Nos. 22-277 & 22-555

In The

Supreme Court of the United States

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ASHLEY MOODY,
ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Respondents.

———————

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

———————

**On Writs of Certiorari
to the United States Courts of Appeals
for the Fifth and Eleventh Circuits**

———————

**BRIEF OF YELP INC. AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS IN NO. 22-277
AND PETITIONERS IN NO. 22-555**

———————

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BRIEF OF YELP INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

Amicus respectfully submits this brief in support of NetChoice, LLC and Computer & Communications Industry Association, respondents in No. 22-277 and petitioners in No. 22-555.[1]

INTEREST OF AMICUS CURIAE

Yelp owns and operates Yelp.com, a popular local search and discovery website, and related applications. On Yelp's sites and apps, members of the public can read and write reviews, post and view photos, and peruse other consumer-oriented information about local businesses and services—everything from restaurants and auto mechanics to doctors and government agencies.

One of Yelp's founding principles is that the best source for information about a local community is the community members themselves. Users have contributed more than 265 million reviews on Yelp, which allow consumers to find a broad range of helpful information about the communities where they live or travel. These reviews have far more breadth and depth than reviews in local papers, so consumers can make more informed choices.

Yelp has spent years developing a multi-pronged approach to cultivate useful and reliable information for the public, and First Amendment protection is

critical to these efforts. As an initial matter, Yelp has developed recommendation software, which uses Yelp's proprietary algorithms to recommend the most reliable and relevant reviews while weeding out potentially unreliable reviews. In addition, Yelp employs a dedicated content-moderation team to investigate whether specific content violates its Terms of Service or Content Guidelines and to remove the content when warranted. And Yelp's community of users and business owners serve as an additional layer of oversight, reporting content that they believe violates Yelp's Terms or Guidelines.

Yelp has gained the trust of millions of users through its efforts to highlight the most reliable reviews. The laws at issue here would interfere with those recommendations and harm the ability of consumers to find trustworthy information about local businesses.

INTRODUCTION AND
SUMMARY OF ARGUMENT

After this Court's decision in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Colorado bakery was hit with a surge of critical reviews motivated by politics rather than frosting.[2] Some used culinary language to criticize the bakery ("Tastes like self-righteousness"); others engaged in more explicit political attacks. Yelp responded by applying its content-moderation and curation policies, which among other things require reviews to be based on firsthand experience with a business rather than what people saw in the news. Yelp's content-moderation team posted an alert to warn consumers about the influx of inauthentic reviews, and worked on removing the reviews that violated Yelp's content policies.[3] Yelp's recommendation software caught other reviews, moving them to a non-recommended review page and excluding them from Masterpiece Cakeshop's overall Yelp rating.

Yet the Texas and Florida laws at issue in this case appear to prohibit Yelp from taking any future action

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[2] *E.g.*, Jeffrey Delfin, *Surge in Bad Yelp Reviews for US Bakery Whose Owner Turned Away Gay Couple*, The Guardian (June 4, 2018), https://www.theguardian.com/us-news/2018/jun/04/yelp-colorado-bakery-jack-phillips-supreme-court.

[3] The Consumer Alert posted on the Yelp page for Masterpiece Cakeshop explained that Yelp will seek to "remove reviews that appear to be motivated more by the news coverage itself than by the reviewer's own customer experience with the business." Whitney Filloon, *Masterpiece Cakeshop's Yelp Page Slammed in Wake of Supreme Court Decision*, Eater (June 5, 2018), https://www.eater.com/2018/6/5/17429148/masterpiece-cake-shop-supreme-court-verdict-yelp-protest.

to address unreliable reviews like the ones that targeted Masterpiece Cakeshop. Under the statutes, Yelp must give the same weight to political attacks as it does to genuine bakery reviews or be liable for "viewpoint" discrimination and "shadow banning." Both statutes infringe on the First Amendment, and both should be struck down.

Florida and Texas argue that "social media" companies are not engaged in constitutionally protected activity when they curate third-party users' speech on their platforms.[4] But a "social media" company's decisions about whether and how to display third-party speech is just like a newspaper's decisions about whether and how to publish third-party views, which "fall squarely within the core of First Amendment security." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 570 (1995) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

Yelp provides a useful illustration of the problems with the Texas and Florida laws—and it is an example without some of the political baggage of the large social media companies. The primary goal of Yelp's content-moderation and curation polices is to identify the most useful, trustworthy reviews for consumers, so those consumers come back to Yelp's platform the next time they need to find information about a local business. Yelp moderates and curates the reviews it

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[4] Although Yelp's platform differs substantially from those offered by Facebook, Twitter, and other large social media companies, Yelp also falls within the broad definitions of "social media" used in the Florida and Texas laws. *See* Fla. Stat. § 501.2041(1)(g); Tex. Bus. & Com. Code Ann. § 120.001(1).

publishes to highlight reviews that provide firsthand accounts of the business. Yelp displays reviews that it determines may be biased or irrelevant, but those reviews are separated from the recommended reviews on a different page and their associated ratings are excluded from the business's overall rating. Yelp also removes content from its platform if the content violates Yelp's policies.

Read broadly, the States' content-moderation laws would prohibit Yelp from enforcing its policies, using its recommendation software to distinguish between reliable and unreliable reviews, and removing reviews from the platform. Fla. Stat. § 501.2041(2)(b); Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.001(1), 143A.002. These laws improperly infringe on Yelp's editorial decisions. Yelp's choices about what content to recommend, what content to treat as unreliable, and what content not to publish are editorial choices, akin to choices made by newspaper editors that have long been protected by the First Amendment.

The individualized-explanation requirements of the Texas and Florida laws are also unconstitutional. Those laws appear to force Yelp to provide a "thorough rationale" or "reason" for every review that it does not recommend, for every review that it removes, and for every Consumer Alert that it issues. Fla. Stat. § 501.2041(2)(d), (3)(c)-(d); Tex. Bus. & Com. Code Ann. § 120.103(a)(1). This would chill Yelp's protected activity of taking proactive steps to protect consumers against deceptive review practices—and potentially reward people posting fraudulent reviews with $100,000 in statutory damages per claim. Fla. Stat. § 501.2041(6)(a).

The Florida and Texas statutes are unconstitutional. The Court should affirm the Eleventh Circuit's decision and reverse the Fifth Circuit's decision.

ARGUMENT

Most Americans read online reviews before deciding where to spend their money. One recent study found that a staggering 99 percent of U.S. consumers used the internet to find information about local business at least once in 2021, and 77 percent reported that they "always" or "regularly" read online reviews when browsing for a local business.[5]

While most people read online reviews before making purchasing decisions, it can be difficult for most consumers to assess whether the reviews might be biased or unreliable. A restaurant seeking more business might pay people to post positive reviews, for instance, but a consumer deciding to visit that restaurant after reading glowing reviews might not have any indication those reviews are unreliable.

That's where Yelp's Content Guidelines, moderation efforts, and recommendation software come in. As explained below, Yelp weeds out deceptive reviews and seeks to provide consumers with the most reliable reviews. That sort of assessment and selection of material to publish is at the core of First Amendment

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[5] Jamie Pitman, *Local Consumer Review Survey 2022*, BrightLocal (Jan. 26, 2022), https://www.brightlocal.com/research/local-consumer-review-survey. Similarly, in a recent survey commissioned by Yelp and conducted by an outside company, 93 percent of respondents said that they read reviews to inform their purchasing decisions. And, for 70 percent, it was rare for them to visit an unfamiliar business without first checking online reviews.

protection. *E.g.*, *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.").

I. Review sites like Yelp exercise editorial judgment by recommending reliable reviews to consumers.

The Fifth Circuit said that "social media" platforms "exercise virtually no editorial control or judgment" aside from "screen[ing] out certain obscene and spam-related content." 22-555 Pet. App. 35a. But that's factually inaccurate as applied to Yelp, and likely as to many other social media companies as well. As explained below, Yelp moderates and curates reviews based on a wide variety of factors, and removes reviews that don't appear to be based on authentic consumer experiences or are otherwise problematic. Yelp's policies also prohibit businesses from soliciting reviews—even if no cash or other incentive is offered. Yelp has also decided that it will not recommend reviews if it determines certain conflicts of interest likely exist. These decisions and others reflect Yelp's viewpoint and exercise of its editorial discretion.

A. Yelp's policies provide consumers with reliable and relevant reviews.

Yelp carefully moderates and curates the reviews it features to provide consumers access to useful, trustworthy information. The company's business

model depends on ensuring consumers have access to reliable reviews and are not misled by biased or fraudulent reviews. Without that trust, Yelp would not receive the user traffic that is central to its business.

Yet as anyone who has ever used the internet knows, not everything you read online is trustworthy. Indeed, there are entire industries focused on manufacturing deceptive reviews, with companies "creating fake online profiles on consumer review websites and paying freelance writers from as far away as the Philippines, Bangladesh and Eastern Europe for $1 to $10 per review" to be posted on online review platforms.[6] This makes it critical for Yelp to focus on selecting, curating, and publishing the most reliable reviews for consumers.

1. To foster and maintain trustworthy reviews, Yelp employs a content-moderation team to enforce its Terms of Service and Content Guidelines.[7] Yelp's Guidelines cover a variety of topics including, for reviews:

> *Personal experience.* Yelp allows reviews based on firsthand experiences, and advises its users to tell

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[6] Press Release, Office of the New York State Attorney General, *A.G. Schneiderman Announces Agreement with 19 Companies to Stop Writing Fake Online Reviews and Pay More Than $350,000 in Fines* (Sept. 23, 2013), https://ag.ny.gov/press-release/2013/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews.

[7] Yelp's Terms of Service are available at https://terms.yelp.com/tos/en_us/20200101_en_us/. Yelp's Content Guidelines are available at https://www.yelp.com/guidelines.

their own stories without resorting to broad gener-
alizations and conclusory allegations.

Accuracy. Yelp reminds users to make sure their
reviews are factually correct, and that they should
feel free to air their opinions, but not exaggerate
or misrepresent their experiences.

Demanding payment. Writing a review should be
informative and meant to help the broader Yelp
community. Yelp strictly prohibits threats to post
or offers to remove a negative review as a way to
extract payment from a business.

Review updates. Yelp requires that any review up-
dates reflect a new experience or interaction with
the business.

Yelp's moderators review all reported content and
remove content from the platform that they deter-
mine violates Yelp's policies. In 2022, Yelp's content-
moderation team removed over 206,700 reported re-
views, representing approximately 39 percent of all
reported reviews.[8] Many of those reviews were re-
moved because they did not reflect a firsthand cus-
tomer experience, such as the "review bombing" on
the Yelp page for Masterpiece Cakeshop following
this Court's decision. Yelp's content-moderation ef-
forts help make Yelp a useful platform for consumers
who are looking to read about others' actual

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[8] Yelp, *2022 Yelp Trust & Safety Report* 6 (Feb. 1, 2023),
https://issuu.com/yelp10/docs/2022_yelp_trust_safety_report?fr
=sZmZkYzU3NDM2NzY. Each year, Yelp publishes a Trust and
Safety Report, which details the measures it takes to maintain
the integrity and quality of the content on Yelp. *See id.*

experiences with local businesses, not political rants unrelated to the consumer experience.

2. Yelp's efforts extend to providing additional information that may help dispel potential consumer deception or confusion. For example, since 2012, Yelp has maintained a Consumer Alert program, and places pop-up notices on business pages in certain circumstances. When a business like Masterpiece Cakeshop gains public attention, for instance, Yelp posts an Alert and temporarily disables the ability to post reviews of that company in an effort to thwart attempts to artificially inflate or deflate a business's star rating, since those attempts can mislead consumers and hurt businesses. Yelp also uses Consumer Alerts to warn users when Yelp has detected particularly egregious activity (such as large numbers of reviews coming from a single IP address, or reviews from users who may be connected to a group that coordinates incentivized fake reviews) or attempts to mislead (such as compensated review activity).

3. Yelp also curates the reviews its users contribute through special recommendation software. Yelp first developed this software in 2005 to assess each review and evaluate its reliability, and has deployed it ever since. "Yelp invested tens of millions of dollars and hundreds of thousands of hours in developing and maintaining the [software], which runs on hundreds of computers." *Multiversal Enters.-Mammoth Props., LLC v. Yelp Inc.*, 290 Cal. Rptr. 3d 43, 46 (Ct. App. 2022). The software is maintained and updated by a team of experienced engineers to protect the integrity

of consumer and business owner experiences on Yelp.[9] The recommendation software considers many factors, including:

Conflicts of interests. These are reviews likely written by people with undisclosed ties to a business, including competitors, disgruntled employees, friends, or family. These include critical reviews, like those from a restaurant owner who might use a fake name to submit reviews complaining that a competing restaurant is unsanitary.

Solicited or compensated reviews. These are reviews that the business owner or an employee likely asked for or even paid someone to write. Reviews that are paid for or requested are likely to be biased and artificially inflate ratings.

Reliability. Potentially unreliable reviews include those written by less active users, since someone trying to create a fake account to target a specific company will often not have a long history of recommendations.

Usefulness. Some reviews might go on a rant about an irrelevant topic, attempt to promote an unrelated product or political theory, or contain inappropriate content like hate speech.

As a New York Attorney General investigation into fraudulent reviews concluded, Yelp's recommendation software is "the most aggressive" of the review platform technologies that target fake reviews on

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[9] While the algorithm functions automatically, it was created and is maintained by Yelp employees, and it reflects Yelp's editorial decisions, so it receives full First Amendment protection.

consumer-review websites.[10] Yelp's software currently recommends just over 70 percent of reviews that Yelp users have contributed to Yelp, based on all the criteria above and other considerations.

The reviews that Yelp's software does not recommend are still accessible via a link at the bottom of a business's Yelp page; that link displays the number of reviews that are "not currently recommended" and allows users to click to read those reviews and see their associated ratings. Those ratings associated with non-recommended reviews, however, don't factor into the business's overall Yelp star rating, which is only compiled from the recommended reviews.

Categorizing a significant number of reviews as "not recommended" comes at a cost. Yelp's recommendation process results in fewer reviews that are readily visible on the platform, and it can also discourage well-meaning users whose reviews are not recommended by Yelp's software. It can also antagonize businesses who might otherwise choose to advertise with Yelp. But Yelp has made the editorial choice to recommend reviews that the software determines are the most useful and reliable so that consumers will trust its platform for candid reviews of local businesses.

Attempts to evade Yelp's recommendation software grow continually more sophisticated. In recent years, Yelp has confronted a rise of "review exchange" groups, which attempt to flood sites with fraudulent online reviews, making them less reliable for

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[10] Office of the New York State Attorney General, *supra* note 6.

everyone. Review exchange groups exist on various online platforms and facilitate the buying, selling, or exchange of fake reviews.[11] Other attempts are not so sophisticated. A medical emergency care company attempted to recruit people for positive reviews on Yelp by simply messaging people: "I own a company in nyc and would like to get more reviews … would you come checkout our company and write a review? (will pay)."[12] And a spa in New York posted "I need someone who is a YELP expert to post positive reviews for a spa that will not be filtered," adding "I will pay $10 per-review."[13]

4. Yelp has a system in place to avoid conflicts of interest of its own. It bars employees from

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[11] Greg Sterling, *Yelp Cracks Down on 'Review Rings' as Google Continues to See Widespread Mapspam*, Search Engine Land (Jan. 10, 2020), https://searchengineland.com/yelp-cracks-down-on-review-rings-as-google-continues-to-see-widespread-mapspam-327432; Sudheer Someshwara, *Yelp Updates Recommendation Software to Better Target and Mitigate Content from Online Review Exchange Groups*, Yelp Blog (Feb. 25, 2021), https://blog.yelp.com/news/yelp-updates-recommendation-software-to-better-target-and-mitigate-content-from-online-review-exchange-groups/.

[12] Press Release, Office of the New York State Attorney General, *A.G. Schneiderman Announces Settlement with Medrite Urgent Care and Carmel for Paying for Positive Reviews Online* (Dec. 2, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-medrite-urgent-care-and-carmel-paying. Yelp detected that the medical company had been soliciting reviews, classified those reviews as "not recommended," and posted a Consumer Alert on the company's page notifying users that the company had been caught trying to buy reviews. *Id.*

[13] Office of the New York State Attorney General, *supra* note 6.

recommending reviews or manually overriding the recommendation software's decision as to any review. Similarly, businesses that advertise on Yelp don't get any special treatment by the recommendation software. The recommendation software applies the same standards to all businesses, so reviews of Yelp's advertisers and non-advertisers are treated the same. In this way, Yelp preserves its ability to publish and feature the reviews it determines to be the most reliable and useful to consumers.

B. Yelp's content-moderation and curation policies provide important value to consumers and local businesses.

Yelp's platform would be far less helpful to consumers if Yelp could not effectively moderate reviews that violate its Content Guidelines, recommend useful reviews, and separate recommended reviews from those reviews its software does not recommend. Consumers would not be able to trust the reviews, as unscrupulous businesses and third-party "reputation management" companies would game the system to promote their own business to the detriment of consumers and honest competitors.

1. Access to customer reviews provides consumers transparency and aids their spending decisions. Yelp provides one of the most trusted platforms for reviews, and it has far more breadth and depth than reviews in local papers or word of mouth. One study focused on Seattle restaurants, for instance, found that Yelp users had posted reviews for more than 60,000 restaurants, which is 70 percent of all

restaurants in the city.[14] The *Seattle Times*, by contrast, had reviewed only about 5 percent of those restaurants.[15]

The breadth of reviews aids small businesses, allowing companies to make a name for themselves and attract customers with their quality products and services.[16] The free and widespread availability of Yelp's platform allows smaller businesses to compete for consumer dollars against larger businesses, earning increased revenue as their community reputation improves through online reviews.

As noted above, most Americans now report frequently consulting online reviews before making purchasing decisions.[17] And Congress has recognized the importance of unbiased reviews to that decision-making process: The Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355, better protects consumers' ability to share their honest opinions of goods and services on platforms like Yelp.

2. Yelp also gives users insight and control over what data they want to see. As noted above, Yelp doesn't permanently remove most of the potentially unreliable reviews; instead it exercises its editorial discretion to display them on a different page that users can view to obtain more information.

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[14] Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* 3 (Harvard Business School, Working Paper No. 12-016, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928601.

[15] *Id.*

[16] *Id.*

[17] Pitman, *supra* note 5.

This means that users who are trying to make a quick decision can see the most reliable reviews at a glance, while users who want to have more information can read the non-recommended reviews, and may decide to consider them. Indeed, a study from researchers at Carnegie Mellon and the University of Washington found that people trust review platforms more when they display the reviews that are not recommended by their algorithms, like Yelp does, instead of simply removing such non-recommended reviews altogether.[18]

Another study identified five key mechanisms that review platforms can implement to minimize less reliable content and build trust with consumers: monitoring (evaluating reviews for authenticity), exposure (exposing firms propagating fake reviews), community building (enabling consumer and reviewer interactions), status endowment (recognizing credible and helpful reviewers), and identity disclosure (having reviewers share identifying details such as a real name).[19] After examining 25 review platforms, the study found that Yelp is one of two platforms that applies all five mechanisms, and, as the research states, has become a "guardian of trust" for review infor-

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[18] Uttara M. Ananthakrishnan et al., *A Tangled Web: Should Online Review Portals Display Fraudulent Reviews?* 22-25 (Mar. 8, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3297363.

[19] Ben B. Beck et al., *Trust Guardians: How Review Platforms Can Fight Fakery and Build Trust* (Mktg. Sci. Inst. Working Paper Series 2022, Report No. 22-109, 2022), https://thearf-org-unified-admin.s3.amazonaws.com/MSI/2022/06/MSI_Report _22-109.pdf.

mation.[20] But if Yelp were forced to combine recommended and non-recommended reviews, consumers would have no way of knowing which recommendations were the most reliable, harming them and impeding Yelp from continuing to build and maintain consumer trust.

3. Reviews also encourage great service by businesses. A good illustration comes from *Edwards v. District of Columbia*, 755 F.3d 996, 1006-07 (D.C. Cir. 2014), which struck down regulations requiring all paid tour guides in D.C. to pass a 100-question examination before they could tell tourists about the District. The District tried to argue the examination was needed to ensure guides didn't mislead tourists, but the court pointed out that "consumer review websites[] like Yelp" accomplished this goal far more efficiently than government regulations. *Id.*

As the *Edwards* court explained, review websites show "the expressed outrage and contempt that would likely befall" a tour company that was "less than scrupulous" about providing a quality tour. 755 F.3d at 1006-07. "Put simply, bad reviews are bad for business." *Id.* at 1007. Citing Adam Smith's *The Wealth of Nations*, the opinion noted that it should come as no surprise that vigorous competition means companies can take "the coal of self-interest" and turn it into "a gem-like consumer experience." *Id.* As the court concluded, a market where consumers have access to

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[20] *Id.*

candid reviews is far more efficient than government regulations.[21]

4. Displaying but separating out less reliable reviews, as Yelp does, also "increases the cost to commit fraud by creating a system of reputation."[22] The study from the Carnegie Mellon and University of Washington researchers found that 80 percent of consumers surveyed trusted "a review platform more if it displays fraudulent review information because businesses are less likely to write fraud reviews on these platforms."[23] That is, flagging but still displaying potentially fraudulent reviews "can be an effective tool for review portals to curb fraudulent behavior of dishonest businesses" because consumers quite naturally "associate fraud with poor quality."[24] This process "can be a good way to introduce a penalty for getting caught and deter businesses from writing fraudulent reviews in the first place."[25]

5. Yelp's recommendation system imposes a significant cost to companies that attempt to game the system by submitting positive reviews of their own company. Not only do they have to expend substantial time and effort submitting these reviews (which often involves paying fake-review writers), there is

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[21] This is particularly true for independent businesses, which have less name recognition and are more impacted by reviews than chain restaurants. Luca, *supra* note 14, at 2.

[22] Ananthakrishnan et al., *supra* note 18, at 23.

[23] *Id*. at 4.

[24] *Id*. at 15.

[25] *Id*.

also the reputational cost noted above that comes to a company linked to fraudulent reviews.[26]

But the Texas and Florida laws could eliminate the costs of submitting fraudulent reviews by prohibiting Yelp from recommending the reviews it deems most reliable. If Yelp had to display every submitted review, without the editorial discretion to recommend some over others, business owners could submit hundreds of positive reviews for their own business with little effort or risk of a penalty. And some doubtless would (as some have already), because reviews impact consumer decisions. A well-regarded study found that a one-star increase in Yelp rating—for instance, a business that increases its combined review rating from 3 stars to 4 stars—led to a 5-to-9-percent increase in revenue.[27]

Empirical evidence bears out the importance of assessing and identifying unreliable reviews. The Deputy Director for Consumer Protection of the Federal Trade Commission conducted a study examining the impact of fake reviews.[28] The results were particularly interesting for the companies classified as "low quality businesses"—those with an "F" grade from the Better Business Bureau or a high number of complaints filed against them.[29] Those low quality businesses had a higher percentage of positive reviews

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[26] *Id.*

[27] Luca, *supra* note 14, at 2.

[28] Devesh Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms* (Feb. 27, 2023) (unpublished manuscript), https://deveshraval.github.io/reviews.pdf.

[29] *Id.* at 4.

that been "not recommended" by Yelp's software as compared to higher quality businesses, and the low quality businesses received a lower overall rating on Yelp than they did on other platforms, which don't employ rigorous recommendation software like Yelp's.[30] That is, the study concluded that businesses flagged as low quality were more likely to have unreliable reviews saying positive things about their business, and those positive reviews would artificially increase the company's rankings if not for the exercise of Yelp's editorial discretion through its recommendation software.[31] As the study noted, "a platform that spends less effort on reducing fake reviews is likely to have inflated reviews for low quality businesses."[32]

II. The laws' content-moderation restrictions harm consumers.

The Texas and Florida content-moderation restrictions infringe on Yelp's First Amendment right to exercise editorial discretion over users' reviews, hampering Yelp's ability to protect consumers from deceptive review practices. These laws require Yelp to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." Fla. Stat. § 501.2041(2)(b). And Yelp cannot "deny equal access or visibility" to a user's "viewpoint." Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.001(1), 143A.002(a). These laws could force Yelp to abandon its recommendation software, which

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[30] *Id*. at 32-33.

[31] *Id*. at 5, 36-37.

[32] *Id*. at 5.

would harm consumers and allow dishonest companies to flourish.

1. Read broadly, the laws preclude Yelp from recommending certain reviews as reliable while not recommending others.[33] Although "consisten[cy]" is not defined in the Florida Act, it appears to bar treating two reviews differently based on factors about the trustworthiness of the source of the content. But even if two reviews are, broadly speaking, similar, one may be less reliable than the other, and therefore of less value to consumers.

Consider two reviews of a local service provider, each proclaiming "this is the best roofing company in Washington D.C.!" Yelp's recommendation software might well treat those two reviews differently if one was posted by a long-time Yelp user with many trusted reviews, while the second was from a newer user that Yelp doesn't know much about, or from a user that Yelp determines likely has a conflict of interest.

Yelp's recommendation software could flag the second review as less trustworthy, place it on a "not recommended" page, and exclude it from the roofer's overall star rating. While unreliable reviews of roofing companies are presumably not what the lawmakers had in mind when outlawing "shadow banning,"

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[33] Of course, the laws might not be read broadly, especially given the serious First Amendment concerns here. But "[p]rolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at the law's meaning and differ as to its application.'" *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)) (alteration omitted).

the Florida Act appears to bar companies like Yelp from recommending certain reviews and excluding others from immediate view.

The law's "consistency" requirement is particularly troublesome because the recommendations made by Yelp's software can change over time. A key feature of Yelp's recommendation software is that it repeatedly evaluates all reviews on Yelp's platform, so its recommendations may change as the system receives new information about a review, a reviewer, or a business. A review that was not recommended one day might later become recommended as the software receives more information about the user that allows it to determine that the review likely can be trusted. Or a review that was recommended might become not recommended, if for example the software receives information allowing it to identify the reviewer as potentially being affiliated with the reviewed business.

These laws would harm consumers if they precluded Yelp from recommending the most reliable and useful reviews. Yelp would be less useful, and consumers would find it burdensome and frustrating to try to discern which reviews are reliable. Yelp's star ratings would also lose value. Consumers might stop reading Yelp reviews altogether—and stop posting their own reviews, resulting in less speech.

2. Likewise, Texas's law prohibiting the denial of "equal . . . visibility" based on "viewpoint" was probably not enacted to prohibit a consumer review platform like Yelp from giving less visibility to a review that appears to be focused on politics rather than quality of service. But the law might demand that these reviews be displayed together.

Recall the "review bombing" of Masterpiece Cakeshop after this Court's decision. Yelp removed "reviews" that argued over gay rights and contained no firsthand experience with the bakery, because those postings violated Yelp's content-moderation and curation policies. Yelp's recommendation software determined other reviews were "not recommended" and excluded those from the company's overall Yelp rating.

On a different point of the political spectrum, some businesses were inundated with critical reviews when they began requiring proof of vaccination at the height of the Covid-19 pandemic.[34] As with Masterpiece Cakeshop, Yelp removed reviews lacking firsthand experience or which otherwise went against Yelp's guidelines, while its software sorted others as "not recommended" and excluded them from the companies' overall Yelp rating.

If the Texas law precluded Yelp from applying its policies to remove "reviews" expressing political viewpoints and required Yelp to give the same weight to political attacks as it does to genuine, firsthand business reviews, consumers would have to wade through irrelevant reviews to find information based on authentic experiences with the business.

3. These laws not only interfere with Yelp's content-moderation practices and recommendation software, but also interfere with Yelp's ability to issue

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[34] Hannah Towey, *Yelp Has Removed Thousands of "Review Bombing" Attempts That Target Businesses' COVID-19 Safety Measures, Such as Vaccine Requirements*, Bus. Insider (Aug. 25, 2021), https://www.businessinsider.com/yelp-businesses-list-vaccine-required-policies-get-negative-review-bombings-2021-8.

Consumer Alerts, as it did on the Yelp page for Masterpiece Cakeshop in Colorado.[35] Yelp's pop-up notices "deny equal access or visibility" to reviews behind the notices, in potential violation of the Texas law. But even the Fifth Circuit recognized that a social media company's "addenda or disclaimers" to third-party content is the company's own speech. 22-555 Pet. App. 41a.

4. Yelp would face significant financial exposure if it continued to protect consumers and honest businesses that work hard to earn their Yelp ratings. A dishonest company that solicited positive reviews could be *rewarded*—up to $100,000 in statutory damages per claim—if it brought a claim against Yelp for weeding out those reviews. Fla. Stat. § 501.2041(6)(a). And that company might be entitled to attorney's fees. *Id*. § 501.2041(6)(e); Tex. Civ. Prac. & Rem. Code Ann. § 143A.007(b). The potential for a large financial reward could encourage more fraudulent reviews and lawsuits against Yelp.

III.   The laws' individualized-explanation requirements would chill Yelp's exercise of its editorial discretion.

The individualized-explanation requirements of the Texas and Florida laws would also impermissibly burden Yelp's protected activities and affect Yelp's ability to protect consumers from deceptive review practices.

The Florida law requires a "social media" company to provide notice with "a thorough rationale

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[35] *See* Delfin, *supra* note 2.

explaining the reason" that it "censored" a user, and "a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable." Fla. Stat. § 501.2041(2)(d), (3)(c)-(d); *see also id.* § 501.2041(1)(b) (broadly defining "censor"). Similarly, the Texas law requires companies to notify each user whose content is removed and "explain the reason the content was removed." Tex. Bus. & Com. Code Ann. § 120.103(a)(1).

The scope of these laws is extremely vague, and that vagueness itself raises First Amendment concerns because it could curb speech. Do these laws require Yelp to provide a reason for every review that it removes from the platform? For every review that Yelp does not recommend? What would Yelp have to explain? What would it have to disclose about the investigations that lead to a Consumer Alert based on deceptive review practices? Would it have to reveal its sources and methods? And what would Yelp have to disclose about its recommendation software?

Read broadly, the Texas and Florida requirements might force Yelp to reveal information that could provide review spammers with information sufficient to defeat Yelp's content-moderation efforts or recommendation software. Giving feedback to someone trying to circumvent Yelp's policies or reverse engineer Yelp's recommendation software is akin to giving burglars the sources and methods used to catch them, so that they can avoid being caught in future burglaries.[36] If Yelp were required to disclose exactly what

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[36] Yelp's engineers have explained that providing immediate feedback to spammers would let the spammers know Yelp

made the company suspect certain reviews were fraudulent, that information could help those fraudsters evade Yelp's recommendation software in the future. As one court noted, "Yelp's filter is proprietary software that is not distributed or sold to third parties because disclosure would expose Yelp to the risk of persons using the information to overcome the filter." *Multiversal*, 290 Cal. Rptr. 3d at 46.

The Texas and Florida laws would deter companies like Yelp from robust content moderation and from recommending content and warning consumers about deceptive reviews. And again, dishonest businesses could be financially rewarded. If a judge determined that Yelp's disclosures about its software were not "thorough," Yelp could face $100,000 in statutory damages for each claim and fee exposure. Fla. Stat. § 501.2041(6)(a), (e); Tex. Civ. Prac. & Rem. Code Ann. § 143A.007(b).

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caught them and help enable them to determine why. *See* Marcello Tomasini & Jeraz Cooper, *Moderating Promotional Spam and Inappropriate Content in Photos at Scale at Yelp*, Yelp Eng'g Blog (May 12, 2021), https://engineeringblog.yelp.com/2021/05/moderating-promotional-spam-and-inappropriate-content-in-photos-at-scale-at-yelp.html.

CONCLUSION

States may not pass laws prohibiting private "social media" companies from curating and organizing the content their platforms publish. For all the reasons set out above and in the briefs on the merits for NetChoice and the Computer & Communications Industry Association, the States' laws violate the First Amendment. The Court should thus affirm the Eleventh Circuit's decision and reverse the Fifth Circuit's decision.

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