

IN THE
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL
OF FLORIDA, *et al.*,

Petitioners,

v.

NETCHOICE, LLC, D/B/A NETCHOICE, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

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

**BRIEF OF THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW AS *AMICUS
CURIAE* IN SUPPORT OF NO PARTY**

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NETCHOICE, LLC, D/B/A NETCHOICE, *et al.*,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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Cases	Pages
<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996)	3, 30
<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023).....	1, 17, 30
<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986).....	26
<i>Arizona v. Inter Tribal Council of Ariz.</i> , 570 U.S. 1 (2013).....	1
<i>Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987).....	30
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983).....	30
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	3, 27, 31
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014)	30
<i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 557 (1980)	27, 31
<i>Counterman v. Colorado</i> , 600 U.S. 66 (2023).....	1

<i>Dumpson v. Ade</i> , No. CV 18-1011 (RMC), 2019 WL 3767171 (D.D.C. Aug. 9, 2019).....	1
<i>Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008).....	28
<i>Gonzalez v. Google LLC</i> , 598 U.S. 617 (2023).....	1
<i>Henderson v. Source for Pub. Data</i> , 53 F.4th 110 (4th Cir. 2022).....	28
<i>Ill. State Bd. of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979).....	21
<i>Kramer v. Union Free Sch. Dist. No. 15</i> , 395 U.S. 621 (1969).....	21
<i>Liapes v. Facebook, Inc.</i> , 313 Cal. Rptr. 3d 330 (Cal. Ct. App. 2023)	28
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958).....	8

<i>Nat'l Coal. on Black Civic Participation v. Wohl</i> , No. 20-cv-8668, 2023 WL 2403012 (S.D.N.Y. Mar. 8, 2022).....	1, 23
<i>Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.</i> , 413 U.S. 376 (1973)	3, 27
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	26, 30
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	26
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	30
<i>Rumsfeld v. Fund for Acad. & Institutional Rts., Inc.</i> , 547 U.S. 47 (2006).....	3, 26, 27
<i>Shelby Cnty., Ala. v. Holder</i> , 570 U.S. 529 (2013).....	1
<i>Students for Fair Admissions, Inc. v. Univ. of N.C.</i> , 600 U.S. 181 (2023).....	1
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012).....	3, 30
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	26

Ward v. Rock Against Racism,
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Yick Wo v. Hopkins, 118 U.S.
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Constitutions, Statutes, and Rules

15 U.S.C. §§ 6501-0628

18 U.S.C. § 251128

18 U.S.C. § 271028

47 U.S.C. § 60528

D.C. Code § 2-1401.02 (2023).....28

Fla. Stat. § 501.2041 (2022)7, 8

Nev. Rev. Stat. § 651.050 (2023)28

Tex. Civ. Prac. & Rem. Code
§ 143A.001 (West 2021)7

Tex. Civ. Prac. & Rem. Code
§ 143A.002 (West 2021)7

Secondary Sources

Sylvia Albert et al., *As a Matter
of Fact: The Harms Caused
by Election Disinformation*,
Common Cause Educ. Fund
Report (Oct. 2021).....21

Amnesty Int'l, <i>Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse against Women on Twitter</i> , Amnesty Decoders	12
Anti-Defamation League, <i>Footage of Buffalo Attack Spread Quickly Across Platforms, Has Been Online for Days</i> (May 20, 2022).....	13
Anti-Defamation League Ctr. for Tech. & Soc'y, <i>Online Hate and Harassment: The American Experience 2023</i> (June 2023).....	12
Anti-Defamation League Ctr. for Tech. & Soc'y, <i>What Is Swatting?</i> (Aug. 18, 2022)	12
Ruha Benjamin, <i>Race After Technology</i> (2019)	29
David Brody & Sean Bickford, <i>Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce</i> , Lawyers' Comm. for Civ. Rts. Under Law (Jan. 2020)	28

Ctr. for Fam. Rsch., <i>Skin-deep Resilience</i> , Univ. of Ga. (Mar. 2021).....	17
Kalyani Chadha et al., <i>Women's Responses to Online Harassment</i> , 14 Int'l J. Commc'ns 239 (2020).....	18
Cmty. Rel. Serv., <i>2022 FBI Hate Crime Statistics</i> , Dep't of Justice (Oct. 30, 2023)	8
Juan Del Toro & Ming-Te Wang, <i>Online Racism and Mental Health Among Black American Adolescents in 2020</i> , 62(1) J. Am. Acad. Child Adolescent Psych. 25 (2023).....	10, 11, 16
Maeve Duggan, <i>Online Harassment 2017</i> , Pew Rsch. Ctr. (July 11, 2017).....	14, 18
Elizabeth Dwoskin et al., <i>Facebook's race-blind practices around hate speech came at the expense of Black users, new documents show</i> , Wash. Post (Nov. 21, 2021, 8:00 a.m.).....	4

Devin English et al., *Daily multidimensional racial discrimination among Black U.S. American adolescents*, 66 J. Applied Developmental Psych. 1 (2020)11

Fed. Trade Comm'n, *Serving Communities of Color: A Staff Report on the Federal Trade Commission's Efforts to Address Fraud and Consumer Issues Affecting Communities of Color* (Oct. 2021).....31

Lucina Fisher & Brian McBride, *'Ghostbusters' Star Leslie Jones Quits Twitter After Online Harassment*, ABC News (July 20, 2016, 6:54 a.m.).....19

Sheera Frenkel & Kate Conger, *Hate Speech's Rise on Twitter Is Unprecedented, Researchers Find*, N.Y. Times (Dec. 2, 2022)6

Jason Guerrasio, ‘ <i>Star Wars</i> ’ actress <i>Kelly Marie Tran</i> Left <i>Social Media After Racist and Sexist Trolls Drove Her to Therapy</i> , Business Insider (Mar. 3, 2021, 1:33 p.m.).....	18
Jessica Guynn, <i>Facebook while black: Users call it getting ‘Zucked,’ say talking about racism is censored as hate speech</i> , USA Today (July 9, 2020, 6:17 p.m.).....	4
Oliver L. Haimson et al., <i>Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas</i> , 5 Proc. ACM on Hum. Comput. Interaction 466 (2021).....	4
Rebekah Herrick et al., <i>Gender and Race Differences in Mayors’ Experiences of Violence</i> , Ctr. for Am. Women & Politics (2022)	12

Sherman James, <i>John Henryism and the health of African Americans</i> , 18 Culture, Med. & Psychiatry 163 (1994).....	17
James Byrd Jr. Center to Stop Hate at the Lawyers' Committee for Civil Rights Under Law, <i>Hate in Elections</i> 8 (Sept. 2020)	18
Brian TaeHyuk Keum, <i>Impact of Online Racism on Suicide Ideation Through Interpersonal Factors Among Racial Minority Emerging Adults: The Role of Perceived Burdensomeness and Thwarted Belongingness</i> , 38(5-6) J. Interpersonal Violence 4537 (2022).....	17
Brian Keum & Matthew J. Miller, <i>Racism on the Internet: Conceptualization and Recommendations for Research</i> , 8(6) Psychology of Violence 782 (June 7, 2018).....	9

Alyan Layug et al., *The Impacts of Social Media Use and Online Racial Discrimination on Asian American Mental Health: Cross-sectional Survey in the United States During COVID-19*, 6(9) JMIR Formative Rsch. (Sept. 6, 2022).....10, 15

Amanda Lenhart, *Online Harassment, Digital Abuse, and Cyberstalking*, Data & Soc’y Rsch. Inst. (Nov. 21, 2016).....18

Cristiano Lima & David DiMolfetta, *Antisemitic tweets soared on Twitter after Musk took over, study finds*, Wash. Post (Mar. 20, 2023, 9:02 a.m.).....6

Graham Macklin, *The Christchurch Attacks: Livestream Terror in the Viral Video Age*, 12(6) CTC Centinel 18 (July 2019)13

Meta, *Hate Speech*.....5, 6

Meta, *Misinformation: Policy details*20

Adam M. McCready et al.,
*Students of Color, Mental
Health, and Racialized
Aggressions on Social Media*,
58(2) J. Student Aff. Rsch. &
Prac. 179 (2021)16

Ashley Nerbovig, *Michigan’s
immigrant communities hit
with misinformation on
closed platforms*, Detroit
Free Press (Nov. 27, 2020).....22

Safiya Noble, *Algorithms of
Oppression* (2018)29

Ciarán O’Connor, *Hatescape:
An In-Depth Analysis of
Extremism and Hate Speech
on TikTok*, Inst. for Strategic
Dialogue (Aug. 24, 2021)13

Tiani Perkins et al., *Gender and
Racial Identity Moderate the
Effects of Online and Offline
Discrimination on Mental
Health: Dismantling
Systems of Racism and
Oppression During
Adolescence*, 32(1) J. of Rsch.
on Adolescence 244 (2022)15

Blake Peterson, *ICE, Dispelling Rumors, Says It Won't Patrol Polling Places*, ProPublica (Nov. 2, 2019)22

Julie Posetti & Nabeelah Shabbir, *The Chilling: A Global Study of Online Violence Against Women Journalists*, Int'l Ctr. for Journalists 8, 11 (Nov. 2022).....19

Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36(3) Berkeley Tech. L.J. 101 (2021).....29

Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Vol. 2: Russia's Use of Social Media with Additional Views, S. Rep. No. 116-290 (2020).....22

Dhanaraj Thakur & DeVan
 Hankerson Madrigal, *An
 Unrepresentative Democracy:
 How Disinformation and
 Online Abuse Hinder Women
 of Color Political Candidates
 in the United States*, Ctr. for
 Democracy & Tech. (2023).....12

Alvin Thomas, *Online Racial
 Harassment Leads to Lower
 Academic Confidence for
 Black and Hispanic
 Students*, *The Conversation*
 (Jan. 23, 2023, 8:23 a.m.).....10, 16

TikTok, *Combating
 misinformation*20

TikTok, *Safety and Civility*
 (Mar. 2023).....5, 6

Brendesha Tynes et al.,
*Adolescence, race, and
 ethnicity on the Internet: A
 comparison of discourse in
 monitored vs. unmonitored
 chat rooms*, 25(6) *J. Applied
 Developmental Psych.* 667
 (2004).....11

Brendesha M. Tynes et al., *An Unwelcomed Digital Visitor in the Classroom: The Longitudinal Impact of Online Racial Discrimination on Academic Motion*, 44(4) Sch. Psych. Rev. 407 (Oct. 27, 2015).....16

Brendesha M. Tynes et al., *Online Racial Discrimination and Psychological Adjustment Among Adolescents*, 43(6) J. Adolescent Health 565 (Aug. 27, 2008).....15

Brendesha Tynes et al., *Trajectories of Online Racial Discrimination and Psychological Functioning among African American and Latino Adolescents*, 91(5) Child Dev. 1577 (2020).....9, 16

U.S. Att’ys Off. E.D.N.Y., *Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race*, Dep’t of Just. (Mar. 31, 2023).....23

Ian Vandewalker, <i>Digital Disinformation and Voter Suppression</i> , Brennan Ctr. for Just. (Sept. 2, 2020).....	21
George Veletsianos et al., <i>Women Scholars' Experiences with Online Harassment and Abuse: Self-Protection, Resistance, Acceptance, and Self-Blame</i> , 20(12) <i>New Media & Soc'y</i> 4689 (2018).....	18
White House, <i>Big Data: Seizing Opportunities, Preserving Values</i> (May 2014)	25
White House Off. of Sci. & Tech. Pol'y, <i>Blueprint for an AI Bill of Rights</i> (Oct. 2022)	29
Kimmy Yam, <i>Right-Wing Disinformation Ramps Up on WeChat Ahead of Midterms, Report Finds</i> , NBC News (Oct. 3, 2022).....	23
YouTube, <i>Elections Misinformation policies</i>	20
YouTube, <i>Hate speech policy</i>	6

YouTube, *How does YouTube
protect the community from
hate and harassment?*5, 6

**STATEMENT OF INTEREST
OF *AMICUS CURIAE***

Formed in 1963, the Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization using legal advocacy to pursue racial justice. It fights inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of American democracy real. To that end, the Lawyers' Committee has frequently represented parties or served as *amicus curiae* in this Court. See, e.g., *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 U.S. 181 (2023); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013). The Lawyers' Committee is also a leader on voting rights and online civil-rights issues. It regularly participates in cases involving online discrimination, voter intimidation, and threats aimed at Black communities and other communities of color. See, e.g., *Counterman v. Colorado*, 600 U.S. 66 (2023); *Gonzalez v. Google LLC*, 598 U.S. 617 (2023); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 CIV. 8668 (VM), 2023 WL 2403012 (S.D.N.Y. Mar. 8, 2023); *Dumpson v. Ade*, No. CV 18-1011 (RMC), 2019 WL 3767171 (D.D.C. Aug. 9, 2019).¹

¹ No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Texas and Florida’s laws (H.B. 20 and S.B. 7072, respectively) contain a combination of legal prohibitions and penalties on online platforms’ ability to curate, take down, promote, and demote content generated by users. These provisions vitiate the ability of online businesses to remove content spewing hate and disinformation on their platforms by making it legally or practically impossible to engage in content moderation. *See, e.g.*, Br. for Pet’r’s at 36, 43, *NetChoice v. Paxton*, No. 22-555, Nov. 30, 2023; Br. for Resp’s at 8, *Moody v. NetChoice*, 22-277, Nov. 30, 2023. The Lawyers’ Committee has grave concerns that, if left standing, H.B. 20 and S.B. 7072 would also specifically harm the electoral rights and rights to freedom of speech and association of Black people and other people of color.

Black people and other people of color experience a different quantity and quality of hateful and discriminatory speech online than other people. Online hate and harassment—even when constitutionally protected—have a profound chilling effect on the free expression of groups that have experienced longstanding discrimination. In fact, *that is often the intent* of such speech. Online disinformation and voter intimidation targeted at Black people and people of color similarly impair the ability of these communities to support and advocate for the representatives of their choice. Online platforms have a role to play in protecting civil rights, and many platforms have policies and procedures that attempt to curb these harms. This self-

regulation, while often insufficient and imperfect in practice, is nevertheless a necessary tool to foster an internet where Black people and other people of color can freely participate.

We urge the Court to recognize that H.B. 20 and S.B. 7072 fail First Amendment strict scrutiny because they prohibit expressive speech, inhibit expressive association, and are content-based. However, such a ruling should be narrow in scope so that it does not inadvertently inhibit the ability of governments to regulate harmful conduct and unprotected speech. Just because activity occurs on the internet does not necessarily give rise to a First Amendment issue. Not all laws governing online businesses merit strict scrutiny or even regulate speech in the first place. Online publishers, just like their offline counterparts, need to comply with generally applicable laws. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376, 382-83 (1973). Even when speech is involved or incidentally affected, the First Amendment does not bar myriad civil-rights and consumer-protection laws, including prohibitions of discrimination, *see Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006); voting rights protections, *see Burson v. Freeman*, 504 U.S. 191, 198-208 (1992) (plurality opinion); prohibitions of fraudulent statements, *see United States v. Alvarez*, 567 U.S. 709, 722-23 (2012) (plurality opinion); regulations of unfair or deceptive practices, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996); and other content-neutral time, place, and manner regulations of speech, like restricting the amplification of speech, *see Ward v.*

Rock Against Racism, 491 U.S. 781, 791-92 (1989). The Court should recognize that declaring H.B. 20 and S.B. 7072 to be unconstitutional will not inhibit governments from regulating online businesses in other ways, including to prohibit discrimination online.²

² Lawyers' Committee supports transparency requirements for content moderation. Transparency requirements would assist the public in ensuring that the voices of Black people and other people of color are not unfairly silenced by content-moderation systems. *See, e.g.*, Oliver L. Haimson et al., *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, 5 Proc. ACM on Hum. Comput. Interaction 466:1, 466:3 (2021); *see also* Jessica Gynn, *Facebook while black: Users call it getting 'Zucked,' say talking about racism is censored as hate speech*, USA Today (July 9, 2020, 6:17 p.m.), <https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/> (users who tried to call out or discuss their experiences with discrimination were likely to be incorrectly flagged for violating hate-speech rules); Elizabeth Dwoskin et al., *Facebook's race-blind practices around hate speech came at the expense of Black users, new documents show*, Wash. Post (Nov. 21, 2021, 8:00 a.m.), <https://www.washingtonpost.com/technology/2021/11/21/facebook-algo-rhythm-biased-race/>.

ARGUMENT

- I. Barring online businesses from removing hate and discrimination on their platforms would impair the free expression and association of Black people and other people of color.**
 - A. Upholding H.B. 20 and S.B. 7072 would undermine the ability of online businesses to self-regulate and proactively remove hateful content from their platforms.**

Online businesses currently have the ability to make their platforms safer for users. Most major social media platforms have policies that prohibit race-based hateful and discriminatory content. *See, e.g., Meta, Hate Speech*³; TikTok, *Safety and Civility* (Mar. 2023);⁴ YouTube, *How does YouTube protect the community from hate and harassment?*⁵ Their policies describe prohibiting the use of hateful slurs, harmful stereotypes, dehumanizing content (like saying or implying a person is physically, mentally, or morally inferior, or calling them degrading terms, such as criminals, animals, and inanimate objects, because of a protected characteristic), promoting

³ <https://transparency.fb.com/policies/community-standards/hate-speech/> (last accessed Dec. 5, 2023).

⁴ <https://www.tiktok.com/community-guidelines/en/safety-civility/> (last accessed Dec. 5, 2023).

⁵ <https://www.youtube.com/howyoutubeworks/our-commitments/standing-up-to-hate/> (last accessed Dec. 5, 2023).

hateful ideologies like Nazism, claiming racial supremacy, or calling for segregation. *See* Meta, *Hate Speech, supra*; TikTok, *Safety and Civility, supra*; YouTube, *How does YouTube protect, supra*; YouTube, *Hate speech policy*.⁶ Platforms also prohibit denying that well-documented violent events took place, like school shootings, the Holocaust, or the Rwandan genocide. *See* TikTok, *Safety and Civility, supra*; YouTube, *How does YouTube protect, supra*.

Predictably, those platforms that do not remove hateful and harassing content, or that deprioritize removing that content, end up with more. *See, e.g.,* Sheera Frenkel & Kate Conger, *Hate Speech's Rise on Twitter Is Unprecedented, Researchers Find*, N.Y. Times (Dec. 2, 2022) (slurs against gay men and antisemitic posts increased, and slurs against Black Americans tripled);⁷ Cristiano Lima & David DiMolfetta, *Antisemitic tweets soared on Twitter after Musk took over, study finds*, Wash. Post (Mar. 20, 2023, 9:02 a.m.) (study showing 105 percent increase in posts containing antisemitic language over four months).⁸

Given these circumstances, and many platforms' mixed efforts to address race-based hateful

⁶ <https://support.google.com/youtube/answer/2801939> (last accessed Dec. 5, 2023).

⁷ <https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html>.

⁸ <https://www.washingtonpost.com/politics/2023/03/20/antisemitic-tweets-soared-twitter-after-musk-took-over-study-finds/>.

and harassing content, that content is still pervasive online. This is particularly true for Black people and other people of color, who experience some of the most egregious forms of online hate and its attendant effects. But prohibiting online businesses from self-regulating or making it so difficult as to be practically impossible—which is what H.B. 20 and S.B. 7072 would do—would only increase the flood of harmful content.

On its face, H.B. 20 would prohibit social media platforms from acting on content they deem hateful or discriminatory or that otherwise violates the platforms' own terms of service. It flatly bars such platforms from removing, demonetizing, de-boosting, or otherwise restricting content based on “the viewpoint of the user or another person” or “the viewpoint represented in the user’s expression or another person’s expression.” Tex. Civ. Prac. & Rem. Code §§ 143A.001, 143A.002 (West 2021).

SB 7072 does not as obviously prohibit social media platforms from moderating hateful and discriminatory content, but the practical result is the same. It requires social media platforms to “apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform” but does not define “consistent manner.” Fla. Stat. § 501.2041(2)(b) (2022). It also prohibits social media platforms from acting on content from any “journalistic enterprise” and broadly defines what constitutes a “journalistic enterprise” based on the number of published words, video, or

audio, and the number of subscribers, active users, viewers, or listeners. *Id.* § 501.2041(1)(d).

H.B. 20 would make content moderation impossible, and S.B. 7072 would have the same practical effect through its ambiguous standards. Texas and Florida’s actions therefore risk further silencing Black people and other people of color online, making it less safe for them to engage online, and harming their “freedom to engage in association for the advancement of beliefs and ideas.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

B. Black people and other people of color experience a significant amount of speech involving hate and discrimination online.

Black people and other people of color in the United States have long experienced race-based harassment, hate, and discrimination. Today, these communities continue to face hate and harassment in their daily lives, including online. *See* Cmty. Rel. Serv., *2022 FBI Hate Crime Statistics*, Dep’t. of Just. (Oct. 30, 2023) (race was the most common motivator of hate crimes in 2022, and anti-Black incidents “were more than three times higher than the next highest racial or ethnic category”).⁹ For Black people, hate and harassment online can include traumatic experiences like regularly being targeted by racial slurs and being “stereotyped as unintelligent, as

⁹ <https://www.justice.gov/crs/highlights/2022-hate-crime-statistics>.

criminals, and as lazy,” represented as animals, or mocked with images using blackface. Brendesha Tynes et al., *Trajectories of Online Racial Discrimination and Psychological Functioning among African American and Latino Adolescents*, 91(5) *Child Dev.* 1577, 1578 (2020). The Lawyers’ Committee is concerned that the challenged laws would preclude the operators of the largest social media websites from effectively self-regulating their own platforms and thus increase both the volume and unjustifiable effects of such race-based hate and harassment.

Online hate, harassment, and discrimination comes in many forms. It often includes disparaging or discriminatory remarks, symbols, images, or other behaviors based on and directed at listeners, viewers, or readers because of their race or color. *See, e.g.*, Tynes et al., *Trajectories of Online Racial Discrimination, supra*, at 1578. It also is significantly more common and explicit online than offline because of online anonymity. *See, e.g.*, Brian Keum & Matthew J. Miller, *Racism on the Internet: Conceptualization and Recommendations for Research*, 8(6) *Psych. of Violence* 782, 783 (2018). Black people and other people of color experience online hate and discrimination not only when it is aimed at them individually, but when they hear or see discriminatory or disparaging behaviors directed at others like them. Tynes et al., *Trajectories of Online Racial Discrimination, supra*, at 1578.

These experiences can include being “mocked in historically dehumanizing ways such as blackface” and “overrepresented in degrading images and text

(e.g., memes) that are produced as racial humor.” *Id.* Latino people experience being “mocked for having perceived stereotypical careers like landscaping . . . or large families.” *Id.* One study examined several racial and ethnic groups’ exposure to online racial discrimination during the COVID-19 pandemic and found that Black people in the United States experienced the most, “corresponding to the vast prevalence of online hatred directed toward Black people throughout US history.” Alyan Layug et al., *The Impacts of Social Media Use and Online Racial Discrimination on Asian American Mental Health: Cross-sectional Survey in the United States During COVID-19*, 6(9) JMIR Formative Rsch. 1, 21 (2022).

Young Black people in particular regularly confront online speech involving hate and discrimination based on their race. For example, in one study, 45% of Black adolescents reported at least one instance of online racial discrimination over a two-week period in 2020. See Juan Del Toro & Ming-Te Wang, *Online Racism and Mental Health Among Black American Adolescents in 2020*, 62(1) J. Am. Acad. Child Adolescent Psych. 25, 29 (2023); see also, e.g., Alvin Thomas, *Online Racial Harassment Leads to Lower Academic Confidence for Black and Hispanic Students*, The Conversation (Jan. 23, 2023, 8:23 a.m.) (“Black and Hispanic teens who used social media

more were more likely than not to encounter online racial harassment or discrimination.”).¹⁰

Many Black adolescents experience multiple incidents of racial discrimination per day, including online. See, e.g., Devin English et al., *Daily multidimensional racial discrimination among Black U.S. American adolescents*, 66 J. Applied Developmental Psych. 1, 8 (2020) (Black adolescents reported an average of 70 experiences of racial discrimination in two weeks, including online discrimination); see also Del Toro & Wang, *supra*, at 32-34. Even in the early days of the internet, participating in unmonitored chat rooms involved a 59% chance of being exposed to negative remarks about a particular racial or ethnic group. See Brendesha Tynes et al., *Adolescence, race, and ethnicity on the Internet: A comparison of discourse in monitored vs. unmonitored chat rooms*, 25(6) J. Applied Developmental Psych. 667, 673 (2004).

Given its frequency, it is not surprising that hateful and discriminatory speech experienced by Black people and other people of color often rises to the level of harassment. Thirty-eight percent of Black American adults experienced online harassment over 12 months, including being called offensive names, physically threatened, harassed, stalked, sexually harassed, doxxed, or swatted. See Anti-Defamation League Ctr. for Tech. & Soc’y, *Online Hate and*

¹⁰ <https://theconversation.com/online-racial-harassment-leads-to-lower-academic-confidence-for-black-and-hispanic-students-197515>.

Harassment: The American Experience 2023 19 (June 2023).¹¹ Black women and other women of color are even more likely to face such risks. See Amnesty Int’l, *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse against Women on Twitter*, Amnesty Decoders (analyzing millions of tweets and finding that Black women were 84% more likely to be mentioned in abusive tweets than white women).¹² In a study of the 2020 congressional election, women of color seeking office were five times more likely than other candidates to experience online abuse related to their gender and racial identities. See Dhanaraj Thakur & DeVan Hankerson Madrigal, *An Unrepresentative Democracy: How Disinformation and Online Abuse Hinder Women of Color Political Candidates in the United States*, Ctr. for Democracy & Tech., 8 (2023);¹³ see also Rebekah Herrick et al., *Gender and Race*

¹¹ https://www.adl.org/sites/default/files/pdfs/2023-06/Online-Hate-and-Harassmen-2023_0.pdf. “Doxing is the broadcasting of private or identifying information about an individual, group, or organization with the intent that the information be used against the target for an unlawful purpose.” *Id.* “Swatting is the deliberate and malicious act of reporting a false crime or emergency to evoke an aggressive response (often a SWAT team) from a law enforcement agency to a target’s residence or place of work to harass and intimidate them.” Anti-Defamation League Ctr. for Tech. & Soc’y, *What Is Swatting?* (Aug. 18, 2022), <https://www.adl.org/resources/blog/what-swatting>.

¹² <https://decoders.amnesty.org/projects/troll-patrol/findings> (last accessed Dec. 6, 2023).

¹³ <https://cdt.org/wp-content/uploads/2022/10/update-anunrepresentativedemocracy-a11y-102622-1710.pdf>.

Differences in Mayors' Experiences of Violence, Ctr. for Am. Women & Politics (2022) (study of U.S. mayors showed women of color experienced more threats than other groups).¹⁴

Perpetrators of white-supremacist attacks commonly publicize their actions and philosophies through online speech involving social media as well. Footage of the racist mass shooting at a Buffalo, New York, supermarket in May 2022 was livestreamed by the perpetrator and spread with great speed across the internet through Facebook, Twitter, Instagram, Reddit, Telegram, Bitchute, and Gab. *See Footage of Buffalo Attack Spread Quickly Across Platforms, Has Been Online for Days*, Anti-Defamation League (May 20, 2022).¹⁵ The perpetrator of the 2019 mass shooting at a New Zealand mosque similarly livestreamed his attack on Facebook. *See* Graham Macklin, *The Christchurch Attacks: Livestream Terror in the Viral Video Age*, 12(6) CTC Sentinel 18, 18 (July 2019).¹⁶ Social media websites are rife with promotions of white supremacy, including videos that espouse the racist and anti-Semitic “Great Replacement” conspiracy theory, that express support for leaders like Adolf Hitler, and that abuse people based on their race or color. *See* Ciarán O’Connor,

¹⁴ <https://cawp.rutgers.edu/research/cawp-grants-and-awards/cawp-research-grants/research-briefs/gender-and-race-differences-mayors-experiences>.

¹⁵ <https://www.adl.org/resources/blog/footage-buffalo-attack-spread-quickly-across-platforms-has-been-online-days>.

¹⁶ <https://ctc.westpoint.edu/christchurch-attacks-livestream-terror-viral-video-age/>.

Hatescape: An In-Depth Analysis of Extremism and Hate Speech on TikTok, Inst. for Strategic Dialogue, 5 (Aug. 24, 2021).¹⁷

In short, Black people and other people of color are particularly subject to online hate and discrimination based on their race or color. Online platforms have not done enough to address these harms, but that does not mean that what they have done is worthless or that they cannot do more. The Texas and Florida laws would have a regressive effect and close off any possibility of improvement. As explained below, hate and discrimination would consequently shut out Black people's voices from online platforms.

C. Online hate and discrimination harm Black people and other people of color and have chilling effects on their free expression and civic participation.

Online speech involving hate and discrimination has widespread consequences. *Cf.*, e.g., Maeve Duggan, *Online Harassment 2017*, Pew Rsch. Ctr., 20 (July 11, 2017) (20% of Americans said online harassment led to problems with friends and family, in romantic relationships, at work, or in school; caused a financial loss; or contributed to

¹⁷ https://www.isdglobal.org/wp-content/uploads/2021/08/HateScape_v5.pdf.

trouble finding a job or housing).¹⁸ This speech has particularly devastating effects on the lives of Black people and other people of color.

Experiencing or witnessing discrimination has negative psychological, physiological, and economic effects, including stress, depression, and anxiety. *See, e.g.,* Layug et al., *supra*, at 20 (finding that “individual and vicarious forms of online discrimination experienced during the COVID-19 pandemic were . . . positively associated with [secondary traumatic stress], depression, and anxiety”); Tiani Perkins et al., *Gender and Racial Identity Moderate the Effects of Online and Offline Discrimination on Mental Health: Dismantling Systems of Racism and Oppression During Adolescence*, 32(1) *J. of Rsch. on Adolescence* 244, 250-51 (2022) (finding that online discrimination against Black college students is positively associated with symptoms of depression and anxiety); Brendesha Tynes et al., *Online Racial Discrimination and Psychological Adjustment Among Adolescents*, 43(6) *J. Adolescent Health* 565, 567 (2008) (hierarchical linear regressions reveal that individual online racial discrimination is significantly related to depression and anxiety). For Black people, these mental-health effects are even worse than for other populations. *See id.*

Online speech involving hate and discrimination is particularly damaging for younger people of color, who—like all young people—spend a

¹⁸ <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/>.

large amount of time online. See Tynes et al., *Trajectories of Online Racial Discrimination*, *supra*, at 1577 (“95% of adolescents have access to a smart phone and nine out of 10 go online at least ‘multiple times per day.’”). One study found that online racial harassment or discrimination causes Black and Hispanic teens to doubt their academic skills and harms their mental health. See Thomas, *supra*; Brendesha M. Tynes et al., *An Unwelcomed Digital Visitor in the Classroom: The Longitudinal Impact of Online Racial Discrimination on Academic Motion*, 44(4) Sch. Psych. Rev. 407, 418 (2015) (elevated rates of online racial discrimination experienced by Black American adolescents directly correlate to decreased academic motivation). Another study concluded that, for students of color, experiencing racialized aggression on social media is positively related to increased mental-health issues. See Adam M. McCready et al., *Students of Color, Mental Health, and Racialized Aggressions on Social Media*, 58(2) J. Student Aff. Rsch. & Prac. 179, 189 (2021). Different researchers found not only that Black youths experience a level of online racial discrimination not fully explained by the time they spent online or by general cybervictimization, but also that this racial discrimination predicts poorer same-day and next-day mental health among Black youths, though not among white youths. See Del Toro & Wang, *supra*, at 34.¹⁹ Another study found that experiencing online racism significantly predicts suicidal ideation across

¹⁹ The existing mental health of those Black youths did not, in contrast, predict their online racial-discrimination experiences. *Id.*

younger Black, Asian, and Latino groups. See Brian TaeHyuk Keum, *Impact of Online Racism on Suicide Ideation Through Interpersonal Factors Among Racial Minority Emerging Adults: The Role of Perceived Burdensomeness and Thwarted Belongingness*, 38(5-6) J. Interpersonal Violence 4537, 4553 (2022). The constant stress from routine exposure to racial discrimination is also linked to higher rates of diseases such as hypertension in Black people. See, e.g., Sherman James, *John Henryism and the health of African Americans*, 18 Culture, Med. & Psychiatry 163, 178 (1994); see also Ctr. for Fam. Rsch., *Skin-deep Resilience*, Univ. of Ga. (Mar. 2021) (the additional effort required to overcome adversity affects health outcomes in Black people, including cellular aging, diabetes risk, and respiratory infection).²⁰

These psychological and emotional effects risk causing Black people to withdraw from online discourse, affecting their rights to engage in the marketplace of ideas and to associate with others. See *Patterson*, 357 U.S. at 460 (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech.”); see also, e.g., *303 Creative LLC*, 600 U.S. at 586 (“[T]he First Amendment protects acts of expressive association.”). In the United States, 27% of adults say they have refrained from posting something online, and 13% elected to stop using an

²⁰ <http://cfr.uga.edu/wp-content/uploads/sites/18/2021/03/ResearchDigest-Skin-Deep.pdf> (last accessed Dec. 5, 2023).

online service after witnessing harassment. *Duggan, supra*, at 11. Studies show that when confronted with online harassment, women are more likely to self-censor or withdraw from online platforms altogether. See Kalyani Chadha et al., *Women's Responses to Online Harassment*, 14 Int'l J. Commc'ns 239, 247-48 (2020); George Veletsianos et al., *Women Scholars' Experiences with Online Harassment and Abuse: Self-Protection, Resistance, Acceptance, and Self-Blame*, 20(12) New Media & Soc'y 4689, 4692 (2018) (harassment of women scholars led to their avoiding certain social media platforms and "turning to silence"); Amanda Lenhart, *Online Harassment, Digital Abuse, and Cyberstalking*, Data & Soc'y Rsch. Inst., 5 (Nov. 21, 2016) (41% of women ages 15-29 self-censor).²¹ Indeed, numerous prominent women of color have withdrawn from online discourse as a result of online harassment. See, e.g., Jason Guerrasio, 'Star Wars' actress Kelly Marie Tran Left Social Media After Racist and Sexist Trolls Drove Her to Therapy, Business Insider (Mar. 3, 2021, 1:33 p.m.);²² James Byrd Jr. Center to Stop Hate at the Lawyers' Committee for Civil Rights Under Law, *Hate in Elections*, 11 (Sept. 2020) (Black female lawmaker in Vermont left office after severe

²¹ [https://www.datasociety.net/pubs/oh/Online Harassment 2016.pdf](https://www.datasociety.net/pubs/oh/Online%20Harassment%202016.pdf).

²² <https://www.insider.com/kelly-marie-tran-racist-sexist-trolls-social-media-2021-3#:~:text=Tran%2C%2032%2C%20said%20she%20constantly,had%20to%20go%20to%20therapy.>

harassment online and in person);²³ Lucina Fisher & Brian McBride, *'Ghostbusters' Star Leslie Jones Quits Twitter After Online Harassment*, ABC News (July 20, 2016, 6:54 a.m.).²⁴ Journalists have also receded from online interactions after experiencing online harassment. Julie Posetti & Nabeelah Shabbir, *The Chilling: A Global Study of Online Violence Against Women Journalists*, Int'l Ctr. for Journalists, 12 (Nov. 2022) (30% of survey respondents self-censor on social media, and 20% withdrew from online interaction).²⁵

Online businesses should retain the ability to remove race-based hate and discrimination on their platforms, legally and practically. If they lose that ability, Black people and other people of color will suffer negative repercussions to their right to engage in discourse and associate with others online.

II. Online disinformation and voter intimidation threaten the ability of Black people and other people of color to exercise fundamental civil rights.

In addition to hateful and discriminatory online content that harms Black people and other

²³ https://lawyerscommittee.org/wp-content/uploads/2020/09/LC2_HATE-IN-ELECTIONS_RPT_E_HIGH-1.pdf.

²⁴ <https://abcnews.go.com/Entertainment/ghostbusters-starleslie-jones-quits-twitter-online-harassment/story?id=40698459>.

²⁵ https://www.icfj.org/sites/default/files/2022-11/ICFJ_UNESCO_The%20Chilling_2022_1.pdf.

people of color in their private lives, a substantial amount of activity directed at these communities seeks to prevent them from exercising fundamental public rights. Most obviously, disinformation and voter intimidation are used to interfere with their voting rights.

Though much of this voter interference is illegal, it is not always preventable by outside parties and after-the-fact litigation may not be feasible. It is more efficient and rights-protecting when online businesses can also self-police to remove this kind of harmful content from their platforms. Indeed, most major social media platforms prohibit election-related disinformation. *See* Meta, *Misinformation: Policy details*;²⁶ YouTube, *Elections Misinformation policies*; TikTok, *Combating misinformation*.²⁷ They prohibit voter-suppressive acts like spreading false information about the dates, locations, methods, and qualifications for voting, encouraging interference with election administration, and promoting false information about dangers at the polls to intimidate voters. *See, e.g.*, YouTube, *Elections Misinformation, supra*;²⁸ Meta, *Misinformation, supra*. Handcuffing online businesses so that they can no longer remove election-related disinformation will only increase its

²⁶ <https://transparency.fb.com/policies/community-standards/misinformation> (last accessed Dec. 5, 2023).

²⁷ <https://www.tiktok.com/transparency/en-us/combating-misinformation/> (last accessed Dec. 5, 2023).

²⁸ https://support.google.com/youtube/answer/10835034?s_jid=1846092111824394653-NA (last accessed Dec. 5, 2023).

volume and threat and endanger Black people's right to vote.

“[V]oting is of the most fundamental significance under our constitutional structure.” *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“the political franchise of voting” is “a fundamental political right”). This is because the right to vote “is preservative of other basic civil and political rights.” *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (cleaned up). As a result, “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Id.* (cleaned up).

Nevertheless, using false or misleading statements online to disenfranchise voters of color is commonplace. *See generally* Sylvia Albert et al., *As a Matter of Fact: The Harms Caused by Election Disinformation*, Common Cause Educ. Fund, 12-29 (Oct. 2021);²⁹ Ian Vandewalker, *Digital Disinformation and Voter Suppression*, Brennan Ctr. for Just. (Sept. 2, 2020).³⁰ Sometimes such content stems from illegal foreign activity. For example, in 2016, “no single group of Americans was targeted by [Russia’s Internet Research Agency] information operatives more than African-Americans.” Russian

²⁹ https://www.commoncause.org/wp-content/uploads/2021/10/CC_AsaMatterofFact_FINAL_10.27.21.pdf.

³⁰ <https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression>.

Active Measures Campaigns and Interference in the 2016 U.S. Election, Vol. 2: Russia’s Use of Social Media with Additional Views, S. Rep. No. 116-290, at 6 (2020).³¹ This included “voter suppressive content intended to dissuade African-American voters from participating in the 2016 presidential election” *Id.* at 59. Indeed, much of the Russian online effort, involving Instagram, Twitter, and Facebook in particular, focused on race. *See id.* at 35, 38-49.

Other times, online voter suppression involves fraudulent information about voting at the most local level, where online speakers can easily disseminate their falsehoods and then try to hide. For example, in Detroit in 2020, stories on Facebook aimed at Latinos told them “it was dangerous to vote” because “the government would record who people voted for and they might face consequences.” Ashley Nerbovig, *Michigan’s immigrant communities hit with misinformation on closed platforms*, Detroit Free Press (Nov. 27, 2020).³² A similar effort involved false online statements that immigration officers would be monitoring voting. *E.g.*, Blake Peterson, *ICE, Dispelling Rumors, Says It Won’t Patrol Polling*

³¹ https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf.

³² <https://www.freep.com/story/news/politics/elections/2020/11/27/michigan-election-misinformation-immigrant-whatsapp/6393693002/> (last accessed Dec. 5, 2023).

Places, ProPublica (Nov. 2, 2019, 4:13 p.m.).³³ Another that same year targeted the nation’s largest Muslim community. *See id.* (“WhatsApp helped to spread a debunked text that targeted Dearborn, [Michigan,] residents . . . that read: ‘URGENT ALERT: Due to a typographical error, Scantron ballots being used for the 2020 Election has swapped sensors. If you are intending on voting for Joe Biden, you must bubble in Trump and vice versa. – Federal Berue [sic] of Investigation.”); *see also generally* Kimmy Yam, *Right-Wing Disinformation Ramps Up on WeChat Ahead of Midterms, Report Finds*, NBC News (Oct. 3, 2022, 5:11 p.m.).³⁴ Likewise, in 2016, a social media “influencer” circulated a variety of images and tweets that were likely intended to influence communities of color to “Vote from Home” online or by text message, which, of course, they could not do. *See* U.S. Att’y’s Off. E.D.N.Y., *Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race*, Dep’t of Just. (Mar. 31, 2023).³⁵ These activities amount to using fraud to deprive people of color of their right to vote.

Such disenfranchisement efforts often violate the law. *Cf. Nat’l Coal. on Black Civic Participation*,

³³ <https://www.propublica.org/article/ice-dispelling-rumors-says-it-wont-patrol-polling-places>.

³⁴ <https://www.nbcnews.com/news/asian-america/right-wing-disinformation-ramps-wechat-ahead-midterms-report-finds-rcna50539>.

³⁵ <https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016>.

2023 WL 2403012, at *22 (robocall that deceptively threatened “that a voter’s private information will become exposed if that person votes by mail” violated Voting Rights Act). But even where there is a violation of law, litigation may be infeasible. The efforts are not always blatant; the scale of the disinformation may be too large; it may be impossible to identify the perpetrators; and prosecutors and civil society have limited resources with which to pursue wrongdoers. Deceptive voter suppression can spread at the speed of the internet on the eve of an election, and judicial relief may be too slow to prevent harm. Social media companies therefore play a critical role in protecting Black people and other people of color from efforts to disenfranchise them.

This—and the long history of attempts to disenfranchise Black people and other people of color—means that restricting private actors in how they assess and mitigate the risks created by this speech is problematic. Online platforms have not done enough to protect democracy and the voting rights of Black people. But while their efforts are lacking, the Texas and Florida statutes would eviscerate the efforts that have been made and the potential for improvements. The Court should reject Texas and Florida’s attempts to remove this shield from the armory of civil-society protections.

III. Striking down the Texas and Florida laws should not prevent lawmakers from regulating social media platforms, including to prohibit online discrimination.

Texas has argued that “by characterizing the central feature of the platforms—hosting third-party content—as speech, the federal government all but immunizes social-media companies from *any* substantive regulation.” Suppl. Br. for Resp’t at 1, *NetChoice v. Colmenero*, No. 22-555, Aug. 28, 2023 (emphasis in original). This is incorrect. The Texas and Florida laws trigger—and fail—heightened First Amendment scrutiny because they prohibit expressive speech, inhibit expressive association, and are content-based. However, online businesses must still comply with laws that impose generally applicable duties on many types of businesses, including laws prohibiting discrimination and deceptive practices. These laws are increasingly important as online platforms incorporate automated decision-making processes into their businesses, sometimes resulting in “digital[] redlining” and other harms to Black people. White House, *Big Data: Seizing Opportunities, Preserving Values*, 53 (May 2014).³⁶ The Court should issue a narrow holding that does not inhibit the ability of governments to regulate conduct by online businesses, such as

³⁶ https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

prohibiting discrimination and deceptive practices or protecting data privacy.

The Texas and Florida laws call out for First Amendment strict scrutiny. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”); *Rumsfeld*, 547 U.S. at 66 (First Amendment applies to “inherently expressive” conduct). The states must therefore demonstrate that S.B. 7072 and H.B. No. 20 further “a compelling governmental interest” and that the statutes are “narrowly tailored to achieve that interest.” *Reed*, 576 U.S. at 171 (cleaned up). The states cannot meet these criteria for many reasons, including the lack of any compelling interest on the part of Florida or Texas to impose advance restrictions on the editorial and curatorial decisions of the private owners and operators of the few websites singled out by those statutes.

But not all laws regulating online businesses implicate First Amendment rights. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (“[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”). Indeed, “words can in some circumstances violate laws directed not against speech but against conduct” *R.A.V.*, 505

U.S. at 389; *Pittsburgh Press*, 413 U.S. at 382 (noting press has “no special immunity” from laws of general applicability) (cleaned up). For example, “[t]he fact that [an antidiscrimination law] will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Rumsfeld*, 547 U.S. at 62.

Likewise, not all laws that implicate First Amendment rights must undergo strict scrutiny. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561-66 (1980) (holding commercial speech undergoes intermediate scrutiny). For example, this Court has recognized that content-neutral regulation of the *amplification* of speech can be permissible. *See Ward*, 491 U.S. at 791-92 (holding that the government may impose reasonable restrictions on the time, place, or manner of protected speech). And even strict scrutiny is not a death sentence for a law of truly compelling governmental need and narrow focus. *See, e.g., Burson*, 504 U.S. at 199-211 (plurality opinion) (upholding, after strict scrutiny, ballot-privacy laws imposing advance restrictions on noncommercial speech near polling places).

Accordingly, conduct by social media companies such as collecting, retaining, and selling data; advertising; or offering or implementing targeted advertising does not require First Amendment protection, even if the conduct were somehow considered to express ideas about how the websites operate. *See, e.g., Ward*, 491 U.S. at 791-92

(upholding city’s sound-amplification guidelines as reasonable time, place, manner restrictions). Lawmakers are therefore free, for example, to regulate social media platforms’ data-collection, retention, and sharing practices. *See, e.g.*, Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501-06; Electronic Communications Privacy Act, 18 U.S.C. § 2511; Video Privacy Protection Act, 18 U.S.C. § 2710; Radio Act, 47 U.S.C. § 605.

Lawmakers also may prohibit certain discrimination on social media platforms. For example, many public-accommodations laws apply to online services. *See, e.g.*, David Brody & Sean Bickford, *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce*, Lawyers’ Comm. for Civ. Rts. Under Law, 2 (Jan. 2020) (cataloging which state antidiscrimination laws apply to online platforms).³⁷ Federal and state courts are increasingly applying traditional civil-rights laws to online discriminatory conduct. *See, e.g.*, *Henderson v. Source for Pub. Data*, 53 F.4th 110, 118-19 (4th Cir. 2022) (Fair Credit Reporting Act); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (Fair Housing Act); *Liapes v. Facebook, Inc.*, 313 Cal. Rptr. 3d 330, 335, 340-41 (Cal. Ct. App.

³⁷ <https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf>. Since the publication of this report, Nevada and the District of Columbia have amended their statutes to apply to online services. *See* D.C. Code § 2-1401.02 (2023); Nev. Rev. Stat. § 651.050 (2023).

2023), *pet. for review filed* (Oct. 31, 2023) (California Unruh Civil Rights Act).

Traditional civil-rights laws are increasingly important in holding accountable online platforms as they incorporate automated decision-making processes into their businesses. These processes often rely on data such as one’s neighborhood, job and credit history, education, personal associations, wealth, and health, which are inextricably intertwined with generations of discrimination and segregation in housing, employment, education, banking, insurance, and criminal justice. *See* Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36(3) *Berkeley Tech. L.J.* 101, 120 (2021); *see generally* Ruha Benjamin, *Race After Technology* (2019); Safiya Noble, *Algorithms of Oppression* (2018). Automated decision-making systems built with societal data therefore often reproduce discrimination—at scale. *See* White House Off. of Sci. & Tech. Pol’y, *Blueprint for an AI Bill of Rights*, 24 (Oct. 2022) (“Data that fails to account for existing systemic biases in American society can result in a range of consequences.”).³⁸

Applying existing laws against discrimination to social media platforms is also consistent with this Court’s recognition that the government has a compelling interest in “eradicating discrimination” against its citizens, particularly discrimination

³⁸ <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

against Black people and members of other historically marginalized communities. *303 Creative LLC*, 600 U.S. at 590. As the Court noted in *R.A.V.*, “[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V.*, 505 U.S. at 390; *accord, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”); *see also, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (there must be “equal opportunity to participate in the workforce without regard to race”); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (upholding public-accommodation statute requiring equal treatment based on sex); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (upholding IRS policy requiring racially nondiscriminatory policies at tax-exempt private schools).

Likewise, social media platforms cannot engage in fraud or unfair or deceptive trade practices, even if speech is involved in doing so. *See, e.g., Alvarez*, 567 U.S. at 722-23 (plurality opinion) (prohibiting fraudulent speech does not violate First Amendment); *44 Liquormart*, 517 U.S. at 501 (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive

sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”); *Cent. Hudson Gas*, 447 U.S. at 563 (“The government may ban forms of communication more likely to deceive the public than to inform it . . .”). Unscrupulous trade practices disproportionately harm communities of color. See generally Fed. Trade Comm’n, *Serving Communities of Color: A Staff Report on the Federal Trade Commission’s Efforts to Address Fraud and Consumer Issues Affecting Communities of Color* (Oct. 2021).³⁹

The Court also has recognized compelling interests in “protecting voters from confusion and undue influence,” “preserving the integrity of [a state’s] election process,” and “ensuring that an individual’s right to vote is not undermined by fraud in the election process.” *Burson*, 504 U.S. at 199 (plurality opinion) (cleaned up). Thus, a narrowly crafted law targeting voter intimidation may survive strict scrutiny if, for example, it required removing false or misleading speech about the time, place, or manner of voting from social media.

³⁹ https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf.

Unlike the Texas and Florida laws, laws regulating conduct or with substantial or compelling justifications—like those prohibiting discrimination or protecting consumers—do not run afoul of the First Amendment. The Court should issue a narrow decision that preserves the ability of governments to regulate online businesses just like other businesses.

CONCLUSION

This Court should hold narrowly that S.B. 7072 and H.B. No. 20 violate the First Amendment without setting a precedent that will impair the ability to safeguard civil rights.

December 7, 2023

Respectfully submitted,

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