Nos. 22-277 and 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 United States Courts Of Appeals For The Fifth And Eleventh Circuits

BRIEF AMICUS CURIAE OF BLUESKY, A PUBLIC BENEFIT CORPORATION, M. CHRIS RILEY, AN INDIVIDUAL, AND FLOOR64, INC. D/B/A THE COPIA INSTITUTE, IN SUPPORT OF NETCHOICE AND CCIA

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INTEREST OF AMICI CURIAE[1]

The laws at issue in these cases target Internet platforms. Amici are all platform operators, as well as platform users and innovators of platform technology. Although amici vary in certain ways – for instance, some are companies while others are individual people – each stands to be harmed if the Florida or Texas laws are allowed to go into effect. In some cases they will be harmed in how the laws would directly target them, and in some the harm is indirect. But in all cases amici will be harmed because targeting *any* platforms with laws like these inevitably harms them all, both through their own terms and by virtue of the fact that if these laws are permitted to go into effect it will open the floodgates to regulation even more debilitating to their rights of free expression, their practical ability to facilitate the expression of others, and the ability of users to control their own expressive experiences online.

Amicus Bluesky PBC

Bluesky PBC ("Bluesky") is a public benefit corporation providing a new, scalable microblogging[2] platform available to users worldwide at https://bsky.app/.[3]

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[1] No counsel for any party authored this brief in whole or in part. Amici and their counsel authored this brief in its entirety. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* https://en.wikipedia.org/wiki/Microblogging.

[3] Bluesky's platform is accessible to users via a provided web interface and phone app, as well as interfaces developed by third parties, such as https://deck.blue/, which connect to the platform

In addition to providing the public an alternative to Twitter[4] it is also developing the underlying Authenticated Transfer (AT) Protocol technology, along with complementary software-based tools, that others can employ to provide their own microblogging platforms to users. Among its features the AT Protocol technology allows these separately-administered platforms to "federate," or interconnect. Federation means that users can publish their thoughts without being dependent on any particular platform provider to help their expression reach readers throughout the world. Not only can they easily reach users on other platforms, but they can also freely migrate from one platform provider to another whose site administration practices may better suit their needs without having to leave behind what they have already published.

The company is additionally developing its own toolset to help those who administer platforms using the AT Protocol best cultivate and care for their user communities by assisting with moderation and

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via an API. While in beta status the bsky.app platform is available to users on an invite-only basis but currently has more than two million users, with nearly as many on a waitlist to sign up.

[4] Twitter is a prototypical example of a microblogging platform, but, as this brief will explain, not the only example. Although Bluesky began with an investment from Twitter, it has long been operated separately and today is a financially independent entity. *See* https://blueskyweb.xyz/blog/7-05-2023-business-plan.

curation,[5] verification,[6] and access control.[7] In addition, Bluesky has designed its technology to allow third parties to develop their own tools.[8] Some of these tools can employ algorithmic technology to help both administrators and even users themselves make their own moderation decisions. It is a priority of Bluesky to ensure that its technology allows for these decisions to empower users so that everyone can have the platform experience most appropriate for them.[9]

Laws such as Florida's and Texas's interfere with this platform architecture, as well as Bluesky's ability to administer its own site, particularly as it grows, by imposing constraints on how sites can be administered and, moreover, how users can customize them, regardless of whether these constraints suit administrators' expressive needs or those of their users. Furthermore, even if any particular site using the AT Protocol may, at least at the outset, escape the reach of these laws today, they may not escape their reach as they grow, or the reach of whatever laws are next to get put on the

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[5] *See* https://blueskyweb.xyz/blog/4-13-2023-moderation.

[6] *See*, *e.g.*, https://blueskyweb.xyz/blog/4-28-2023-domain-handle-tutorial.

[7] *See* Matthew Lane, *How Bluesky's Invite Tree Could Become A Tool To Create Better Social Norms Online*, TECHDIRT (May 5, 2023) https://www.techdirt.com/2023/05/05/how-blueskys-invite-tree-could-become-a-tool-to-create-better-social-norms-online/.

[8] *See* https://atproto.com/blog/feature-skyfeed.

[9] Chris Stokel-Walker, *Bluesky's Custom Algorithms Could Be the Future of Social Media*, WIRED (Jun. 3, 2023), https://www.wired.com/story/bluesky-my-feeds-custom-algorithms/.

books. If these Florida and Texas laws are not found unconstitutional it will open the door to other laws even more debilitating to the expressive interests of Bluesky itself, any other AT Protocol site administrator, or any of their users seeking to use a microblogging platform to facilitate their own expression.

Amicus M. Chris Riley

Amicus M. Chris Riley[10] is an individual who runs his own social media platform at https://techpolicy.social/.[11] The platform is one of thousands[12] of Mastodon[13] instances, a type of microblogging server software that, like Bluesky's, provides users with a social media experience roughly akin to Twitter but distributed across independently-run servers that interconnect via an open protocol, rather than within a closed proprietary service like Twitter itself. Although there are similarities with the AT Protocol being developed by Bluesky,

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[10] Riley is a distinguished research fellow at the Annenberg Public Policy Center at the University of Pennsylvania and the executive director of the Data Transfer Initiative. Previously he was a Senior Fellow in Internet Governance at the R Street Institute, Director of Public Policy at Mozilla, and a former internet freedom program lead at the U.S. Department of State. He holds a Ph.D. in computer science from Johns Hopkins University and a J.D. from Yale Law School. He submits this brief in his individual capacity and not on behalf of any employer, past or present.

[11] Riley's Mastodon instance is accessible to users via a web interface supported by the server software, as well as interfaces and phone apps developed by third parties, such as https://tusky.app/, which connect to the platform via an API.

[12] *See* https://joinmastodon.org/servers.

[13] *See* https://en.wikipedia.org/wiki/Mastodon_(social_network).

Mastodon uses a separate, competing protocol called ActivityPub[14] that offers users and administrators certain features not necessarily shared by Bluesky's.[15]

Riley administers this platform for the benefit of others, including his colleagues in the technology policy space, to provide them with an alternative to commercial social networks by allowing them to have accounts through which they can engage in their own microblogging. As users of his platform they can also interact with others' expression as well, both on his own platform, where Riley moderates his community of users, or on other Mastodon servers elsewhere on the Internet.

If laws like Florida's and Texas's could reach him, however, and either force Riley to administer his platform in certain ways, or refrain from administering it as he thinks best serves himself or his users, by creating liability if he does not administer his service as the law requires, then he would not be able to provide the service his Mastodon instance offers his user community. This community would now have fewer options for platforms to use to speak online, leaving chilled both his expressive interests and those of his users.

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[14] *See* https://www.w3.org/TR/activitypub/.

[15] *See* https://atproto.com/guides/faq#why-not-use-activitypub for some differences between the protocols.

Amicus Copia Institute

Amicus Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for 25 years.[16] In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression and platform liability – issues that are at the heart of this matter. The site often receives more than a million page views per month and provides its own platform to solicit what has amounted to nearly two million reader comments, which itself is user expression that advances discovery and discussion around these topics. The company then uses other Internet platforms of various types to promote its own expression and engage with its audiences.

As a think tank the Copia Institute also produces evidence-driven white papers examining the underpinnings of tech policy. Of particular note is the *Protocols, Not Platforms: A Technological Approach to Free Speech* paper[17] it authored, which led to the original

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[16] Its founder and owner Michael Masnick was recently profiled in the New York Times. Kashmir Hill, *An Internet Veteran's Guide to Not Being Scared of Technology*, NEW YORK TIMES (Jul. 29, 2023), https://www.nytimes.com/2023/07/29/technology/mike-masnick-techdirt-internet-future.html.

[17] Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMENDMENT INSTITUTE (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech.

investment in Bluesky,[18] and which set out a roadmap for a future where there could be more protocol-based platforms like Mastodon and Bluesky's available for users to speak with, instead of a world where a few companies could control all the platform outlets. The Copia Institute also develops interactive games such as "Moderator Mayhem" and "Trust and Safety Tycoon,"[19] which allows players to experience the difficulties of effective platform moderation given various competing pressures that typically bear on the site management experience. And it produces other advocacy instruments as well, such as amicus briefs[20] and regulatory comments, all of which are designed to educate lawmakers, courts, and other regulators – as well as innovators, entrepreneurs, and the public – on these subjects, with the goal of influencing good policy that promotes and sustains innovation and expression.

As an enterprise whose business is built around engaging in expressive conduct the laws implicated by this litigation are highly relevant to its own endeavors. If allowed to stand they will impact its business and ability to engage with audiences, both on its own systems and via other platforms. It also threatens the future the Copia Institute envisioned where there could

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[18] Mike Masnick, *Twitter Makes A Bet On Protocols Over Platforms*, TECHDIRT (December 11, 2019), https://www.techdirt.com/2019/12/11/twitter-makes-bet-protocols-over-platforms/

[19] *See*, *e.g.*, https://en.wikipedia.org/wiki/Moderator_Mayhem.

[20] *See*, *e.g.*, Brief Amicus Curiae of the Copia Institute et al., *Gonzalez v. Google*, 143 S.Ct. 1191 (2023) (No. 21-1333); Brief Amicus Curiae of the Copia Institute, *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 143 S.Ct. 1258 (2023) (No. 21-869).

be more independently-run platforms that better afford users and administrators like Bluesky and Riley the opportunity to vindicate their own expressive values.

SUMMARY OF ARGUMENT

This litigation is about more than just the Florida or Texas laws. Indeed, they are each direct assaults on free expression that require this Court's repudiation. But the stakes extend beyond the particular harms threatened by these two laws. They are but canaries; amici write because there is a full aviary of looming constitutional harm that will result if this Court allows a government entity to attempt to control online expression via regulatory pressure on the platforms enabling it, preventing a future where more platforms, and thus more expression, can exist.

ARGUMENT

I. Amici, their users, and others similarly situated, exemplify how the Florida and Texas laws attack the First Amendment.

The details of the Florida and Texas laws vary. But they both operate by placing demands on anyone providing platform services to facilitate others' speech *because* they exist to facilitate others' speech. Both Florida and Texas object to how platforms have performed that service and so passed regulations that

would force them to do it differently in order to produce results more in keeping with their preference over what sort of user expression should be fostered online and what sort of user expression should be suppressed.

But, as amici themselves illustrate, when governments try to take over how platforms moderate their users' protected expression it offends the First Amendment both directly and indirectly. It does so directly by attacking the discretion platforms have, and must be able to have, to choose what speakers and speech to facilitate on their platforms, subordinating their preferences for the preference of the government. And it does so indirectly by depleting the ecosystem of the platforms all speakers need for them to be able to express themselves online at all, including via the more federated, distributed, and alternative systems that amici are developing that give users greater control over their online experience as speakers and readers.

This ecosystem of platforms is necessary in order for there to be meaningful choices in what expression Internet users experience online. Platform choice, and the customization algorithmic choice enables, are what helps realize the expression-promoting value of the Internet and ensures it captures a diversity of expression by putting the choices of what expression to be exposed to in the hands of users. It is not for the government to take away this choice, creating a platform or algorithmic monoculture, which is what the Florida and Texas laws threaten.

a. The Florida and Texas laws directly attack the First Amendment rights of platforms.

As NetChoice and CCIA correctly argue in their briefs, the First Amendment protects how platform providers administer their platforms, including by choosing what speech to facilitate and what speech to moderate, as well as how and why. The experience of amici illustrates how the First Amendment also *must* protect these decisions, and how laws like Florida's and Texas's violate that constitutional protection.

i. The laws attack amicus Copia Institute.

In the case of amicus Copia Institute, its Techdirt site allows reader comments on its articles, which makes it a platform provider helping to facilitate others' expression. These comments add to the richness of the discourse found on its pages, and by hosting this user expression the Copia Institute can build a dialog around its ideas. The comments also often help the Copia Institute's own expression be more valuable, with story tips, error checking, and other meaningful feedback provided by the reader community.[21]

To keep the discussion in the comments meaningful, the Copia Institute uses a system of moderation. It is a community-driven system, where the reader

[21] In fact, so productive is the Techdirt comment section that the Copia Institute has even hired onto staff someone who had previously been a regular contributor to the discussion there.

community can affect what appears on Techdirt's pages in several ways. One way is through "boosting" comments, and one source of revenue for the Copia Institute is derived from people purchasing credits to be put towards this boosting. Meanwhile, all readers can rate comments as insightful or funny, and for many years Techdirt has published weekly summaries highlighting the most insightful or humorous comments that appeared on its stories for the previous week.[22] Crucially, readers can also designate comments as abusive or spam to help remove them from view.[23]

But while the Copia Institute's moderation practices can be described in broad strokes, they cannot be articulated with the specificity that the Texas law would require. For instance, the law requires that platforms disclose their moderation standards. *See*, *e.g.*, TEX. BUS. & COM. CODE § 120.051. And it also puts limits on how platforms can do this moderation. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 143A.002 (banning certain moderation decisions, including those based on the "viewpoint" of the user expression being moderated). But even if the Copia Institute wanted to comply with the Texas law, it could not. For instance, it could not disclose its moderation policy because its

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[22] *See*, *e.g.*, Leigh Beadon, *Funniest/Most Insightful Comments Of The Week At Techdirt*, TECHDIRT (Dec. 3, 2023), https://www.techdirt.com/2023/12/03/funniest-most-insightful-comments-of-the-week-at-techdirt-88/.

[23] Being removed from view generally leaves comments hidden but available to readers to see with an extra click. But such comments may also be deleted from the system entirely by the company.

moderation system is primarily community-driven and subject to the community's whims and values of the moment. Which also means that it could not guarantee that moderation always comported with a pre-announced "Acceptable Use Policy," which the Texas law also requires. TEX. BUS. & COM. CODE § 120.052. It would also be infeasible to meet any of the Texas law's additional burdensome demands, including to provide notice to any affected user, TEX. BUS. & COM. CODE § 120.103, maintain a complaint system, TEX. BUS. & COM. CODE § 120.101,[24] or offer a process for appeal,[25] TEX. BUS. & COM. CODE § 120.103. None of these faculties are features the Copia Institute has the resources or infrastructure to support. In other words, the Texas law sets up a situation where if the Copia Institute cannot host user-provided content exactly the way Texas demands, it effectively does not get to host any user-provided content at all. Or, potentially even worse, it would leave Techdirt in the position of having to host odious content, including content threatening to it, its staff, or others in its reader community, in order to satisfy Texas's moderation requirements.[26]

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[24] The law also sets criteria for how responsive the complaint system must be. TEX. BUS. & COM. CODE § 120.102.

[25] There is also the additional consideration that the more laws like Florida's and Texas's create legal risk for platforms, the more likely platforms will remove content on the advice of counsel, which should be a reason privileged from disclosure, and thus not be something that can be subject to an appeal.

[26] *See*, *e.g.*, Mike Masnick (@mmasnick), TWITTER (May 12, 2022, 9:14 AM), *available at* https://web.archive.org/web/20220512161544/https://twitter.com/mmasnick/status/1524785192442863626

The Copia Institute would have similar problems complying with the Florida law too. Techdirt does not even offer some of the basic functionality the Florida law demands either. As one example, Techdirt does not provide a tool for commenters to see how many people have read their comments, as the statute would require. FLA. STAT. § 501.2041(2)(e).[27] Nor does it have a mechanism for users to export their data, as the statute further requires. FLA. STAT. § 501.2041(2)(i).[28] It also has no practical way to identify, favor, or even deter postings by political candidates, as the law would require platforms to privilege. FLA. STAT. § 501.2041(2)(h); *see also* FLA. STAT. § 106.072.[29] Even if the Copia Institute might see value in providing some of these faculties, they can be expensive to engineer, and being compelled to build them would come at the expense of whatever it would prefer to spend its resources on, including activities that would better advance its own expression.

And as for the many disclosure obligations required by Florida, Techdirt would have problems there too. Like Texas, Florida requires that platforms disclose their moderation standards. FLA. STAT.

(displaying a Techdirt comment promising his personal imprisonment for his expression).

[27] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[28] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[29] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

§ 501.2041(2)(a).[30] But, again, Techdirt does not have anything to disclose because its moderation system is primarily community-driven[31] and subject to the community's whims and values of the moment, which also means it could not meet the consistency requirement. FLA. STAT. § 501.2041(2)(b).[32] Furthermore, in the event that Techdirt editors might overrule the community, they may be doing so due to exigent circumstances which can neither wait for the next monthly opportunity to change the moderation practices, FLA. STAT. § 501.2041(2)(c)[33] (limiting changes to moderation practices to no more than every 30 days), nor be for a reason that can be publicly disclosed. The reasons may also not be any business of the government to know.[34]

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[30] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[31] And implemented with some algorithmic logic, which the Florida law would also potentially prohibit. *See*, *e.g.*, FLA. STAT. § 501.2041(1)(e); *see also* FLA. STAT. § 501.2041(2)(f)(2).

[32] As the Copia Institute has also long chronicled, content moderation at scale is always impossible to deliver consistently. *See* Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml; https://www.techdirt.com/blog/contentmoderation/ (collecting case studies of moderation challenges).

[33] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[34] The issue of privilege is similarly raised here, because the more that laws like this one create legal risk for platforms, the more likely it will be that platforms will be removing content on the advice of counsel.

The effects of this regulation are thus injurious to the Copia Institute's expressive freedom. The Copia Institute chooses to host user comments, and moderate them in the way it does, because doing so fulfills its own expressive objectives.[35] It should be able to just as easily choose not to host them, or to moderate them with a different system prioritizing different factors.[36] The First Amendment ensures that it can make these editorial and associative choices as most appropriate for its own expressive priorities at that moment.[37] But these laws attack that freedom.

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[35] Many publications have opted to not host their own comments, which is obviously a choice they are entitled to make. However, studies have noted that by not doing so, they lose engagement with their readership. Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort.*, POYNTER (Nov. 4, 2021), available at https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/. The irony is that, without comment sections, what reader engagement there is tends to go to the larger social media sites that have attracted these state legislatures' ire. *Id.* ("[W]hether or not news outlets choose to play the commenting game, that game will still go on without them. Conversations on Twitter, Facebook and Instagram won't stop.").

[36] The decision to close comment sections has frequently been driven by concerns over their moderation. Djinis ("The language in these announcements was sometimes similar, portraying a small group of people taking over a forum meant for the public. They used words like 'hijack' and 'anarchy.' "). Because moderating ability is so critical to whether a publication can self-host user engagement, it is critical that moderation decisions remain legally protected so that these sites can discover the most effective way of moderating that best serves them and their users in order for them to be able to facilitate them at all.

[37] The First Amendment also ensures that these expressive choices can't be chilled by mandatory disclosures. *See* Eric

ii. The laws attack amici Bluesky and Riley.

While amici Bluesky and Riley differ from the Copia Institute in terms of the sorts of platforms they run, their experience as platform providers, and providers of platform technology, is similarly salient.

As an individual, Riley directly personifies how providing a platform service is itself an expressive activity that the First Amendment protects, and why it must, because his experience shows how *personal* the choices are that he, like any platform provider – big or small, commercial or otherwise – must make in order to administer his service. These choices include deciding whom to provide accounts to,[38] what the rules for his user community should be in order to best foster user discourse and minimize abuse (and deciding then

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Goldman, *Mandating Editorial Transparency*, 73 HASTINGS LAW JOURNAL 1203, 1213-17 (Jul. 2022). *See also* Eric Goldman, *Zauderer and Compelled Editorial Transparency*, IOWA LAW REVIEW ONLINE, vol. 108:80 (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4246090. While moderation transparency can be a positive value, mandatory transparency is a censorial one that effectively strips the moderator of their discretion by forcing them to articulate it. It would obviously offend the First Amendment and the expressive freedom it protects if the New York Times had to document every article it opted not to run and why, or every story that Fox News opted not to run and why. Such a requirement is no less Constitutionally odious when applied to platform providers, where it would inherently chill their ability to make moderation decisions if they then also had to explain them.

[38] His is currently "intended for use by technology and internet policy professionals." *See* https://techpolicy.social/about.

when and how to enforce them),[39] what technical tools to employ in service of connecting people to the expression they seek to consume or avoid, and, ultimately, what ideas and expression to be associated with.[40] Like with the Copia Institute discussed above, the choices that he makes vindicate his own expressive interests. In his case, Riley has chosen to support users who are connected to the technology policy field, but if he did not care about facilitating discussion about technology policy he could make different choices about what speakers and speech to platform. But he needs the First Amendment to protect his ability to make any of these choices. Without its protection forestalling laws like Florida's and Texas's, the consequences of not complying with them – for whatever reason, even if it were because he did not have the resources, technology, or skills needed to comply – could be personally dire for him, affecting his finances and conceivably even, with other such laws that could follow if these are allowed,[41] his freedom.

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[39] *See id.* ("Users wishing to join techpolicy.social are expected to act without malice and in good faith. Doing otherwise may lead to removal from the service, independent of whether a user violates the content moderation rules.").

[40] The current distribution (or version) of Mastodon offers a few algorithmic tools to modulate how content is intermediated, in particular regarding the general display of content published by users on other instances, as well as any "trending" content. The open nature of Mastodon's code also allows for additional software to be written to provide more algorithmic functionality, either as part of the Mastodon server software itself or as external services or applications developed by third parties that can work with it.

[41] *See* discussion *infra* Section II.b.

Laws like these also impinge on the rights of companies like amicus Bluesky, which, in addition to providing a platform service also innovates on the technology others can use to offer their own. But instead of producing tools that give site administrators the greatest ability to cultivate their user communities most effectively, laws such as these inherently rewrite Bluesky's product roadmap. Some curation tools that uprank and downrank content, such as those enabling the creation and sharing of algorithmic feeds, may not even be legal to deploy, either on their own site or on others'. But this kind of algorithmic choice, which empowers users to curate their own experiences, even outside the controls of any platform moderator, are key elements of what Bluesky seeks to build. Instead, AT Protocol platform operators, including the Bluesky company itself, will need to have tools enabling them to comply with what each law demands, regardless of whether running their platforms in accordance with such demands is appropriate for their user communities or any of their own expressive agendas – or potentially even harmful to them.

Bluesky's own expressive agenda, beyond providing its own platform service, is to produce an open technology that will create a free marketplace that allows anyone to build a new platform to innovate on the social experience, and for platform providers and their users to exert their own expressive independence in how they run and use their platforms. From its earliest days Bluesky has recognized that one-size does not fit all when it comes to platform administration and so its

mission has been to provide the tooling needed to allow each platform provider, and user, to make the choices right for their own situation.[42] But the Florida and Texas laws directly frustrate that goal by making it impossible for platforms to decide for themselves what administration practices to employ by deciding for everyone what they must do to run their platforms. Not only do they co-opt Bluesky's own ability to make their own choices but they nullify its ability to empower other platform administrators, and users, from making their own choices by replacing their judgment with that of these states. This supplanting of their own discretion is therefore unconstitutional.

b. By attacking the First Amendment rights of platforms, Florida and Texas undermine the ability of anyone to be able to express themselves online.

Although the Florida and Texas laws are styled as laws designed to advance online expression, they will ultimately have the exact opposite effect because of how they take aim at the entire Internet ecosystem and its ability to facilitate any online expression at all. For expression to occur online it needs systems and services to help it get from the speaker to the audience. We call these helpers many things ("service providers," "intermediaries," or, as used mostly here, "platforms"), and they come in many shapes and sizes, providing all sorts of intermediating services, from network

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[42] *See* https://blueskyweb.xyz/blog/3-30-2023-algorithmic-choice.

connectivity to messaging to content hosting, and more. All of them need to feel legally safe to provide that help, or else they won't be able to offer it. But laws like Florida's and Texas's put them all in jeopardy.

Amici are all small businesses, or, in the case of Riley, individuals, who now find themselves in the position of needing to stare down the enforcement power of any state who wishes to regulate how they provide platform services if they wish to continue to provide theirs to anyone. The risk to them, their livelihoods, and even their liberty is not a hypothetical one. These and other government entities have felt little compunction against using their state power to target platforms that in some way have provoked their disapproval. Without this Court making it unequivocally clear that the First Amendment bars such regulatory efforts,[43] their ability to continue to provide platform services, without being sitting ducks for an

[43] The federal statute 47 U.S.C. Section 230 should also forestall such regulatory efforts. *See* 47 U.S.C. § 230(c) ("Section 230"). Section 230 provides an alternative basis for nullifying the Florida and Texas statutes. (*See also* 47 U.S.C. § 230(e)(3) (preventing states from taking action that interfered with platforms' statutory protection from liability arising from how they provide their platforms)). But keeping platforms free to moderate implicates more than just a statutory immunity crafted by Congress. It is a constitutional imperative, because the harm that results if they are not protected from this regulatory interference undermines the free expression the First Amendment is intended to protect. If that protection were to weaken here, it would weaken it for everyone everywhere.

enthusiastic state prosecutor,[44] will become unsustainably irrational. But when they then inevitably close down their services, it will also be the speakers whose expression they previously facilitated who will lose. Far from fostering more speech, by losing the helpers speakers need to speak, there will only be less speech.

That these particular laws might not immediately reach amici[45] does not resolve the problem. *Any* loss of platforms in the wake of regulation attempting to govern them will result in a loss of online expression, including that of amici. For instance, in the case of amicus Copia Institute, laws like these that chill platforms won't just hurt it as a platform; the Copia Institute will also be hurt as a *user* of other platforms it depends on for its own expression to be facilitated, just as it will hurt every other user of these now-chilled platforms. Indeed it would be of little comfort or utility to the Copia Institute if either of these laws spared it as a platform but drove offline any of the other platforms it currently uses to support its own expressive activities.[46]

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[44] *See*, *e.g.*, Cathy Gellis, *Twenty-one States Inadvertently Tell The DC Circuit That The Plaintiffs Challenging FOSTA Have A Case*, TECHDIRT (May 2, 2019), https://www.techdirt.com/2019/05/02/twenty-one-states-inadvertently-tell-dc-circuit-that-plaintiffs-challenging-fosta-have-case/.

[45] For further discussion of whether they do, *see* discussion *infra* Section II.a.

[46] For instance, the Copia Institute sometimes uses specialized platforms that host other forms of content the Copia Institute produces, such as SoundCloud and the AppleStore, which serve its podcasts to listeners. The Copia Institute has also used ad

The way these laws attack Bluesky also reveals another way that online speech will suffer. Bluesky's guiding philosophy is to produce a platform technology that centers users in their own online experience. The Florida and Texas laws, however, seek to take that user agency away. Where these governments resented how large corporate platforms handled the user experience they have now sought to unconstitutionally replace the companies' control with their own. But technologies like Bluesky's offer an alternative to either corporate or government control: strong user control, supported by a competitive marketplace of interoperating platforms built by third-party developers, which laws like these threaten.

At the time these laws were passed it may have seemed like the Internet was divided up between a few large companies offering online services, however imperfectly. This perception was false, however, as plenty of other platforms still existed, such as the one offered by amicus Copia Institute. But at the time the services offered by Bluesky and Mastodon had yet to take firm

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platforms to monetize its Techdirt articles, and in general its monetization activities themselves require the support of payment providers and other platforms like Patreon and Discord that help facilitate the monetization of expression and community engagement in innovative ways. But none of these other platforms could exist to support the Copia Institute's expressive business if the First Amendment did not protect their ability to provide these services in a way that works for themselves and their users. Affecting their Constitutional protection will inevitably affect the Copia Institute as well, as well as all amici here, who each need backend platforms, like web hosts and domain registrars, to even be able to provide their own platform services to others.

root. These laws were spawned in a regulatory environment that incorrectly believed that the online experience needed to be regulated by the government, as the only alternative to corporate control over the user experience. But since they were passed, platforms and protocol technologies like Bluesky and Mastodon have grown to facilitate the expression of millions of users thanks to them having been able to innovate new technologies that have elevated the ability of users and independent administrators to create and operate platform technology in ways that best met their own expressive needs.[47] But as long as these laws, or others like them, can still come into effect, they put the features and functions of these new technologies in their crosshairs, leaving users in danger of having control over their own online experiences unconstitutionally snatched away from them, exacerbating user dependence on what few platforms can manage to survive the new regulatory burdens.

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[47] For example, Meta's new Threads service and the Truth Social platform both make use of the ActivityPub protocol, with the latter also relying on Mastodon server software. Eugen Rochko, *What To Know About Threads* (Jul. 5, 2023), https://blog.joinmastodon.org/2023/07/what-to-know-about-threads/; Michael Kan, *Trump's Social Media Site Quietly Admits It's Based on Mastodon*, PC MAGAZINE (Dec. 1, 2021), https://www.pcmag.com/ews/trumps-social-media-site-quietly-admits-its-based-on-mastodon.

II. The Constitutional harms posed by the Florida and Texas laws are neither limited to these states' laws nor the platforms that they intended to target.

Even if neither Florida nor Texas intended to reach these particular amici with either of their laws, these laws nevertheless still may. And even if they do not reach them today, they easily could tomorrow, either as amici grow and evolve, or as more jurisdictions take their turn passing their own laws designed to target how any platform may serve their users. The distinctions between these laws, their effects, or their intended targets provide no basis for lessening the protection the First Amendment offers platform providers. The Florida and Texas laws must be voided to prevent the expressive harm they threaten, as well as the harm threatened by what laws might follow.

a. There is no limiting principle to justify how Florida and Texas can pressure platforms in this way and not have every platform and all online speech be vulnerable to government interference.

The Florida and Texas laws offend the First Amendment regardless of whether they are laws of narrow applicability, in which case they will reach few platforms but be additionally unconstitutional for singling out an arbitrary population of platforms to penalize, or if their criteria for enforcement is so broad that they impinge the rights of nearly every platform.

For amici, or another similarly situated platform provider, both may be the case. Their unconstitutionality remains a direct threat, because while today neither of these laws may directly reach an entity like, for example, the Copia Institute, tomorrow they well might.

For instance, while the Florida law purports to apply only to entities with either "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants globally." FLA. STAT. § 501.2041(1)(g), and the Texas law purports to apply only to platforms with "more than 50 million active users in the United States in a calendar month," TEX. BUS. & COM. CODE § 120.002(b); TEX. CIV. PRAC. & REM. CODE § 143A.004(c), per this criteria, as of today, all three amici might be beyond either laws' reach. But tomorrow that status could easily change. Perhaps it is unlikely that either of the companies will suddenly attain that much revenue, but every platform aspires to grow, and terms like these create policy pressure deterring growth.[48]

Especially because there are ways to grow other than in revenue, which puts platforms like Techdirt and others with relatively small revenue streams but potentially large userbases on a collision course with

[48] For Riley, while his Mastodon instance might not aim to be nearly as big as these laws target, there is the separate danger that an enterprising legislature might conclude that all ActivityPub servers together could constitute as a single system, at which point his expressive autonomy would still be subsumed by government regulation targeting platform administration.

such laws, especially as they grow more popular. Even small sites like Techdirt can attract large audiences;[49] indeed, the very point of the Copia Institute enterprise is to reach and influence people. Meanwhile, the popularity of Bluesky's own service has exploded, reaching over two million users in less than a year.[50] Every platform aspires to grow, yet laws like Florida's and Texas's create policy pressure stifling growth if the reward for that growth is more debilitating regulation, where, as they grow more popular and they can suddenly find themselves taking on more and more regulatory obligations dictating how they may continue to engage with their readership – but without necessarily a commensurate increase in resources necessary to comply with these rules, or cope with the consequences if they don't.

Furthermore, size and userbase are not the only definitional criteria that are potentially applicable to amici. For instance, Texas's definition of the artificial construct "social media platform" is broad enough to not only cover Bluesky and Mastodon but also

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[49] For instance, in 2005 Copia Institute founder and Techdirt editor Michael Masnick coined the term, "the Streisand Effect," as part of his commentary. It is a term that has had significant staying power, remaining in common parlance as a term for discussing the unwanted attention ill-considered attempts at censorship might unleash. *See* https://en.wikipedia.org/wiki/Streisand_effect.

[50] *See* Sarah Perez, *X Rival Bluesky Hits 2M Users, Says Federation Coming "Early Next Year,"* TECHCRUNCH (Nov. 16, 2023), https://techcrunch.com/2023/11/16/x-rival-bluesky-hits-2m-users-saying-federation-coming-early-next-year/.

Techdirt. TEX. BUS. & COM. CODE § 120.001(1); TEX. CIV. PRAC. & REM. CODE § 143A.001(4). After all, Techdirt is "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." The same is true for Florida's definition of a "social media platform," which would cover Techdirt as an "information service" or "system" that "enables computer access by multiple users to a computer server." FLA. STAT. § 501.2041(1)(g). It also is a "sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity" that does business in the state by virtue of having readers, and likely also commenters, based there. *Id.*[51] And so is Bluesky.

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[51] Its parent company also does not own a theme park, which at the time of the law's passage was a delineating factor in defining a "social media" platform subject to this law. Mike Masnick, *Disney Got Itself A 'If You Own A Themepark . . . ' Carveout From Florida's Blatantly Unconstitutional Social Media Moderation Bill*, TECHDIRT (Apr. 30, 2021), https://www.techdirt.com/2021/04/30/disney-got-itself-if-you-own-themepark-carveout-floridas-blatantly-unconstitutional-social-media-moderation-bill/. That provision was subsequently removed from the law after litigation challenging it began. Mike Masnick, *It Can Always Get Dumber: Ron DeSantis Moves To Eliminate The Ridiculous Disney Exemption To His Unconstitutional Social Media Bill Because He's Mad At Disney*, TECHDIRT (Apr. 19, 2022), https://www.techdirt.com/2022/04/19/it-can-always-get-dumber-ron-desantis-moves-to-eliminate-the-ridiculous-disney-exemption-to-his-unconstitutional-social-media-bill-because-hes-mad-at-disney/. Although no longer in force, the existence of that provision at passage, which sought to favor certain platforms, helps illuminate the censorial motives behind this law and, accordingly, its unconstitutionality, although

There is also no assurance that, if these laws are allowed to stand, the next ones produced would not more directly target amici. The enforcement criteria in play now are arbitrary, but if these laws are permitted then the next ones could be even more encompassing and capture platforms of all sizes and shapes and expressive missions. The expressive freedom of platforms should not be this vulnerable, dependent solely on the hope that it can escape the dragnet of the next regulator. The First Amendment should protect them all.

b. If Florida and Texas can regulate how platforms operate, then so can every government entity.

The constitutional problems with regulation targeting how platforms moderate their platforms applies to any would-be regulator, including those rooted in the federal government and not just the states. But a practical problem with greenlighting Florida's and Texas's efforts to mold online expression according to their preferences is that there is no limit to the myriad state and local, and potentially conflicting, regulatory demands that could chill anyone interested in providing an Internet platform.

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the overall unconstitutionality of the law does not alone pivot on this factor. *See* Mike Masnick, *How Disney Got That 'Theme Park Exemption' In Ron DeSantis' Unconstitutional Social Media Bill*, TECHDIRT (Feb. 3, 2022), https://www.techdirt.com/2022/02/03/how-disney-got-that-theme-park-exemption-ron-desantis-unconstitutional-social-media-bill/.

The Internet inherently transcends state boundaries. If by providing such a platform the provider would be exposed to regulators in every jurisdiction where their services could be reached, they would have to try to adjust their services to accommodate the most restrictive rules. As explained above, they would have to try to adjust, regardless of whether compliance with those rules was in their expressive interests, the interests of the users, or even the interests of any of the other jurisdictions where their service is available, including those also trying to regulate their moderation practices, potentially in a completely opposite way. Often there is simply no practical or cost-effective way for a platform to cabin compliance with a specific jurisdiction's rules, let alone all of the potentially countless rules of potentially countless jurisdictions, especially not without inherently compromising their own expression or that of their users.

In other words, if it were possible for a law like Florida's or Texas's to ever reach Internet platforms like amici's, then it would be possible for any other state, or even any one of the infinite local jurisdictions within each state, to reach them as well, regardless of how well each jurisdiction would choose to regulate them, or what sort of challenges platforms would face in complying with even one of these local regulations, let alone all of them, or whether the requirements among all these regulations from all the many jurisdictions were even consistent with each other. Even if it were practical for platforms to comply with the rules of one jurisdiction, they could easily find themselves

with the impossible task of having to please multiple masters potentially in conflict with each other, as is likely to be the case given that these laws are so viewpoint-driven, designed to skew what expression appears online. State (and local) governments across the United States today vary significantly in their political control, and the regulatory policy favored by some may not be the regulatory policy favored by others, particularly when it comes to preferring certain viewpoints. Thus, if one jurisdiction can effectively chill certain types of online speech with the threat of potential liability for platform providers, it will effectively chill it for every jurisdiction everywhere, including in places where that speech may be perfectly lawful or even desirable.

When platforms can find themselves facing existential legal risk for non-compliance with any of these regulations, they will find themselves having to make some hard, if not impossible, choices. Faced with potentially irreconcilable compliance obligations, Internet platform providers will either have to (a) choose to obey only the jurisdiction whose penalties for non-compliance are most untenable, even if at the expense of any other jurisdiction's policies or priorities, (b) try to block serving users in certain locations, which diminishes the value of the Internet as a communications network that can unite people across geography, or (c) give up and stop providing platform services anywhere. None of these outcomes are good for fostering online expression for anyone.

This parade of horrors is why Section 230 includes a preemption clause, to get state and local jurisdictions

out of the Internet regulatory business, particularly when it comes to regulating via imposing liability on Internet platforms. 47 U.S.C. § 230(e)(3). It is also disfavored by the dormant Commerce Clause doctrine, which seems to prevent any one state from having undue influence on interstate commerce, which is better left to Congress to regulate (as it has, with Section 230).

But this fracturing of the Internet can also be avoided by recognizing the correctness of NetChoice and CCIA's arguments, that the Florida and Texas laws are laws designed to interfere with online expression by interfering with the expressive rights of the platforms facilitating it, and thus are both forbidden by the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should find all provisions of the Florida and Texas statutes unconstitutional.

Respectfully submitted,

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