. Social media companies deploy addictive designs without any reference to the meaning of the content they are arranging or what message it sends. When a company chooses to display content in a never-ending feed instead of a succession of pages, that choice does not change the meaning of any user-generated content or the amount hosted. Nor can these practices be said to reflect a company's own expression. What message does it send when a company implements "autoplay," which automatically plays one video after another instead of allowing a user to decide whether and what they want to watch next? Just because addictive design practices impact the arrangement of user-generated content does not mean that regulating those practices infringes on the free expression rights of the platforms.

The argument that because "[e]verything viewers see is arranged according to websites' editorial policies," Pet'rs Br. 5, *NetChoice, LLC v. Paxton*, these companies should be free from regulation of these activities should fail for two reasons. First, none of the cases NetChoice cites to support the conclusion that regulations of content ranking activities deserve

heightened scrutiny. Not a single line in *Tornillo*, *Hurley*, *PG&E*, or *Turner* addresses how private entities arrange, prioritize, rank, or order content. Those cases all addressed must-carry laws, not content arrangement laws. The closest the Court got to considering content arrangement was a reference in dicta in *Tornillo* that "the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment." 418 U.S. at 258. But this comment was not about regulating the arrangement of content: it simply restates the Court's earlier explanation that must-carry laws may impact the "size" of a newspaper by forcing it to increase its size to make capacity for the additional materials. *Id.* at 256–57. Unlike must-carry laws, regulations of content arrangement activities by social media companies do not force those companies to carry speech they do not wish to.

Second, the cases imposing heightened scrutiny recognized a sensitivity to how carrying third-party materials would impact a private entity's own message because in entities (i.e. newspapers, parade operators, and utility companies) were engaged in direct speech. The same is not true for social media companies using addictive design or engagement-maximizing recommendation algorithms. Addictive design is obviously content-agnostic—it concerns a website's functionality and appearance, not the substance of any user-generated content. And recommendation algorithms, as described above, do not "understand" user-generated content in any material way, nor do they express anything through the content they rank. Social media companies are not directly speaking when they host user-generated content, and they are more akin to the cable companies in *Turner* than the newspaper in *Tornillo*.

To the extent that some companies encode recommendation algorithms to consider content-moderation goals, such as identifying and removing hate speech, *see* Narayanan, *supra*, at 24, a regulation preventing that process may trigger heightened scrutiny by imposing another type of must-carry law. But that should not mean protection for *all* activities related to content recommendation algorithms.

To the extent that any of these laws burden companies' protected speech, this Court should reconsider some of its pronouncements about the internet issued in *Reno*. In that case, the Court rejected calls to subject internet regulations to intermediate scrutiny. It noted that the "[i]nternet is not as 'invasive' as radio or television" and that "[u]sers seldom encounter content by accident." *Reno*, 521 U.S. at 868. It also noted that channels for speech on the internet were numerous, unlike the scarce number of wavelength spectra that carry television and radio broadcasts. *Id.* at 870. Some of these facts have changed over the past 26 years, especially with the emergence and consolidation of social media platforms. Since then, the Court has recognized that internet-connected phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy," *Riley v. California*, 573 U.S. 373, 385 (2014), and many social media websites, especially ones such as TikTok and YouTube, are designed to make users encounter content by accident through features like algorithmic feeds and autoplay. And while the *Reno* Court noted that, unlike broadcast waves, the fora for internet communications were not "scarce," that is not entirely true today. *Reno*, 521 U.S. at 870. Control over internet communications has consolidated significantly

since the heyday of internet blogs and chatrooms in 1997. The Court should consider these factors when issuing its decision about the level of scrutiny to apply to social media regulations.

III. An overbroad ruling that social media companies exercise editorial judgment any time they disseminate and arrange user-generated content would prevent legislatures from regulating internet companies' harmful non-expressive activities.

However the Court rules on the challenged provisions of the Texas and Florida regulations, its decision should recognize that generally applicable regulations of business conduct do not trigger heightened scrutiny, even when they directly or incidentally impact whether social media companies host certain content and how they display it. Marketplace regulations, the copyright system, and privacy laws such as the Fair Credit Reporting Act impose content-based restrictions on how and whether companies may carry third-party content without triggering strict scrutiny or violating the First Amendment.

Many business regulations impact how internet companies present user-generated content without triggering heightened scrutiny. For example, some cities have passed ordinances regulating online home rental booking companies such as Airbnb and HomeAway. *See, e.g.*, *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 680 (9th Cir. 2019). These laws require that internet home rental companies not book transactions for properties that are not pre-registered with the city. *Id.* The effect of these laws, as the companies warned, would be to incentivize the companies to remove user-generated content that they otherwise would not remove. *Id.* at 683, 686. If any content-based

law that interfered with companies' content-hosting decisions automatically triggered strict scrutiny, then these ordinances would plainly trigger strict scrutiny and violate the First Amendment. But in this case, like many others, the court held that the law did not trigger First Amendment scrutiny because it targeted non-expressive activities and had only incidental impacts on speech. *Id.* at 686; *see also Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) ("[S]ubjecting every incidental impact on speech to First Amendment scrutiny 'would lead to the absurd result that any government action that had some conceivable speech inhibiting consequences . . . would require analysis under the First Amendment.'" (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring))).

Similarly, copyright law restricts the user-generated materials that social media companies host without triggering heightened scrutiny. Copyright law clearly restricts speech by empowering copyright owners to enjoin others from speaking or writing. Because it punishes the republication of copyright-infringing speech, it also punishes social media companies for hosting infringing third-party speech, clearly interfering with their editorial discretion. But in *Eldred v. Ashcroft*, the Court explained that "to the extent" a speaker's right to carry third-party content "raise[s] First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them." 537 U.S. 186, 221 (2003). Copyright law may be exceptional in some ways, for example, the fact that "[t]he Copyright Clause and First Amendment were adopted close in time." *Id.* at 219. But that was only one factor found to make copyright law consonant with the First Amendment. The others were "built-in First Amendment accommodations" that other content-

based laws could presumably have. For example, copyright law only protects expression, not ideas, enabling ideas themselves to spread without restriction. *Id.* And the "fair use" defense allows the public to use the protected expression itself in some circumstances, such as criticism, news reporting, and research. *Id.* at 219–20.

Privacy laws also directly and indirectly restrict companies' user-generated content presentation decisions without violating the First Amendment. This is a particularly active regulatory area as many states have passed or are considering passing consumer privacy laws in the last few years. As of September 2023, 13 states have passed new comprehensive privacy laws, *see* LewisRice, *U.S. State Privacy Laws*,[8] and many more are actively considering similar legislative proposals. Americans overwhelmingly support the passage of these new privacy laws and demand better regulation of how businesses collect and process their personal data. *See* Colleen McClain *et al.*, Pew Resch. Ctr., *How Americans View Data Privacy* 6 (Oct. 18, 2023).[9] Some privacy laws could conceivably trigger First Amendment scrutiny in narrow as-applied situations, such as if they are used to inhibit the spread of information about matters of public concern. *See Fla. Star v. B.J.F.*,491 U.S. 524, 540–41 (1989). But if the Court were to adopt a maximalist reading that every decision a social media company makes as to the arrangement and dissemination of user-generated content is editorial judgment, every privacy law would

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[8] https://www.lewisrice.com/u-s-state-privacy-laws/ (last visited Dec. 5, 2023).

[9] https://www.pewresearch.org/internet/2023/10/18/views-of-data-privacy-risks-personal-data-and-digital-privacy-laws/.

directly or indirectly burden speech, and many would be impossible to enforce. Indeed, NetChoice and other technology company actors have already challenged state privacy laws on these exact grounds. *See Netchoice, LLC v. Bonta*, No. 22-cv-8861-BLF, 2023 WL 6135551 at *6–7, 9–10 (N.D. Cal. Sept. 18, 2023) (arguing that a privacy law triggered strict scrutiny, in part, by impacting how companies disseminate information). Rather than make such a far-reaching pronouncement, the Court's ruling should remain sensitive to a point it has repeatedly underscored: "clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 533; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 574 (2011) ("This is not to say that all privacy measures must avoid content-based rules."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) ("Rather than address the broader question whether . . . the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents . . . .").

A variety of other important, developing regulatory regimes would all be rendered nearly impossible if the Court determines that companies always use editorial judgment when deciding whether and how to disseminate and arrange user-generated content. Legislators must be able to address the ways companies maximize engagement, implement addictive design practices, and violate users' privacy without having to pass heightened scrutiny for every one of these regulations.

Sensitivity to context when determining the contours of the First Amendment is not only this

Court's established practice, but an especially important one given the quickly moving technological and regulatory landscape. This Court should reject overbroad arguments about the scope of protected speech and ensure that its ruling does not cause undue damage to important internet regulations.

CONCLUSION

The Court should narrowly scope its ruling in this case to avoid impeding the necessary oversight and regulation of online business practices and should consider the unique context of social media platforms when evaluating the First Amendment claims at issue.

Respectfully submitted,

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