

## MISGUIDED FEDERALISM: STATE REGULATION OF THE INTERNET AND SOCIAL MEDIA\*

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*There is a widespread sense that the internet and social media are broken, and there is great political pressure to fix them. But there is little consensus regarding what the problem is or how to solve it. While Congress has been unable to come to sufficient consensus to act, state governments recently have begun to enact laws addressing the issue, and hundreds of bills are pending in state legislatures across the country.*

*Conservative states, like Florida and Texas, have enacted laws prohibiting platforms from moderating speech. Liberal states, like New York and California, have enacted laws to encourage platforms to moderate more expression, such as hateful content or speech that could harm children. Some states have restricted platforms' ability to offer their services to minors and imposed significant moderation requirements with respect to permitted underage users. And many states have enacted or considered laws requiring internet companies to make burdensome disclosures. Many more state laws, some based on these and many taking new approaches, are sure to follow.*

*But such state regulation of content moderation by online platforms is undesirable. These are national media that are enormously important for expression, and a myriad of state regulations would have a devastating effect on speech. Many of the laws discussed in this Article would violate the First Amendment, even more would be preempted by federal law, and almost all would be bad policy. Laws that require content moderation unconstitutionally restrict platforms' speech and editorial discretion. Laws that prohibit content moderation or impose significant disclosures compel speech, in violation of the First Amendment. And even for those state regulations that do not infringe the First Amendment, almost all are preempted by Section 230, a federal law that immunizes platforms from liability for user content that the platforms host or remove, or other federal laws.*

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*This Article focuses not on how social media should be regulated, but on who should do the regulating. We argue that, to the extent that regulation of content moderation is desirable, it should come from the federal government. State attempts to regulate internet content should be struck down, and states should abstain even from those attempts to regulate content moderation that are not unconstitutional or preempted.*

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## INTRODUCTION

There is a widespread sense that the internet and social media are badly broken. But there is little consensus as to what the problem is, and even less agreement about how to fix it.<sup>1</sup> Many, on both the left and the right, blame a federal statute, 47 U.S.C. § 230 (“Section 230”), which protects internet and social media companies from liability for content posted to their platforms by users and the platforms’ decisions to remove (or not remove) that content.<sup>2</sup> Progressives complain that there is not nearly enough content moderation by internet and social media companies and bemoan the falsehoods and awful but lawful content, such as hate speech, that is so prevalent. Conservatives object that there is too much content moderation, especially of conservative viewpoints.<sup>3</sup> Each side of the political aisle has introduced dozens of bills in Congress to revise Section 230 and to change how the internet functions.<sup>4</sup> But with fundamental disagreements over the problem to be solved and the solutions to be imposed, not one has come close to being adopted in Congress.

Not surprisingly, in the last couple of years, state legislatures have stepped into this breach with their own efforts to deal with the problems of these media. From 2020 to 2022, more than 250 bills were introduced in state legislatures to

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1. See Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, BROOKINGS (May 14, 2021), <https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/> [https://perma.cc/47FX-NG6P (staff-uploaded archive)] (“[M]any blame Section 230 or seize on it as a vehicle to force changes on platforms. But there is little agreement among political leaders as to what are [sic] the real problems are, much less the right solutions. The result is that many proposals to amend or repeal Section 230 fail to appreciate collateral consequences—and would ultimately end up doing more harm than good.”).

2. 47 U.S.C. § 230(c). See generally JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) [hereinafter KOSSEFF, *TWENTY-SIX WORDS*] (providing thorough discussion of Section 230 and its history).

3. See Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46–47 (2020) (“Today, politicians across the ideological spectrum are raising concerns about the leeway provided to content platforms under Section 230. Conservatives claim that Section 230 gives tech companies a license to silence speech based on viewpoint. Liberals criticize Section 230 for giving platforms the freedom to profit from harmful speech and conduct.”).

4. See, e.g., *Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act*, S. 560, 118th Cong. (2023) (introduced by Democrat Senator Mark Warner); *Curtailing Online Limitations that Lead Unconstitutionally to Democracy’s Erosion Act*, S. 1525, 118th Cong. (2023) (introduced by Republican Senator Eric Schmitt).

regulate internet content or content-moderation practices.<sup>5</sup> These laws have taken a variety of forms and, as is to be expected, vary depending on the political composition of the state legislatures. Republican-controlled legislatures, such as in Florida and Texas, have adopted laws that restrict content moderation by social media companies.<sup>6</sup> But Democrat-controlled legislatures, such as in California and New York, have enacted laws intended to coerce platforms, directly and indirectly, into moderating more content.<sup>7</sup> Even among similarly politically aligned legislatures, these laws vary significantly. And these developments are surely just the beginning of state legislative efforts to regulate the internet and social media, as dozens of bills are pending in legislatures across the country.

While states continue to develop these laws, the Supreme Court will soon step into the fray and hear legal challenges brought against two of the newly adopted laws. The Court granted certiorari on two cases on September 29, 2023—one dealing with the Eleventh Circuit decision concerning a Florida law and the other dealing with the Fifth Circuit decision concerning a Texas law.<sup>8</sup> However, as the Court begins developing doctrine in this area, its initial review will be limited to two areas: (1) whether the laws' content-moderation provisions violate the First Amendment, and (2) whether what we call the laws' "specific disclosure requirements" violate the First Amendment.<sup>9</sup>

5. *CCLIA Releases State Content Moderation Landscape*, COMPUT. & COMM'NS INDUS. ASS'N (Nov. 21, 2022), <https://www.ccianet.org/2022/11/ccia-releases-state-content-moderation-landscape/> [<https://perma.cc/XP4D-Y46P>].

6. *See, e.g.*, Act of May 24, 2021, ch. 32, 2021 Fla. Laws 503 (codified as amended at FLA. STAT. §§ 106.072, 287.137, 501.2041, 501.212 (2022)); Act of Sept. 9, 2021, ch. 3, 2021 Tex. Gen. Laws 2d Sess. 3904 (codified at TEX. BUS. & COM. CODE ANN. §§ 120, 321 (2021); TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001-.008 (2023)). Although conservative states have tended to favor laws restricting moderation, several conservative states have enacted laws that require moderation with respect to minors. *See, e.g.*, Securing Children Online Through Parental Empowerment Act, ch. 795, § 2.01, 2023 Tex. Sess. Law Serv. (West) (some sections effective Sept. 1, 2024) (codified at TEX. BUS. & COM. CODE ANN. § 509 (2021)). For example, Utah and Arkansas have passed laws prohibiting social media platforms to allow users under 18 without parental consent and imposing significant moderation requirements for accounts controlled by permitted underage users. *See* Social Media Regulation Amendments, ch. 498, §§ 4-5, 2023 Utah Legis. Serv. (West) (codified at UTAH CODE ANN. §§ 13-63-103 to -104 (2023)); Act of April 11, 2023, Act 689, § 1, 2023 Ark. Acts (codified at ARK. CODE ANN. §§ 4-88-1401 to -1404 (2023)). And Montana has gone a step further by entirely banning TikTok, a social media platform popular with teenagers. An Act Banning TikTok in Montana, ch. 503, § 1, 2023 Mont. Laws (effective Jan. 1, 2024) (to be codified at MONT. CODE ANN. § 30-14).

7. *See* California Age-Appropriate Design Code Act, ch. 320, 2022 Cal. Stat. 4916 (sec. 2, § 1798.99.31 effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.28-.40); Act of June 6, 2022, ch. 204, 2022 N.Y. Laws 1176 (codified at N.Y. GEN. BUS. LAW § 394-ccc (2023)).

8. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196 (11th Cir. 2022), *cert. granted*, 90 U.S.L.W. 3054 (U.S. Oct. 2, 2023) (No. 22-277); *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2023), *cert. granted*, 92 U.S.L.W. 3054 (U.S. Oct. 2, 2023) (No. 22-555).

9. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, *cert. granted*, 90 U.S.L.W. 3054; *Paxton*, 49 F.4th 439, *cert. granted*, 92 U.S.L.W. 3054; Brief for the United States as Amicus Curiae at I,

This Article argues that state efforts to regulate content moderation are undesirable. The internet and social media transcend state and national boundaries. A proliferation of state laws risks exacerbating chaos and undermining freedom of speech over enormously important platforms for expression. For all of their flaws, these media are the most significant developments in freedom of speech since the invention of the printing press. They have democratized the ability of people to reach a mass audience and have made infinite information instantly available.<sup>10</sup>

Congress and the courts realized early on that it made no sense to let states impose their own restrictions on the broadcast media. It likewise would be undesirable to allow states—whether progressive or conservative—to regulate the internet and social media.

Simply put, we believe that most of these state efforts to regulate the internet and social media should be struck down by the courts.<sup>11</sup> Some aspects of these laws should be invalidated for violating the First Amendment. Most other provisions should be found to be preempted by Section 230. Even if the state content-moderation laws are not unconstitutional, and we think they are, they are bad policy because they impose burdens that platforms struggle to accommodate. Individually, the laws are unwieldy. As the laws multiply, it will become impossible for internet platforms to comply. The result will seriously impair free speech online.

Through Section 230, the federal government has adopted a significant deregulatory policy toward internet speech. We have defended this deregulatory policy in the past, and we still believe it is the best way to protect free speech on the internet.<sup>12</sup> But we recognize that many are unhappy with the government's current deregulatory policy. We also recognize that the policy of nonregulation has permitted platforms to act capriciously and has allowed hateful speech and misinformation to prosper online.

Still, to the extent that greater regulation of internet content is desirable and constitutional, that regulation should be national in scope and should not emerge at the state level. Maintaining a national policy toward content moderation will enhance the freedom of platforms and their users, avoid drowning platforms in a deluge of state regulations that are frequently

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NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, *cert. granted*, 90 U.S.L.W. 3054 (No. 22-277) [hereinafter Brief for the U.S. in NetChoice v. Att'y Gen.]; Brief for the United States as Amicus Curiae at I, *Paxton*, 49 F.4th 439, *cert. granted*, 92 U.S.L.W. 3054 (No. 22-555) [hereinafter Brief for the U.S. in NetChoice v. Paxton]; *see also infra* Section I.B.1.

10. For our previous development of this point, see Erwin Chemerinsky & Alex Chemerinsky, *The Golden Era of Free Speech*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* 87, 87–101 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

11. As we argue below, we favor some limited disclosure requirements imposed by state law. *See* discussion *infra* Section II.C.

12. Chemerinsky & Chemerinsky, *supra* note 10, at 90–95.

downright contradictory, and best effectuate a unified vision of what the internet should look like. The First Amendment will still heavily restrict such efforts—and it should. But there is a great deal more that the federal government can do than state governments regarding online speech without destroying the internet or stifling competition.

We develop this argument in three parts. Part I describes the recently enacted state laws and some of the proposals advanced in other states. Part II then explains why some of the provisions in these laws should be deemed unconstitutional as violating the First Amendment. Finally, Part III looks directly at federalism. In Section III.A, we explain why federal laws preempt the great majority of state attempts to regulate content moderation. Our focus will primarily be on the broad preemption imposed under Section 230. As we will show, there are very few areas in which states can presently regulate. Section III.B will argue that this broad preemption is a good thing. For those areas not preempted, we hope to explain why most regulation should nevertheless remain federal.

Throughout this Article, we will focus especially on the laws that were enacted in Florida, Texas, California, New York, Utah, and Arkansas.<sup>13</sup> Because these laws have been adopted and are being challenged in the courts, they provide a concrete basis for discussing these issues. Also, other states will likely adopt laws based on these approaches.<sup>14</sup> However, where appropriate, we will address other proposals for regulation that are being considered in states throughout the country. State regulation of the internet currently has great political salience, and many states are considering (or have considered) bills that, in our view, should not become law. Although we will concentrate most significantly on how these state laws affect social media platforms (because the laws seem most concerned with social media platforms), we hasten to note that the scope of internet moderation laws is not so limited. It is not just Facebook, Reddit, and Twitter that will be affected—it is ultimately the entire World Wide Web.

To be clear, our central focus in this Article is on the question of *who* should regulate, much more than on *what* should be done to regulate the internet and social media. Inevitably, these questions are intertwined, such as in discussing what is constitutionally permissible under the First Amendment. Yet with the proliferation of state laws, we think it is important to directly address what has not received nearly enough attention: why most state

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13. See discussion *infra* Part I (discussing state laws prohibiting and requiring content moderation).

14. For example, New Jersey considered a law that is nearly identical to California's Age-Appropriate Design Code Act. Compare Gen. Assemb. 4919, 220th Leg., Reg. Sess. (N.J. 2022), with California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31, 2022 Cal. Stat. 4916, 4920–22 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31).

regulation of the internet and social media is undesirable, unconstitutional, and preempted by federal law.

## I. STATE LAWS REGULATING THE INTERNET AND SOCIAL MEDIA

### A. *State Content-Moderation Laws*

Many content-moderation laws are currently being adopted or considered in state legislatures across the country. These laws vary widely. For example, some statutes or proposed statutes would require content moderation,<sup>15</sup> while others would prohibit it.<sup>16</sup> Some statutes would require platforms to promulgate policies to inform users about content the platform is willing or unwilling to host,<sup>17</sup> and some would require platforms to enforce those policies.<sup>18</sup> Some statutes would regulate platforms' ability to moderate content using algorithms—a practice used by every major social media platform.<sup>19</sup> And many would impose disclosure or transparency requirements.<sup>20</sup> Although the proposed and already-enacted content-moderation laws diverge significantly, they all, at least indirectly, attempt to influence platforms' decisions about what content to host. As we will explain in later sections, the First Amendment and federal statutes shield platforms from liability for most of the content affected by these state laws.

15. *See, e.g.*, sec. 2, § 1798.99.31, 2022 Cal. Stat. at 4920–22; Act of June 6, 2022, ch. 204, § 1, 2022 N.Y. Laws 1176, 1177 (codified at N.Y. GEN. BUS. LAW § 394-ccc (2023)); S. 287, 2023–24 Leg., Reg. Sess. (Cal. 2023).

16. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.); H.R. 441, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); Assemb. 530, 2021–22 Leg., Reg. Sess. (Wis. 2021) (proposing a ban on censoring “official pages, accounts, profiles, or handles relating to a candidate’s campaign or an elected official’s office”); Assemb. 589, 2021–22 Leg., Reg. Sess. (Wis. 2021) (proposing a ban on censoring journalistic enterprises based on the content of their publications or broadcasts).

17. *See, e.g.*, Act of June 6, 2022 § 1.

18. *See, e.g.*, sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. at 4921.

19. *See, e.g.*, S. 3933, 92d Leg., Reg. Sess. (Minn. 2022); sec. 2, § 1798.99.31(a)(1)(B)(v), 2022 Cal. Stat. at 4920 (requiring a data protection impact assessment that addresses whether algorithms used could harm children). The Utah Governor vetoed the Utah Freedom from Biased Moderation Act, which would have required companies to arbitrate content-moderation decisions and would have imposed penalties for moderation decisions held to violate the Act. *See* S. 228, 64th Leg., Gen. Sess. (Utah 2021); Bryan Schott, *Utah Gov. Spencer Cox Vetoes Controversial Social Media Legislation*, SALT LAKE TRIB., <https://www.sltrib.com/news/politics/2021/03/23/utah-gov-spencer-cox> [<https://perma.cc/UJ7R-UFJN> (dark archive)] (last updated Mar. 24, 2021, 9:49 AM).

20. *See, e.g.*, sec. 2, § 1798.99.31, 2022 Cal. Stat. at 4920–22; Act of Sept. 9, 2021, ch. 3, sec. 2, §§ 120.051–.053, 2021 Tex. Gen. Laws 2d Sess. 3904, 3905–06 (codified at TEX. BUS. & COM. CODE ANN. §§ 120.051–.053 (2021)); S. 393, 2021–22 Gen. Assemb., Reg. Sess. (Ga. 2022).

### 1. Laws Prohibiting Content Moderation

Legislatures in right-leaning states favor laws that prohibit content moderation in service of the states' supposed interest in outlawing "censorship." Florida and Texas have enacted the two most prominent anti-censorship laws.

The Florida statute, enacted via S.B. 7072, applies to platforms with annual gross revenues of greater than \$100 million or more than 100 million global monthly users.<sup>21</sup> It contains five anti-censorship provisions, all of which have been preliminarily enjoined.<sup>22</sup>

First, it prohibits "willfully deplatform[ing] a candidate for office."<sup>23</sup> The statute defines "deplatform" to mean deleting or banning a user for more than fourteen days.<sup>24</sup>

Second, it prohibits the use of "shadow banning" and "post-prioritization" for content posted by or about a candidate.<sup>25</sup> Shadow banning and post-prioritization refer to content-moderation practices platforms use to prioritize some posts over others.<sup>26</sup>

Third, a platform is prohibited to "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast," unless that content is obscene.<sup>27</sup> As the Eleventh Circuit noted, "censor" is "defined broadly" to include not only deleting or editing content but also "any effort to 'post an addendum to any content or material.'"<sup>28</sup>

Fourth, it requires that platforms "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform."<sup>29</sup>

Fifth, it requires platforms to "categorize" post-prioritization and shadow-ban algorithms and to offer users the opportunity to opt out of those algorithms at least once per year.<sup>30</sup>

Texas's anti-censorship law, H.B. 20, is similar. It flatly prohibits "social media platforms"<sup>31</sup> from "censor[ing]" a "user's expression, or a user's ability to

21. FLA. STAT. § 501.2041(1)(g)(4)(a)–(b) (2022).

22. *See* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1232 (11th Cir. 2022) (enjoining all anti-censorship provisions).

23. FLA. STAT. § 106.072(2).

24. *Id.* § 501.2041(1)(c).

25. *Id.* § 501.2041(2)(h).

26. *See id.* § 501.2041(1)(e)–(f).

27. *Id.* § 501.2041(2)(j).

28. NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1206 (11th Cir. 2022) (quoting FLA. STAT. § 501.2041(1)(b)).

29. FLA. STAT. § 501.2041(2)(b).

30. *Id.* § 501.2041(2)(f)–(g).

31. The Texas law defines "[s]ocial media platform" to include all "Internet website[s] or application[s]" that are "open to the public, allow[] a user to create an account, and enable[] users to

receive the expression of another person,” on the basis of viewpoint or geographical location.<sup>32</sup> This prohibition applies even if the viewpoint is not expressed on the social media platform—that is, platforms cannot remove users or their posts on the basis of things said elsewhere.<sup>33</sup> Although H.B. 20 was quickly enjoined,<sup>34</sup> the Fifth Circuit reversed the injunction on the (incorrect)<sup>35</sup> theory that platforms do not enjoy an “unenumerated right to muzzle speech.”<sup>36</sup>

Florida<sup>37</sup> and Texas<sup>38</sup> also attempted to restrict platforms’ content-moderation discretion by declaring social media platforms to be “common carriers.”<sup>39</sup> Common carriage provisions analogize social media platforms to things such as inns, trains, and telecommunication services, which must offer their services to almost all-comers.<sup>40</sup> Although common carriage laws may seem appealing because they intend to level the playing field and require platforms to be neutral among their users, the analogy between common carriers and social media platforms is poor.

Recognizing the shortcomings of this analogy, the Eleventh Circuit emphatically rejected the premise that platforms are common carriers, or that

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communicate with other users for the primary purpose of posting information, comments, messages, or images.” Act of Sept. 9, 2021, ch. 3, sec. 2, § 120.001(1), 2021 Tex. Gen. Laws 2d Sess. 3904, 3905 (codified at TEX. BUS. & COM. CODE ANN. § 120.001(1) (2021)). Social media platforms do not include internet service providers, email applications, or entities that consist primarily of nonuser generated content or where chat and comment functions are incidental to the service. *Id.* H.B. 20 only applies to platforms with greater than 50 million monthly users in the United States. Sec. 2, § 143A.004, 2021 Tex. Gen. Laws 2d Sess. at 3908 (codified at TEX. CIV. PRAC. & REM. ANN. § 143A.004(c) (2023)).

32. Sec. 2, § 143A.002(a), 2021 Tex. Gen. Laws 2d Sess. at 3909.

33. Sec. 2, § 143A.002(b), 2021 Tex. Gen. Laws 2d Sess. at 3909.

34. *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021), *vacated and remanded*, 49 F.4th 439 (5th Cir. 2022). Although the Fifth Circuit subsequently stayed the injunction, which would have permitted H.B. 20 to take effect, the Supreme Court vacated the stay. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715–16 (2022).

35. *See infra* Section II.A.

36. *Paxton*, 49 F.4th at 445 (emphasis omitted).

37. *See* Act of May 24, 2021, ch. 32, § 1(6), 2021 Fla. Laws 503, 505 (“Social media platforms . . . should be treated similarly to common carriers.”). *But see* *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1219–22 (11th Cir. 2022) (rejecting the arguments that social media platforms are common carriers, or that they can be deemed into common carriers by legislation).

38. Sec. 1(3)–(4), 2021 Tex. Gen. Laws 2d Sess. at 3904 (finding social media platforms to be common carriers).

39. In late 2022, the Ohio House considered a law to make platforms common carriers. H.R. 441, 134th Gen. Assemb., Reg. Sess. (Ohio 2022). Florida has also considered a similar law. H.R. 299, 27th Leg., Reg. Sess. (Fla. 2022).

40. For scholarly discussion of the common carrier issue in online content moderation, see generally Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316–31 (2021); Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021); Christopher S. Yoo, *Common Carriage’s Domain*, 35 YALE J. ON REG. 991 (2018).

they can be transformed into common carriers by statute.<sup>41</sup> The court explained that platforms are not common carriers for three reasons: (1) they do not act like common carriers, (2) Supreme Court precedent suggests internet companies are not common carriers, and (3) Congress has expressly distinguished internet computer services from common carriers.<sup>42</sup> The Eleventh Circuit held that states cannot transform private companies into common carriers because doing so would restrict the right to editorial discretion<sup>43</sup>—likely failing under strict scrutiny.

By contrast, the Fifth Circuit held, for the first time in history, that states have broad authority to transform platforms into common carriers.<sup>44</sup> Under this reasoning, a state can restrict the First Amendment rights of any entity that is: (1) a “communications firm,” (2) who “hold[s] [itself] out to serve the public without individualized bargaining,” and (3) is “affected with a public interest.”<sup>45</sup>

## 2. Laws Requiring Content Moderation

Left-leaning legislatures have also begun to experiment with content-moderation laws, including those in New York,<sup>46</sup> California,<sup>47</sup> and New Jersey.<sup>48</sup> However, unlike Florida’s S.B. 7072 and Texas’s H.B. 20, these laws tend to require content moderation, albeit indirectly, rather than prohibit it.

For example, California recently enacted a law that clearly intends to indirectly coerce platforms into moderating more speech in the interest of creating a more palatable online environment.<sup>49</sup> The California Age-Appropriate Design Code Act, which was modeled on a similar law in the

41. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1219–22.

42. *Id.* at 1219–21 (citations omitted).

43. *Id.* at 1221.

44. *See NetChoice, LLC v. Paxton*, 49 F.4th 439, 469–79 (5th Cir. 2022).

45. *Id.* at 473.

46. *See* Act of June 6, 2022, ch. 204, 2022 N.Y. Laws 1176 (codified at N.Y. GEN. BUS. LAW § 394-ccc (2023)) (prescribing social media networks institute process for users to report “hateful conduct” and accessible policy for responding to such reports). New York is working on its own child data protection law that prohibits targeted advertising toward children. S. 3281, 246th Leg., Reg. Sess. (N.Y. 2023); Assemb. 4967, 246th Leg., Reg. Sess. (N.Y. 2023).

47. *See* California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31, 2022 Cal. Stat. 4916, 4920–22 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31) (requiring platforms “likely to be accessed by children” to enforce their promulgated policies, terms of service, and community standards).

48. *See* Gen. Assemb. 4919, 220th Leg., Reg. Sess. (N.J. 2022) (requiring platforms “likely to be accessed by children” to enforce their published terms, policies, and community standards); S. 3493, 220th Leg., Reg. Sess. (N.J. 2023) (same).

49. *See* sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. at 4920–21 (“A business that provides an online service, product, or feature likely to be accessed by children shall . . . [e]nforce published terms, policies, and community standards established by the business, including, but not limited to, privacy rights and report concerns.”).

United Kingdom,<sup>50</sup> imposes strict requirements on platforms “that children are likely to access.”<sup>51</sup> It approaches terms of service differently than other state content-moderation laws.<sup>52</sup> Many laws, including New York’s S. 4511A and Texas’s H.B. 20, require platforms to establish content policies, but they do not *require* platforms to enforce them.<sup>53</sup> The Age-Appropriate Design Code Act attempts to indirectly force content moderation by doing the opposite: it does not require platforms to promulgate policies, but it requires platforms to enforce them.<sup>54</sup> Platforms may not be able to avoid this provision by declining to create policies or community standards that the California law would require them to enforce. Although the Age-Appropriate Design Code Act does not require platforms to promulgate policies, other California laws do,<sup>55</sup> and any platform operating in a jurisdiction that requires content policies—such as New York, Texas, or Europe—would be required to produce standards.<sup>56</sup> The Age-Appropriate Design Code Act would require platforms to enforce those policies if they apply to California users.<sup>57</sup>

The California law contains several more broad and poorly defined prohibitions. When it goes into effect, it will prohibit platforms from using personal information of a child in a way the business “has reason to know[] is materially detrimental to the physical health, mental health, or well-being of a child.”<sup>58</sup> The law does not explain what this might mean, but it does create a state agency that is empowered to produce “best practices” that could offer

50. Shivani Rishi, *From the U.K. to California - Age Appropriate Design Code Enacted in the Golden State*, INFOLAWGROUP (Sept. 20, 2022), <https://www.infolawgroup.com/insights/ca-age-appropriate-design-code> [<https://perma.cc/77QP-MSV8>].

51. Sec. 2, § 1798.99.29(a), 2022 Cal. Stat. at 4919 (codified at CAL. CIV. CODE § 1798.99.29(a) (2023)).

52. The New Jersey legislature has proposed a similar bill. *See* N.J. Gen. Assemb. 4919. New York is working on its own child data protection law that prohibits targeted advertising toward children. S. 3281, 246th Leg., Reg. Sess. (N.Y. 2023). Texas and Utah also have laws restricting advertising to minors. UTAH CODE ANN. § 13-63-103(3) (LEXIS through the 2023 2d Spec. Sess. of the 65th Leg.); TEX. BUS. & COMM. CODE ANN. § 509.052(2)(D) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.) (effective Sept. 1, 2024).

53. For a discussion of these laws, which we describe as “content policy laws,” see *infra* Section I.B. For our assessment of their constitutionality, see *infra* Section II.C.

54. Sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. at 4921 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(a)(9)) (requiring that businesses “[e]nforce published terms, policies, and community standards established by the business”).

55. *See, e.g.*, CAL. CIV. CODE. §§ 1798.100, .130(a)(5) (Westlaw through chapter 1 of 2023–24 1st Exec. Sess., and urgency legislation through chapter 312 of 2023 Reg. Sess.).

56. *See, e.g.*, N.Y. GEN. BUS. LAW § 394-ccc (McKinney 2023); TEX. BUS. & COMM. CODE ANN. § 120.052; Council Regulation 2022/2065, 2022 O.J. (L 277) 49–52, 65 (EU).

57. Sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. at 4921 (requiring that businesses “[e]nforce published terms, policies, and community standards established by the business”). Courts have held federal law precludes breach of contract claims by users who are banned by platforms in a manner inconsistent with the platforms’ own terms of service. *See* *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 17 (2021); *see also* discussion *infra* Section III.A.

58. Sec. 2, § 1798.99.31(b)(1), 2022 Cal. Stat. at 4921.

clarification.<sup>59</sup> The Age-Appropriate Design Code Act also prohibits platforms from using an automated system to process personal information of a child unless it (1) “can demonstrate it has appropriate safeguards in place to protect children” and (2) can show either that the automated information process is necessary to the product or service or that it has a “compelling reason” to do so.<sup>60</sup> And, as we note below, the California law contains vague provisions requiring platforms to produce reports about the platforms’ approach toward child users.<sup>61</sup>

Penalties for violations of these requirements could be extremely high for large platforms. Under the California law, negligent violations are punishable through up to \$2,500 in civil penalties per affected child per violation, and intentional violations are punishable up to \$7,500 per affected child per violation.<sup>62</sup>

To illustrate the potential impact of these penalties, consider the following scenario. The 2020 census estimated there were more than 8.6 million children in California.<sup>63</sup> Some platforms are used by a huge proportion of children: according to one estimate, 45% of children under the age of thirteen use Facebook and 40% use Instagram.<sup>64</sup> These figures are likely much higher among teenagers.<sup>65</sup> If Facebook violated the Age-Appropriate Design Code Act in a way that affected, say, 10% of child users in California, it could face more than \$2 billion in penalties *per violation*.

59. Sec. 2, § 1798.99.32(d), 2022 Cal. Stat. at 4922 (codified at CAL. CIV. CODE § 1798.99.32(d)).

60. Sec. 2, § 1798.99.31(b)(2)(A)–(B), 2022 Cal. Stat. at 4921 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(b)(2)(A)–(B)) (banning profiling of a child except in limited circumstances); *see also* sec. 2, § 1798.99.30(b)(6), 2022 Cal. Stat. at 4919 (codified at CAL. CIV. CODE § 1798.99.30(b)(6)) (defining “profiling” as any “automated processing of personal information that uses personal information to evaluate certain aspects relating to a natural person”).

61. *See* sec. 2, §§ 1798.99.30(b)(2), .31(a)(1)(A), .33, 2022 Cal. Stat. at 4919, 4920, 4923 (sec. 2, § 1798.99.31 effective July 1, 2024) (to be codified at CAL. CIV. CODE §§ 1798.99.30(b)(2), .31(a)(1)(A), .33); *see also* discussion *infra* Section II.C.

62. Sec. 2, § 1798.99.35(a), 2022 Cal. Stat. at 4923 (codified at CAL. CIV. CODE § 1798.99.35(a)).

63. *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> [<https://perma.cc/J3NC-QHJX>].

64. Katie Canales, *40% of Kids Under 13 Already Use Instagram and Some Are Experiencing Abuse and Sexual Solicitation, a Report Finds, as the Tech Giant Considers Building an Instagram App for Kids*, BUS. INSIDER (May 13, 2021, 12:16 PM), <https://www.businessinsider.com/kids-under-13-use-facebook-instagram-2021-5> [<https://perma.cc/K9LF-PCRA>] (citing THORN & BENENSON STRATEGY GRP., *RESPONDING TO ONLINE THREATS: MINORS’ PERSPECTIVES ON DISCLOSING, REPORTING, AND BLOCKING 12* (2021), [https://info.thorn.org/hubfs/Research/Responding%20to%20Online%20Threats\\_2021-Full-Report.pdf](https://info.thorn.org/hubfs/Research/Responding%20to%20Online%20Threats_2021-Full-Report.pdf) [<https://perma.cc/6QMN-AQ2K>]).

65. *Cf.* EMILY A. VOGELS, RISA GELLES-WATNICK & NAVID MASSARAT, PEW RSCH. CTR., *TEENS, SOCIAL MEDIA AND TECHNOLOGY 2022*, at 1 (2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [<https://perma.cc/HRJ2-H5L3> (staff-uploaded archive)] (“Older teens are more likely than younger teens to say they use each of the online platforms asked about except for YouTube and WhatsApp.”).

Between its vague content moderation and disclosure requirements, as well as its enormous penalties, California’s law ultimately may limit platforms’ editorial discretion as significantly as the Florida or Texas laws. As we discuss below, with the Florida and Texas laws, this is concerning because that discretion is protected both by the First Amendment and by federal law.<sup>66</sup> The Northern District of California enjoined the California Age-Appropriate Design Code Act on September 18, 2023.<sup>67</sup>

Federal District Court Judge Beth Labson Freeman entered a preliminary injunction, concluding that NetChoice had shown “it is likely to prevail on its claim that enforcement of the CAADCA violates the First Amendment—and thus could not be lawfully enforced by the State.”<sup>68</sup> Judge Freeman said that she was “keenly aware of the myriad harms that may befall children on the internet,” but California’s law swept too broadly.<sup>69</sup>

Initially, laws requiring content moderation appeared to be limited to left-leaning legislatures. Recently, however, conservative states have enacted several laws that require content moderation. These laws have uniformly focused on restricting minors’ access to social media.

Utah and Arkansas have passed laws that require social media platforms to identify users under the age of eighteen and refuse to permit those users to create accounts unless the platforms obtain parental permission.<sup>70</sup> Even for those minors who do receive parental permission, the Texas and Utah laws impose significant moderation requirements on platforms. For example, under the Utah law, platforms cannot display advertisements to underage users, cannot use targeted services in relation to underage users’ accounts (including algorithmic targeting), cannot allow those users’ accounts to see, or receive messages from, accounts “not linked . . . through friending,” and cannot allow minors to access their accounts during certain hours.<sup>71</sup>

A Texas law imposes different, substantial content-moderation duties on platforms in relation to minors who receive parental permission to use social media. Under the Texas law, platforms cannot target advertising to underage users and are required to “implement a strategy to prevent the . . . minor’s

66. See discussion *infra* Sections II.A, II.C, and III.A.

67. NetChoice, LLC v. Bonta, No. 22-cv-8861, 2023 WL 6135551, at \*1 (N.D. Cal. Sept. 18, 2023).

68. *Id.* at \*24.

69. *Id.* at \*9.

70. Social Media Regulation Amendments, ch. 498, § 3, 2023 Utah Legis. Serv. (West) (codified at UTAH CODE ANN. § 13-63-102 (2023)); Act of April 11, 2023, Act 689, § 1, 2023 Ark. Acts (codified at ARK. CODE ANN. § 4-88-1402(a) (2023)). Arkansas’s law was recently preliminarily enjoined on the ground that it likely violated the First Amendment. See NetChoice, LLC v. Griffin, No. 23-CV-05105, 2023 WL 5660155, at \*21 (W.D. Ark. Aug. 31, 2023).

71. Social Media Regulation Amendments §§ 5, 7.

exposure to harmful material.”<sup>72</sup> The law requires, at a minimum, that platforms “creat[e] and maintain[] a comprehensive list of harmful material,” use filtering technology to restrict access to that material, create a database of keywords that might be used to circumvent the platform’s filters, and use human moderators to perform reviews of the filtering.<sup>73</sup> The law also permits parents to unilaterally alter the platform’s content-moderation duties relative to that parent’s child.<sup>74</sup>

Montana took yet another approach. Rather than restricting minors’ access to social media in general, Montana banned one particular platform—TikTok—from operating in the state.<sup>75</sup> The decision to do so was justified in part because of TikTok’s purported failure to adequately moderate content seen by children.<sup>76</sup> A lawsuit seeking to enjoin the Montana law is pending in the District of Montana.<sup>77</sup>

### B. *State Disclosure Laws*

Legislatures controlled by both Democrats and Republicans have enacted laws imposing disclosure requirements on platforms.<sup>78</sup> All disclosure laws share a common feature: they require platforms to divulge some information about their content-moderation decisions after those decisions are made.<sup>79</sup> But the statutes vary significantly based on the type of information to be disclosed, and their constitutionality is also likely quite different.

#### 1. Specific Disclosure Requirements

States have considered roughly three types of disclosure laws. First, some state laws impose what we refer to as “specific disclosure requirements.” These

72. Securing Children Online Through Parental Empowerment Act, ch. 795, § 2.01, 2023 Tex. Sess. Law Serv. (West) (effective Sept. 1, 2024) (codified at TEX. BUS. & COM. CODE ANN. § 509.053 (2021)). The platform must also “make a commercially reasonable effort to prevent advertisers on the [platform] from targeting a known minor with advertisements that facilitate, promote, or offer a product, service, or activity that is unlawful for a minor in this state to use or engage in.” § 2.01, 2023 Tex. Sess. Law Serv. (codified at TEX. BUS. & COM. CODE ANN. § 509.055).

73. § 2.01, 2023 Tex. Sess. Law Serv. (codified at TEX. BUS. & COM. CODE ANN. § 509.053(b)). The law also contains several suggested practices, including engaging third parties to review platforms’ content filtering practices and coordinating with other platforms to share best practices regarding restricting access to harmful material. *Id.*

74. § 2.01, 2023 Tex. Sess. Law Serv. (codified at TEX. BUS. & COM. CODE ANN. § 509.102(a)) (“A verified parent is entitled to alter the duties of a digital service provider under Section 509.052 with regard to the verified parent’s known minor.”).

75. An Act Banning TikTok in Montana, ch. 503, § 1, 2023 Mont. Laws (effective Jan. 1, 2024) (to be codified at MONT. CODE ANN. § 30-14).

76. S. 419, 68th Leg., Reg. Sess. (Mont. 2023) (“WHEREAS, TikTok fails to remove, and may even promote, dangerous content that direct minors to engage in dangerous activities.”).

77. *See* Complaint for Injunctive and Declaratory Relief, *Alario v. Knudsen*, No. 23-CV-56 (D. Mont. May 17, 2023).

78. *See infra* Sections I.B, II.C, and III.B.1.a.

79. *See infra* Section I.B.

laws require platforms to provide individualized disclosures about content-moderation decisions to the user whose speech has been monitored.<sup>80</sup> Second, some states have “general disclosure requirements.” General disclosure requirements compel platforms to issue broad transparency reports that set forth data about platforms’ moderation practices as a whole.<sup>81</sup> Third, some states require platforms to produce acceptable use policies in which the platforms indicate what content they will host and how they will moderate content.<sup>82</sup> We call these “content policy laws.”

Florida’s S.B. 7072 law and Texas’s H.B. 20 law both contain specific disclosure requirements.<sup>83</sup> The Florida law requires platforms to provide written notice, “includ[ing] a thorough rationale explaining the reason that the social media platform” moderated a user’s content and “a precise and thorough explanation of how the social media platform became aware of the censored content or material,” within seven days of censoring, shadow banning, or deplatforming a user.<sup>84</sup> The Eleventh Circuit interpreted Florida S.B. 7072 to require *advance* notice.<sup>85</sup>

Such notice, as we explain below, places an enormous, if not impossible, burden on platforms, which make huge numbers of content-moderation choices every day; thus, requiring platforms to provide an individualized explanation of each is impossible for many, and perhaps all, platforms.<sup>86</sup> In fact, because the number of specific disclosures platforms have to make is directly correlated with the number of content-moderation actions they take (each content-moderation decision may entail a discrete disclosure), specific disclosures would have the potential to impose a significant burden on speech and on platforms’ right to make editorial decisions. Internet and social media platforms likely would refrain from content-moderation choices rather than undertaking an impossible burden of individual justification. As Judge Kevin Newsom of the Eleventh Circuit explained:

80. *See infra* Section I.B.1.

81. *See infra* Section I.B.2.

82. *See infra* Section I.B.2.

83. *See* Act of May 24, 2021, ch. 32, § 4, 2021 Fla. Laws 503, 513–14 (codified as amended at FLA. STAT. § 501.2041(2)–(3) (2022)). Texas law separately requires platforms to disclose how the platforms algorithmically moderate and recommend content. *See* Securing Children Online Through Parental Empowerment Act, ch. 795, § 2.01, 2023 Tex. Sess. Law Serv. (West) (effective Sept. 1, 2024) (codified at TEX. BUS. & COM. CODE ANN. § 509.056(2) (2021)).

84. Act of May 24, 2021 § 4. The statute contains an exception for obscene content. *Id.*

85. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1207 (11th Cir. 2022) (“*Before* a social-media platform deplatforms, censors, or shadow-bans any user, it must provide the user with a detailed notice.” (emphasis added) (citing FLA. STAT. § 501.2041(2)(d))).

86. *Cf.* Evelyn Douek, *Governing Online Speech: From “Posts-as-Trumps” to Proportionality and Probability*, 121 COLUM. L. REV. 759, 791 (2021) [hereinafter Douek, *Governing Online Speech*] (“The scale [of content moderation] is truly unfathomable.”).

The targeted platforms remove millions of posts per day; YouTube alone removed more than a billion comments in a single quarter of 2021. For every one of these actions, the law requires a platform to provide written notice delivered within seven days . . . . This requirement not only imposes potentially significant implementation costs but also exposes platforms to massive liability: The law provides for up to \$100,000 in statutory damages per claim and pegs liability to vague terms like “thorough” and “precise.” Thus, a platform could be slapped with millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn’t provide sufficiently “thorough” explanations when removing posts. It is substantially likely that this massive potential liability is “unduly burdensome” and would “chill[] protected speech.”<sup>87</sup>

Because of this significant burden, the Eleventh Circuit affirmed the preliminary injunction that was entered against the Florida law on First Amendment grounds.<sup>88</sup>

But the Fifth Circuit reached the opposite conclusion; it upheld the Texas law’s specific disclosure requirements.<sup>89</sup> H.B. 20 imposes an immensely burdensome complaint-and-appeal procedure that requires platforms to provide individualized justifications for their content removal decisions, and entertain appeals of those decisions.<sup>90</sup> Platforms are required to explain the reason for almost all content removal decisions at the time the removal occurs and process appeals within fourteen days.<sup>91</sup> Although the plaintiffs demonstrated that the complaint-and-appeal procedure would impose a burden that platforms could not possibly satisfy, the Fifth Circuit upheld this requirement, concluding that content-moderation choices are not protected speech.<sup>92</sup>

As we explain below, the Eleventh Circuit was correct.<sup>93</sup> The Fifth Circuit’s analysis was simply wrong as a matter of First Amendment law and seems premised on a serious misunderstanding of the nature and scale of internet content moderation.

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87. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1230–31. The Eleventh Circuit held that the statute failed to satisfy even the “relatively permissive” standard for factual disclosures under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), because the disclosure requirements are “unduly burdensome and likely to chill platforms’ protected speech.” *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1230.

88. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1231.

89. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022).

90. Act of Sept. 9, 2021, ch. 3, sec. 2, §§ 120.101–.104, 2021 Tex. Gen. Laws 2d Sess. 3904, 3907 (codified at TEX. BUS. & COM. CODE ANN. §§ 120.101–.104 (2021)).

91. *Id.*

92. *Paxton*, 49 F.4th at 486–88.

93. See *infra* Section II.A.1.

## 2. General Disclosure Requirements

Some states have adopted general disclosure requirements requiring platforms to make data about their moderation practices available. For example, Texas’s H.B. 20 requires platforms to publish “Biannual Transparency Reports” containing data about the number of user complaints received in response to unlawful or policy-violating content, and the platforms’ response to such content.<sup>94</sup> H.B. 20 separately requires platforms to publicly disclose information about how they curate content and use algorithms.<sup>95</sup> These general disclosure provisions were recently upheld by the Fifth Circuit.<sup>96</sup>

The California Age-Appropriate Design Code Act also contains general disclosure requirements. Under the California law, an affected platform must conduct a “Data Protection Impact Assessment” before launching any new features, must re-review the impact assessment twice per year, and must provide the assessment to the State upon request.<sup>97</sup> The assessment requires a platform to identify the purpose of any new feature and evaluate eight types of “harms” to children, including exposure to potentially “harmful” content, contacts, conduct, algorithms, and targeted advertisements.<sup>98</sup> The California law also requires platforms to evaluate features designed to encourage children to “increase, sustain, or extend” their use of the new service.<sup>99</sup> The statute does not define the term “harmful” and does not explain what harmful content, algorithms, or advertisements might be. It also requires platforms to estimate the age of all child users “with a reasonable level of certainty” relative to the risks of harm associated with the services or products the platform provides.<sup>100</sup> We will explain in Sections II.B and II.C that we think Texas’s general disclosure requirements are desirable policy and California’s are not.

## 3. Requirements for Publishing Acceptable Use Policies

Finally, Texas and New York are among the states that have adopted content policy laws requiring platforms to publish acceptable use policies. Texas requires platforms to publish policies telling users what content the platform

94. Sec. 2, § 120.053, 2021 Tex. Gen. Laws 2d Sess. at 3906–07.

95. Sec. 2, §§ 120.051, .053, 2021 Tex. Gen. Laws 2d Sess. at 3905–07. A different Texas law requires platforms to disclose “an overview of” how the platform uses algorithms for content moderation. *See* Securing Children Online Through Parental Empowerment Act, ch. 795, § 2.01, 2023 Tex. Sess. Law Serv. (West) (effective Sept. 1, 2024) (codified at TEX. BUS. & COM. CODE ANN. § 509.056 (2021)).

96. *Paxton*, 49 F.4th at 485–88.

97. California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31(a)(1)(A)–(B), (a)(3), 2022 Cal. Stat. 4916, 4920 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(a)(1)(A)–(B), (a)(3)).

98. Sec. 2, § 1798.99.31(a)(1)(B)(i)–(viii), 2022 Cal. Stat. at 4921.

99. Sec. 2, § 1798.99.31(a)(1)(B)(vii), 2022 Cal. Stat. at 4921.

100. Sec. 2, § 1798.99.31(a)(5), 2022 Cal. Stat. at 4921.

will allow, how it will ensure content complies with the policy, and how the platform can be notified of content that does not comply with the policy or is illegal.<sup>101</sup> Aside from these requirements, the Texas law does not dictate what the acceptable use policies should include.

By contrast, New York’s content policy law, S. 4511A, is directed toward a specific type of content. S. 4511A requires “social media network[s]” to establish reporting mechanisms for user-generated material considered by the State to be “hateful conduct,” as well as to promulgate “clear and concise” policies that indicate how the platform will “respond [to] and address” reports of hateful content on their platform.<sup>102</sup> The law defines “hateful conduct” as “the use of a social media network to vilify, humiliate, or incite violence against a group or class of persons on the basis of race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression.”<sup>103</sup> The state legislator that introduced S. 4511A, Senator Anna Kaplan, has insisted the law is “not about violating the First Amendment” because “[w]e are not in any way telling social media what policy to put in.”<sup>104</sup> But it is clear that the law is intended to induce platforms to moderate constitutionally protected speech because the relevant section is entitled “Social media networks; hateful conduct prohibited,” although much of the speech that falls within New York’s definition of “hateful conduct” would be protected by the First Amendment.<sup>105</sup>

We also note that some statutes contain disclosure requirements that are not directly related to the platforms’ content-moderation decisions. For example, a provision of Florida’s S.B. 7072 that was upheld by the Eleventh

101. Act of Sept. 9, 2021, ch. 3, sec. 2, § 120.052, 2021 Tex. Gen. Laws 2d Sess. 3904, 3905–06 (codified at TEX. BUS. & COM. CODE ANN. § 120.052 (2021)).

102. Act of June 6, 2022, ch. 204, § 1, 2022 N.Y. Laws 1176, 1177 (codified at N.Y. GEN. BUS. LAW § 394-ccc (2023)).

103. *Id.*

104. Rebecca Kern, *Push To Rein In Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), <http://politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229> [<https://perma.cc/VB9J-PR76>].

105. Act of June 6, 2022 § 1. Many legislatures have adopted or proposed laws requiring platforms to establish content-moderation policies different from New York’s requirements. *See, e.g.*, sec. 2, § 120.052, 2021 Tex. Gen. Laws 2d Sess. at 3905–06. Florida’s law, for instance, does not require a hateful content policy. Instead, it requires platforms to “publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban,” inform users about any changes to its “rules, terms, and agreements before implementing changes,” and refrain from changing those rules more than once every thirty days. Act of May 24, 2021, ch. 32, § 4, 2021 Fla. Laws 503, 513 (codified as amended at FLA. STAT. § 501.2041(2)(a), (c) (2022)). Similarly, the Texas anti-censorship law requires platforms to accept and process user complaints regarding illegal activity and “decision[s] made by the social media platform to remove content posted by the user.” Sec. 2, § 120.101, 2021 Tex. Gen. Laws 2d Sess. at 3907. That statute requires more than that platforms accept the complaints—it imposes immensely burdensome requirements on platforms to process initial complaints in forty-eight hours and appeals within fourteen days. Sec. 2, §§ 120.102–.104, 2021 Tex. Gen. Laws 2d Sess. at 3907.

Circuit requires platforms to permit a deplatformed user to retrieve their user data and content within sixty days after the user receives notice of the deplatforming action.<sup>106</sup>

As we argue below, a concern with all of the disclosure requirements is the extent to which they impose different and often conflicting requirements on national media. To the extent that disclosure is desirable and constitutional, it would be much better for such regulations to come from the federal government.

## II. THE FIRST AMENDMENT AND STATE REGULATIONS

The starting point in assessing state laws must be the First Amendment. For laws that violate the First Amendment, there is no need to consider whether the action would be better from the federal government as opposed to state governments.

### A. *Controlling the Content of Social Media Platforms Violates the First Amendment*

The First Amendment prohibits state actors from restricting the speech of private parties, including social media platforms.<sup>107</sup>

The crucial First Amendment problem with the state laws that have been adopted—both the conservative and the liberal approaches—is that they regulate the content of the speech of private entities. The First Amendment prevents the government from interfering with the right of private parties to exercise “editorial control over speech and speakers on their properties or platforms.”<sup>108</sup> The Supreme Court has been emphatic that the First Amendment forbids the government from interfering with the right of private parties to exercise “editorial discretion in the selection and presentation” of speech.<sup>109</sup>

Many cases establish and reaffirm this central First Amendment principle. In *Miami Herald Publishing Co. v. Tornillo*,<sup>110</sup> the Supreme Court unanimously invalidated a state law that required newspapers to provide space to political candidates who had been verbally attacked in print.<sup>111</sup> The Court stressed that freedom of the press gave the newspaper the right to decide what was included

106. Act of May 24, 2021 § 4.

107. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

108. *Id.* at 1932.

109. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998).

110. 418 U.S. 241 (1974).

111. *Id.* at 241–42; see also *FCC v. League of Women Voters*, 468 U.S. 364, 364–65 (1984) (declaring unconstitutional a federal law that prohibited noncommercial educational stations from editorializing as violating the First Amendment).

or excluded.<sup>112</sup> Forcing newspapers to publish a reply was deemed to intrude on editorial discretion that is protected by the First Amendment.<sup>113</sup>

Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,<sup>114</sup> the Court declared unconstitutional a utility commission regulation that required a private utility company to include materials prepared by a public interest group in its billing envelope.<sup>115</sup> The utility commission sought to provide a more balanced presentation of views on energy issues; the public interest group's statements were to be a counterpoint to the statements by the utility companies.<sup>116</sup> But the Court found that such compelled access violated the First Amendment.<sup>117</sup> Justice Lewis Powell, writing for the Court, said that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."<sup>118</sup>

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,<sup>119</sup> the Court held that a private group that organized a St. Patrick's Day Parade could exclude a gay, lesbian, and bisexual group from participation.<sup>120</sup> The unanimous decision said that organizing a parade is an inherently expressive activity and that those doing so have a right to exclude messages inimical to their own.<sup>121</sup> The Court explained that compelling the Veterans Council to include the Irish-American Gay, Lesbian, and Bisexual Group "violates the fundamental rule . . . under the First Amendment, that a speaker has the autonomy to choose the content of his own message."<sup>122</sup>

Although the government is prohibited from restricting the speech of private parties, platforms are not.<sup>123</sup> Courts have uniformly rejected the

112. See *Mia. Herald*, 418 U.S. at 258. *But see* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369–71, 375 (1969) (upholding the fairness doctrine as applied to television and radio). The Court stressed the scarcity of the broadcast spectrum as a basis for allowing the regulation. *Id.* at 400–01. There is no similar scarcity with regard to the internet and social media; quite the contrary, its core characteristic is its virtually infinite capacity for speech.

113. *Mia. Herald*, 418 U.S. at 258.

114. 475 U.S. 1 (1986).

115. *Id.* at 20–21.

116. *Id.* at 6.

117. *Id.* at 20–21.

118. *Id.* at 9.

119. 515 U.S. 557 (1995).

120. *Id.* at 580–81.

121. *See id.* at 572–73.

122. *Id.* at 573.

123. The internet and social media companies are privately owned, and there is no credible argument that they are "state actors" who must comply with the First Amendment. They are not performing a task that has been traditionally, exclusively done by the government. *See* *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019) (finding that public access cable channels do not meet the requirements for the public functions exception to the state action doctrine). Nor is

argument that privately owned media companies are state actors by virtue of their social importance or even government regulation. For example, in *Manhattan Community Access Corporation v. Halleck*,<sup>124</sup> the Supreme Court held that public access cable channels do not need to comply with the First Amendment.<sup>125</sup> The Court said that “[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed.”<sup>126</sup>

Likewise, lower courts have consistently held that social media platforms, such as Twitter, are not government actors and do not need to comply with the First Amendment.<sup>127</sup> This is clearly right under current law: these are private companies, not part of the government and not entities that can be regarded as state actors. Under cases like *Tornillo*, *Pacific Gas*, and *Hurley*, platforms have a right to moderate speech.<sup>128</sup> They can choose what content they want to be associated with and delete the content they want to remove.<sup>129</sup> There is nothing that the government can do about it. These are editorial choices about content that are protected by the First Amendment. The Supreme Court has explained that “editorial function itself is an aspect of ‘speech’” that is safeguarded by the First Amendment.<sup>130</sup> It is firmly established that when an entity “exercises editorial discretion in the selection and presentation” of expression it disseminates, “it engages in [protected] speech activity.”<sup>131</sup>

And the platforms *do* moderate speech—a ton of it. Internet and social media platforms are private companies that are constantly engaging in content moderation, making choices about what to include or exclude.<sup>132</sup> Social media companies do an enormous amount of content moderation. For

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there the extensive government regulation and entanglement that would be a basis for requiring that they comply with the Constitution. *See, e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 715 (1961) (finding state action when the government leased space to a privately owned restaurant).

124. 139 S. Ct. 1921 (2019).

125. *Id.* at 1934. Courts have long held that private media companies are not state actors. In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), the Supreme Court, without a majority opinion, ruled that television stations, licensed by the government, could refuse to accept editorial advertisements from anti-Vietnam War groups. *Id.* at 122–23. Several of the Justices took the position that federal licensing of broadcast stations is not sufficient government involvement for state action. *See id.* at 114–21 (plurality opinion).

126. *Halleck*, 139 S. Ct. at 1930.

127. *See, e.g.*, *Prager Univ. v. Google LLC*, 951 F.3d 991, 998 (9th Cir. 2020).

128. *See supra* notes 110–22 and accompanying text.

129. As we explain below, this constitutional right is supplemented by an even more protective federal statutory right. *See discussion infra* Section III.A.

130. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737–38 (1996) (plurality opinion).

131. *Ark. Educ. Tel. Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

132. *Cf.* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1602–03 (2018) (noting that internet platforms have developed complex systems for moderating content that mirror the American legal system and place moderators in a position analogous to that of judges).

example, from October to December 2021, Facebook says it took action against terrorism content 7.7 million times, bullying and harassment 8.2 million times, and child sexual exploitation material 19.8 million times.<sup>133</sup> In the last quarter of 2020, Facebook took action on an average of 1.1 million pieces of content *per day*.<sup>134</sup> Literally billions, if not trillions, of choices are made each year by internet and social media companies about what to include or exclude on their platforms. They may not always do the moderation perfectly.<sup>135</sup> But they are able to do a great deal of it, and they can do it pretty well<sup>136</sup> because of the protection provided by both the First Amendment and Section 230, the federal law that immunizes platforms from liability for their content-moderation decisions.

### 1. Efforts To Prohibit Moderation Are Unconstitutional

Following this clear line of First Amendment caselaw, the Eleventh Circuit held that Florida's S.B. 7072, which, as we described in Section I.A.1, prohibited much content moderation by social media platforms, violates the First Amendment.<sup>137</sup> The unanimous decision explained "that a private entity's

133. *Dangerous Organizations*, META: TRANSPARENCY CTR., <https://transparency.fb.com/reports/community-standards-enforcement/dangerous-organizations/facebook/> [https://perma.cc/H224-ABB9]; *Bullying and Harassment*, META: TRANSPARENCY CTR., <https://transparency.fb.com/reports/community-standards-enforcement/bullying-and-harassment/facebook/> [https://perma.cc/XV9F-9VM4]; *Child Endangerment*, META: TRANSPARENCY CTR., <https://transparency.fb.com/reports/community-standards-enforcement/child-nudity-and-sexual-exploitation/facebook/> [https://perma.cc/6X84-7UV8]. Much of this moderation is either performed by algorithms or aided by algorithms. In the second and third quarters of 2022, alone, Facebook took action against 24.1 million posts containing hate speech. *Hate Speech*, META: TRANSPARENCY CTR., <https://transparency.fb.com/data/community-standards-enforcement/hate-speech/facebook/> [https://perma.cc/DLN3-ZNFZ]. It has attributed its moderation actions in part to "machine learning technology that automatically identifies content." *Proactive Rate*, META: TRANSPARENCY CTR., <https://transparency.fb.com/policies/improving/proactive-rate-metric> [https://perma.cc/6PHM-Q7ZP] (last updated Feb. 22, 2023). For discussion of algorithmic moderation, see, for example, Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT'L L.J. 41, 66–74 (2020); Douek, *Governing Online Speech*, *supra* note 86, at 791; Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2001–06 (2019); Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611, 618–20 (2020).

134. Douek, *Governing Online Speech*, *supra* note 86, at 791.

135. *Id.* at 798 ("Perfect enforcement is still—and, for the imaginable future, will remain—illusory."); MONIKA BICKERT, FACEBOOK, CHARTING A WAY FORWARD: ONLINE CONTENT REGULATION 7 (2020), <https://about.fb.com/wp-content/uploads/2020/02/Charting-A-Way-Forward-Online-Content-Regulation-White-Paper-1.pdf> [https://perma.cc/TP9C-KXHU] (noting that "internet companies' enforcement of content standards will always be imperfect").

136. Eshwar Chandrasekharan, Umashanthi Pavalanathan, Anirudh Srinivasan, Adam Glynn, Jacob Eisenstein & Eric Gilbert, *You Can't Stay Here: The Efficacy of Reddit's 2015 Ban Examined Through Hate Speech*, PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2017, at 1, 17 (concluding that Reddit effectively diminished hateful behavior to a certain degree—even among accounts that were not banned—through repeat enforcement of its antiharassment policy in 2015).

137. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1212 (11th Cir. 2022). For an excellent analysis of laws requiring platforms to host content they would prefer not to host, see Eric Goldman & Jess

decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment.<sup>138</sup> The court stressed that “[s]ocial-media platforms exercise editorial judgment that is inherently expressive.”<sup>139</sup> A platform’s decision to remove content “necessarily convey[s] some sort of message—most obviously, the platform[’s] disagreement with or disapproval of certain content, viewpoints, or users.”<sup>140</sup> The very purpose of the Florida law was to exercise control over the content of speech:

[T]he driving force behind S.B. 7072 seems to have been a perception (right or wrong) that some platforms’ content-moderation decisions reflected a “leftist” bias against “conservative” views—which, for better or worse, surely counts as expressing a message. That observers perceive bias in platforms’ content-moderation decisions is compelling evidence that those decisions are indeed expressive.<sup>141</sup>

Although the Eleventh Circuit declined to adopt a level of scrutiny, indicating that the Florida law was unconstitutional under any tier of review,<sup>142</sup> strict scrutiny should be applied to statutes that regulate the content of speech over the internet and social media. On its own, the content-based focus of the Florida law (and laws like it) suffices to trigger strict scrutiny; laws that compel speakers to “alte[r] the content of [their] speech” are necessarily “content-based” and subject to strict scrutiny.<sup>143</sup> In a recent decision, *City of Austin v. Reagan National Advertising of Austin, LLC*,<sup>144</sup> the Supreme Court clarified that a law is content based if it regulates speech based on “the topic discussed or the idea or message expressed.”<sup>145</sup> The Court also said that a law is content based “[i]f there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based.”<sup>146</sup>

The Florida law, and ones like it, are very much so about regulating the content of expression on social media and the internet. For example, Florida law prohibits companies from deprioritizing posts “about” political

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Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 198–204 (2021).

138. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1212.

139. *Id.* at 1213.

140. *Id.* at 1214 (emphasis omitted).

141. *Id.*

142. *Id.* at 1209–10.

143. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018) (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

144. 142 S. Ct. 1464 (2022).

145. *See id.* at 1474 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015)).

146. *Id.* at 1475 (citation omitted).

candidates.<sup>147</sup> And the Florida and Texas laws are specifically about combatting what those states' legislatures perceive as a liberal bias on social media platforms, seeking to have more politically conservative content on the internet.<sup>148</sup> The purposes and terms of the laws are all about trying to control the viewpoints of speech on the internet and social media.<sup>149</sup>

It thus seems clear that state laws like those in Florida and Texas, which regulate the content of speech on the internet and social media, violate the First Amendment. The Fifth Circuit, though, came to the opposite conclusion in upholding the Texas law preventing content moderation by internet and social media companies.<sup>150</sup> The Fifth Circuit's premise, repeated throughout the opinion, is that the internet and social media companies are the "public square," though it acknowledged that they were not state actors.<sup>151</sup> But the "public square" label, which describes the internet and social media companies' importance as a place for speech, creates a misleading connotation that they should be treated like government-owned property where the First Amendment applies. To be sure, internet and social media platforms, like the traditional town square, are crucial places for expression. But the town square was government property where the government must comply with the First Amendment, while internet and social media companies are private entities where the First Amendment does not apply. The Fifth Circuit obscures this essential distinction by invoking the metaphor of the "public square."<sup>152</sup>

147. Act of May 24, 2021, ch. 32, § 4, 2021 Fla. Laws 503, 513–14 (codified as amended at FLA. STAT. § 501.2041(2)(h) (2022)).

148. It is worth noting that many studies have been done and find no evidence of such a liberal bias on internet and social media platforms. See Rebecca Heilweil, *Right-Wing Media Thrives on Facebook. Whether It Rules Is More Complicated*, VOX (Sept. 9, 2020, 7:00 AM), <https://www.vox.com/recode/21419328/facebook-conservative-bias-right-wing-crowdtangle-election> [<https://perma.cc/ZXW2-2XD3>] ("Consistently, [New York Times columnist Kevin] Roose found, conservative pages were beating out liberals' in making it into the day's top 10 Facebook posts with links in the United States, based on engagement, like the number of reactions, comments, and shares the posts receive. That seems to provide evidence against the notion that Facebook censors conservatives, a complaint often trotted out by Republicans despite lacking any significant data to support their claims of systemic bias.").

149. Also, the laws of this type often distinguish among speakers, applying only to large social media platforms. As explained in Part I, the Florida statute, S.B. 7072, applies just to platforms with annual gross revenues of greater than \$100 million or more than 100 million global monthly users. Act of May 24, 2021 § 4. But the Supreme Court has said that laws which distinguish among speakers also must meet strict scrutiny; it has declared that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 170 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 658 (1994)); see also *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). But that is exactly what laws do when they regulate some social media platforms, but not others. The laws reflect the judgment of the Texas and Florida legislatures that large social media platforms are most likely to be biased against conservative voices.

150. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022).

151. See, e.g., *id.* at 460.

152. See *id.*

The Fifth Circuit, in upholding the Texas law, said that websites engage in “conduct” and repeatedly called it “censorship” unprotected by the First Amendment.<sup>153</sup> But any publisher’s editorial choices about what speech to include or exclude could be recharacterized as a form of conduct. Describing those choices as “conduct” obscures that these are decisions about speech that the First Amendment protects. In *Tornillo*, it could have been said that the government was regulating conduct of newspapers in requiring a “right to reply.”<sup>154</sup> Calling those decisions “conduct” would deny First Amendment protection to any editorial choice by any media company because any decision about what to publish could be called “conduct.”

And any exclusion is “censorship” in a sense, but absent state action there is not a violation of the First Amendment. The choices by companies to exclude speech are only censorship that implicates the First Amendment if there is state action. The Fifth Circuit’s opinion in *Paxton* constantly used the word “censorship” to gain rhetorical force for its opinion,<sup>155</sup> but it ignored that the concept of “censorship” matters from a constitutional perspective only if there is government action. Ironically, here Texas is censoring the ability of internet companies to make their own editorial decisions. Taken literally, the Fifth Circuit’s decision would mean that the government could control all editorial decisions of all media by saying that the media’s choices are conduct and the media are engaging in censorship for anything excluded.

This cannot possibly be reconciled with the Fifth Circuit’s declaration in a subsequent case in September 2023, *Missouri v. Biden*,<sup>156</sup> where the court stated: “Social-media platforms’ content-moderation decisions must be theirs and theirs alone.”<sup>157</sup> In this case, the Fifth Circuit held that it was likely a violation of the First Amendment for the Biden administration to “coerce” or “encourage” social media platforms to remove false speech.<sup>158</sup> The court stressed the complete autonomy of social media companies over their content.<sup>159</sup>

The Fifth Circuit in *Paxton* said that the First Amendment protects editorial discretion only if the entity “accepts reputational and legal responsibility for the content it edits.”<sup>160</sup> This is wrong legally and factually. No Supreme Court precedent conditions the First Amendment’s protections on whether the speaker “accepts responsibility.” It is impossible to know what a speaker would need to do in order to adequately “accept responsibility” to

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153. See, e.g., *id.* at 454.

154. See *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 247 (1974).

155. See, e.g., *Paxton*, 49 F.4th at 439.

156. No. 23-30445, 2023 WL 5821788 (5th Cir. Sept. 8, 2023).

157. *Id.* at \*32 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982)).

158. *Id.*

159. See *id.*

160. *Paxton*, 49 F.4th at 464.

receive First Amendment protection.<sup>161</sup> Moreover, factually, social media platforms are held responsible reputationally. As Elon Musk discovered when he acquired Twitter in 2022, advertisers are quick to abandon platforms when they think the platform will not adequately moderate content.<sup>162</sup>

The Fifth Circuit relied in part on two prior Supreme Court cases,<sup>163</sup> as have those who defend laws like that in Florida and Texas: *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*<sup>164</sup> and *PruneYard Shopping Center v. Robins*.<sup>165</sup> In the former case, the Court rejected a claim that requiring universities to allow military recruiters equal access to campus interviewing as a condition for receipt of federal funds was impermissible compelled speech.<sup>166</sup> Some law schools refused to allow the United States military to use campus facilities for recruiting because of the military's policy of excluding gay, lesbian, and bisexual servicemembers.<sup>167</sup> The Solomon Amendment denied federal funding to universities that denied the military equal access to campus facilities.<sup>168</sup>

The Supreme Court unanimously upheld the law and stated: "The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."<sup>169</sup>

In *PruneYard*, shopping center owners argued that their First Amendment rights were violated by a California Supreme Court ruling that protestors had a right to use their property for speech under the state constitution.<sup>170</sup> The shopping center owners said that forcing them to allow speech was impermissible coerced expression.<sup>171</sup> The Supreme Court disagreed and found no violation of the First Amendment from a state constitutional rule that

161. Despite this First Amendment protection, as we discuss below, there are several ways in which a platform can be held legally liable under federal law for content it hosts, such as for content that violates intellectual property laws, federal criminal laws, or certain sex trafficking laws, though there are very few ways in which a platform can be held liable for content that violates state laws. See discussion *infra* Section III.A.

162. See Kate Conger, Tiffany Hsu & Ryan Mac, *Elon Musk's Twitter Faces Exodus of Advertisers and Executives*, N.Y. TIMES, <https://www.nytimes.com/2022/11/01/technology/elon-musk-twitter-advertisers.html> [<https://perma.cc/NE3W-HYDG> (dark archive)] (last updated Nov. 2, 2022).

163. *Paxton*, 49 F.4th at 456, 458–59, 460–62, 464 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78, 85, 87–88, 100 (1980); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 51, 54, 60–66 (2006)).

164. 547 U.S. 47 (2006).

165. 447 U.S. 74 (1980).

166. See *Rumsfeld*, 547 U.S. at 52–54, 70.

167. See *id.* at 52–53.

168. *Id.* at 52.

169. *Id.* at 60.

170. See *PruneYard Shopping Ctr.*, 447 U.S. at 77–80.

171. *Id.* at 85–88.

created a right of access to shopping centers for speech purposes.<sup>172</sup> The Court said that “no specific message is dictated by the State to be displayed on appellants’ property.”<sup>173</sup>

But contrary to the Fifth Circuit’s reasoning, neither decision provides a basis for upholding laws like the Texas regulation of the internet because neither case involved government restrictions on editorial judgments by private parties. The very essence of what makes laws like those in Florida and Texas unconstitutional was not present in either of these cases. In fact, in *Rumsfeld*, the Court expressly made the point that “recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.”<sup>174</sup> The whole point of the Texas and Florida laws is to alter the speech on the internet to significantly increase conservative voices.

While the Eleventh Circuit applied a combination of strict scrutiny and intermediate scrutiny, the Fifth Circuit expressly rejected strict scrutiny.<sup>175</sup> Yet, the Texas law in its text and its motivation is all about regulating the content and the viewpoint of what is on the internet. And like the Florida law, it regulates based on the speaker by applying only to platforms with more than 50 million monthly users in the United States, with exceptions for websites that “consist[] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider.”<sup>176</sup> That, by its very terms, is content based.

Most astoundingly, the Fifth Circuit said that the First Amendment’s “original public meaning” provides no protection for private entities’ editorial discretion.<sup>177</sup> This statement has enormous implications because, under this approach, the government could literally control the choices made by every newspaper, broadcast company, and internet platform. It is hard to imagine anything more inimical to freedom of the press and freedom of speech. Indeed, the Fifth Circuit adopted a view, expressly rejected by the Supreme Court, that the First Amendment just was about prohibiting prior restraints.<sup>178</sup>

The Fifth Circuit accepted Texas’s argument that internet platforms could be treated as common carriers, stating: “Texas permissibly determined that the

172. *Id.*

173. *Id.* at 87.

174. *Rumsfeld*, 547 U.S. at 64.

175. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1209 (11th Cir. 2022) (“[S]trict scrutiny applies to some of the Act’s content-moderation restrictions while intermediate scrutiny applies to others . . .”); *NetChoice, LLC v. Paxton*, 49 F.4th 439, 480 (5th Cir. 2022).

176. Act of Sept. 9, 2021, ch. 3, sec. 2, § 120.001(1)(C)(i), 2021 Tex. Gen. Laws 2d Sess. 3904, 3905 (codified at TEX. BUS. & COM. CODE ANN. § 120.001(1)(C)(i) (2021)).

177. *Paxton*, 49 F.4th at 453–54.

178. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.3 (1942) (“The protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication.”).

Platforms are common carriers subject to nondiscrimination regulation. That's because the Platforms are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest.<sup>179</sup> The internet and social media are not common carriers as that phrase ever has been understood. A common carrier, like a phone company, exercises no editorial discretion or control over what can be said. By sharp contrast, internet and social media companies are constantly engaged in content-moderation decisions of what to include or exclude. The Eleventh Circuit rightly concluded that this makes them quite different from common carriers.<sup>180</sup>

The Supreme Court granted review in these cases to be heard in its October Term 2023.<sup>181</sup> Under well-established First Amendment principles, the Court should affirm the Eleventh Circuit and reverse the Fifth Circuit to make clear that this type of law is unconstitutional. Interestingly, after a federal district court issued a preliminary injunction against the Texas law and the Fifth Circuit then issued a stay of that ruling, the challengers went to the Supreme Court to issue an emergency order keeping the Texas law from going into effect.<sup>182</sup> The Court, in a 5–4 ruling, issued a stay of the Fifth Circuit's order and continued the district court's preliminary injunction against the Texas law.<sup>183</sup> Chief Justice Roberts and Justices Breyer, Sotomayor, Kavanaugh, and Barrett comprised the majority, but none of them wrote an opinion.<sup>184</sup> Justice Kagan dissented without explanation.<sup>185</sup> Some surmise that Justice Kagan's dissent was about when the Court should rule in such emergency situations on the so-called “shadow docket.”

Justice Alito wrote a dissenting opinion joined by Justices Thomas and Gorsuch.<sup>186</sup> He said that “[i]t is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media

179. *Paxton*, 49 F.4th at 473.

180. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1220–21.

181. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, *cert. granted*, 90 U.S.L.W. 3054 (U.S. Oct. 2, 2023) (No. 22-277); *Paxton*, 49 F.4th 439, *cert. granted*, 92 U.S.L.W. 3054 (U.S. Oct. 2, 2023) (No. 22-555). Interestingly, when the petitions for certiorari came before the Court in early 2023, the Justices asked for views of the Solicitor General about whether the Court should take them. *See, e.g.*, *Moody v. NetChoice, LLC*, 143 S. Ct. 744, 744 (2023) (mem.). This was surprising because given the split between the circuits it is unclear what difference the views of the Solicitor General would make on that. But indeed, the Supreme Court limited its review in each case to two of the issues as presented by the Solicitor General. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, *cert. granted*, 90 U.S.L.W. 3054; *Paxton*, 49 F.4th 439, *cert. granted*, 92 U.S.L.W. 3054; Brief for the U.S. in *NetChoice v. Att'y Gen.*, *supra* note 9, at I; Brief for the U.S. in *NetChoice v. Paxton*, *supra* note 9, at I.

182. *See NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715 (2022) (mem.). For an overview of the procedural complexity of the case, see *id.* at 1718 (Alito, J., dissenting).

183. *Id.* at 1715 (majority opinion).

184. *See id.* at 1715–16 (without opinion or explanation).

185. *See id.* at 1716 (Kagan, J., dissenting) (without opinion or explanation).

186. *Id.* at 1716–18 (Alito, J., dissenting).

companies . . . [and] the statute may be a permissible attempt to prevent ‘repression of [the freedom of speech] by private interests.’<sup>187</sup> Moreover, Justice Alito said that “since HB20 is limited to companies with ‘50 million active users in the United States’ . . . Texas argues that the law applies to only those entities that possess some measure of common carrier-like market power and that this power gives them an ‘opportunity to shut out [disfavored] speakers.’”<sup>188</sup>

This certainly suggests three justices are sympathetic to laws like those in Texas and Florida. But ruling in favor of the Texas state law and denying internet and social media companies discretion to control what is on their platforms simply cannot be reconciled with decades of precedent and the most elemental aspects of the First Amendment, which protect editorial judgments by all who are presenting speech. It is worth noting that Justice Kavanaugh, while a judge on the United States Court of Appeals for the District of Columbia Circuit, opined on this issue and was quite emphatic that the government may not “tell Twitter or YouTube what videos to post . . . or tell Facebook or Google what content to favor” any more than it may “tell *The Washington Post* or the *Drudge Report* what columns to carry.”<sup>189</sup>

## 2. Efforts To Require Moderation of Lawful Content Are Similarly Unconstitutional

Our focus thus far in this section has been on the laws from conservative states like Florida and Texas. That is because these laws are a bit older and the litigation is further along. But laws adopted in more progressive states, like California, also seek to regulate the content of the internet and social media and are likewise unconstitutional.

Just as the Constitution prohibits the government from requiring platforms to host speech, it also prohibits the government from requiring platforms to remove it. Some commentators and legislators have called for laws that would require platforms to remove hate speech content.<sup>190</sup> It must be remembered that hate speech is generally protected by the First Amendment.<sup>191</sup>

187. *Id.* at 1717 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

188. *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577 (1995)).

189. *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

190. *See, e.g.*, Kern, *supra* note 104.

191. For an outstanding discussion and powerful defense of much of the law surrounding hate speech, see NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 11–36 (2018). *Cf.* Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. BLOG (June 28, 2022), <https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/> [<https://perma.cc/F5FZ->

In cases such as *R.A.V. v. City of St. Paul*<sup>192</sup> and *Virginia v. Black*,<sup>193</sup> the Court was clear that hateful speech is constitutionally protected.<sup>194</sup> Thus, laws that would broadly prohibit hate speech or require it not be published run afoul of the Constitution. States like Utah and Arkansas have recently enacted laws that require social media companies to obtain parental consent before permitting users under the age of eighteen to use social media platforms.<sup>195</sup> And a bill recently introduced in California would restrict platforms' editorial discretion by prohibiting social media platforms from using algorithms or features that cause children to receive messages about fentanyl, suicide, or diet pills.<sup>196</sup> Texas requires moderation of similar content for child users<sup>197</sup> and prohibits platforms from permitting targeted advertising to minors.<sup>198</sup> Supreme Court precedent makes it abundantly clear that these bills would be unconstitutional.

The Supreme Court has repeatedly acknowledged the government's interest in safeguarding children, but it has struck down laws that do so by regulating speech. In *Reno v. American Civil Liberties Union*,<sup>199</sup> the Supreme Court first considered the internet and invalidated key provisions of the Communications Decency Act of 1996.<sup>200</sup> The law made it a federal crime to transmit obscene or indecent material over the internet in a manner likely to be accessible to a minor.<sup>201</sup> Specifically, Section 223(a) of the Act prohibited "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age."<sup>202</sup> A second provision, Section 223(d), prohibited "the knowing

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JZHQ] (noting that widely held blind spots about "just how much content falls into the 'lawful but awful' category . . . distort[s] policymakers' expectations about the consequences of platform regulation").

192. 505 U.S. 377 (1992).

193. 538 U.S. 343 (2003).

194. *R.A.V.*, 505 U.S. at 380, 391 (declaring unconstitutional ordinance prohibiting burning a cross or painting a swastika in a manner likely to anger, alarm, or cause resentment); *Black*, 538 U.S. at 347–48 (holding that cross burning is protected by the First Amendment except when done to intimidate or threaten).

195. Although the laws are different in some respects, each requires platforms to implement age verification practices and to restrict access to minors who seek to use the platform without parental consent. See Social Media Regulation Amendments, ch. 498, § 3, 2023 Utah Legis. Serv. (West) (codified at UTAH CODE ANN. § 13-63-102 (2023)); Act of April 11, 2023, Act 689, § 1, 2023 Ark. Acts (codified at ARK. CODE ANN. § 4-88-1402(a) (2023)).

196. S. 287, 2023–24 Leg., Reg. Sess. (Cal. 2023).

197. Securing Children Online Through Parental Empowerment Act, ch. 795, § 2.01, 2023 Tex. Sess. Law Serv. (West) (effective Sept. 1, 2024) (codified at TEX. BUS. & COM. CODE ANN. § 509.053 (2021)) (requiring platforms to "implement a strategy to prevent the known minor's exposure to harmful material and other content that promotes, glorifies, or facilitates: (1) suicide, self-harm, or eating disorders; (2) substance abuse; (3) stalking, bullying, or harassment; or (4) grooming").

198. § 2.01, 2023 Tex. Sess. Law Serv. (codified at TEX. BUS. & COM. CODE ANN. § 509.052(2)(D)).

199. 521 U.S. 844 (1997).

200. *Id.* at 849.

201. *Id.* at 859.

202. *Id.*

sending or displaying of patently offensive messages in a manner that [wa]s available to a person under 18 years of age.”<sup>203</sup>

The Supreme Court, in a 7–2 decision, declared the government could not prohibit transmission of indecent material over the internet in the interest of protecting children.<sup>204</sup> The Court recognized that the government has a compelling interest in protecting children from exposure to sexual material, but it said that the government cannot restrict speech available to adults so as to safeguard children.<sup>205</sup>

In *Ashcroft v. American Civil Liberties Union*,<sup>206</sup> the Court returned to the issue of government regulation of sexual speech over the internet and considered the constitutionality of the Child Online Protection Act, which sought to protect children from exposure to sexual material on the internet.<sup>207</sup> After *Reno*, Congress passed the Child Online Protection Act, which required operators of commercial websites to restrict access by children to material that “the average person, applying contemporary community standards” would find is designed to pander to the minors’ prurient interest.<sup>208</sup> This law was different from the Communications Decency Act in that it applied only to commercial websites, and it defined objectionable material in terms of what would be offensive under community standards.<sup>209</sup> The law required such websites to take actions to exclude children, such as by requiring credit cards or age verification services.<sup>210</sup> Thus, perhaps most importantly, the Act was different from its predecessor because it did not prohibit material so long as the commercial website took the necessary steps to exclude children.<sup>211</sup> In many ways, the Act was similar in its goals and methods to the laws in California, Texas, Arkansas, and Utah discussed throughout this Article.<sup>212</sup>

203. *Id.*

204. *Id.* at 874.

205. *Id.* at 874–75.

206. 542 U.S. 656 (2004).

207. *Id.* at 659–60.

208. Child Online Protection Act, Pub. L. No. 105-277, § 1403, 112 Stat. 2681, 2681–739 (1998) (codified as amended at 47 U.S.C. § 231(e)(6)).

209. *Compare id.* (defining material that is harmful to minors as matter of any kind that “the average person, applying contemporary community standards” would find is designed to appeal or pander to minors’ prurient interests), *with* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133–36 (1996) (codified as amended at 47 U.S.C. § 223) (leaving “material” undefined).

210. *See* Child Online Protection Act § 1403.

211. *See id.*

212. The Age-Appropriate Design Code Act also seeks to protect children by forcing platforms to estimate users’ age. California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31(a)(5), 2022 Cal. Stat. 4916, 4920 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(a)(5)). Similarly, a recently enacted Louisiana law hopes to restrict children’s access to adult content by requiring age verification. Act of June 15, 2022, Act No. 440, § 1, 2022 La. Sess. Law Serv. (West) (codified at LA. STAT. ANN. § 9:2800:29 (2023)). Texas had enacted a similar law, but it

The Supreme Court, in a 5–4 decision, concluded that there was a substantial likelihood that the law would be declared unconstitutional.<sup>213</sup> The Court said that the law was a content-based restriction since it applied only to sexual content over the internet; thus, the law must meet strict scrutiny.<sup>214</sup> Although the Court accepted the government’s goal of protecting children from exposure to sexual material as a compelling interest, the Court found that the law was likely unconstitutional because it was not the least restrictive alternative.<sup>215</sup>

Most directly relevant in assessing the constitutionality of laws that require content moderation to protect children is *Brown v. Entertainment Merchants Ass’n*,<sup>216</sup> which considered the constitutionality of a California law that made it a crime to sell or rent violent video games to minors under eighteen without parental consent.<sup>217</sup> The Court began by observing that video games are a form of speech.<sup>218</sup> It noted that the First Amendment protects minors’ rights to access speech as well as that of adults: “[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”<sup>219</sup> The Court found that the California law was content based—its application depended entirely on the content of the video game—and said that therefore “it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”<sup>220</sup>

California argued that playing interactive video games has a deleterious effect on children and makes them more prone to commit acts of violence.<sup>221</sup> The Court, though, rejected this argument.<sup>222</sup> Justice Scalia, writing for the majority, concluded:

California cannot meet [strict scrutiny.] At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. . . . The State’s evidence is not compelling. . . . They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more

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was swiftly enjoined on the ground that it ran afoul of the First Amendment and Section 230. *See* Free Speech Coal., Inc. v. Colmenero, No. 23-cv-917, 2023 WL 5655712, at \*29–30 (W.D. Tex. Aug. 31, 2023).

213. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

214. *Id.* at 670.

215. *Id.* at 666, 668.

216. 564 U.S. 786 (2011).

217. *Id.* at 788–89.

218. *Id.*

219. *Id.* at 794 (quotation omitted).

220. *Id.* at 799 (citation omitted).

221. *Id.* at 798.

222. *Id.*

aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.<sup>223</sup>

In *Brown*, the Supreme Court held that a state could not prohibit the sale of violent video games to minors without parental consent.<sup>224</sup> Based on this holding, it is clear that the laws in Arkansas, Texas, and Utah that restrict minors' access to material online without parental permission are unconstitutional, as is the proposed law in California. *Brown* is explicit that the government cannot restrict minors' access to constitutionally protected speech, even if it is violent or offensive, and it cannot restrict minors' access to a particular communications medium.<sup>225</sup> That is exactly what the laws in Arkansas, Texas, and Utah do.

Rather than restricting minors' access to social media, Montana took a different approach. It banned the popular social media app, TikTok, from operating in the state.<sup>226</sup> The state's decision to ban TikTok is a content- and speaker-based restriction on speech.<sup>227</sup> The Supreme Court has held that content- and speaker-based restrictions of speech are presumptively unconstitutional.<sup>228</sup> Such laws are unconstitutional unless the State demonstrates that the law is narrowly tailored to serve compelling State interests.<sup>229</sup> The preamble to the Montana law justifies banning TikTok on the basis of national security, privacy, intellectual property, and inadequate content-moderation practices.<sup>230</sup> We doubt that any of these justifications are strong enough to justify a wholesale ban of a popular communications application. And even if there were an adequate justification, it is even more doubtful that a court will find that the outright ban of the application was

223. *Id.* at 799–800.

224. *Id.* at 799.

225. *Id.* at 805.

226. An Act Banning TikTok in Montana, ch. 503, § 1, 2023 Mont. Laws (effective Jan. 1, 2024) (to be codified at MONT. CODE ANN. § 30-14).

227. *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.”). The TikTok ban is content based because it singles out a single speech platform on the basis of the content of the speech that the app hosts. *See generally* S. 419, 68th Leg., Reg. Sess. (Mont. 2023) (“WHEREAS, TikTok fails to remove, and may even promote, dangerous content that directs minors to engage in dangerous activities . . .”). The TikTok ban is speaker based because it targets a particular speaker (TikTok). *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (holding that a law was content and speaker based because it targeted a specific class of speakers).

228. *Reed*, 576 U.S. at 163 (citation omitted) (“Content-based laws . . . are presumptively unconstitutional.”); *Sorrell*, 564 U.S. at 570–71 (noting that content- and speaker-based laws are presumptively unconstitutional).

229. *Reed*, 576 U.S. at 163.

230. Mont. S. 419. TikTok is owned by ByteDance, a Chinese corporation. Sapna Maheshwari & Amanda Holpuch, *Why Countries Are Trying To Ban TikTok*, N.Y. TIMES (Aug. 16, 2023), <https://www.nytimes.com/article/tiktok-ban.html> [https://perma.cc/9QHZ-TE8K (staff-uploaded, dark archive)].

narrowly tailored to that goal. After all, other social media applications, like Facebook, have faced criticisms on the basis of national security, privacy, intellectual property, and inadequate content-moderation practices, and those applications are allowed to operate in Montana.<sup>231</sup>

The California Age-Appropriate Design Code Act, and a nearly identical bill that has been introduced in the New Jersey legislature,<sup>232</sup> also raise First Amendment problems because they hope to force platforms to moderate content. The Age-Appropriate Design Code Act requires platforms to enforce all acceptable use policies and terms and conditions.<sup>233</sup> While the law does not tell platforms what content must be removed, it still restricts platforms' speech by potentially enabling courts to determine after-the-fact whether a platform complied with a certain ruleset—albeit a ruleset of the platforms' own making. And although the Act does not require platforms to promulgate policies, other statutes do. The Age-Appropriate Design Code Act, combined with a law like New York's S. 4511A, which requires platforms to create hate speech policies,<sup>234</sup> might force a platform to moderate constitutionally protected hateful content that the platform would otherwise leave up. This is a laudable goal. But it would be unconstitutional.<sup>235</sup>

The Age-Appropriate Design Code Act also requires platforms to “create a timed plan to mitigate or eliminate” a variety of risks that might occur on its

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231. See Ellen Nakashima, *Pentagon Opens Sweeping Review of Clandestine Psychological Operations*, WASH. POST (Sept. 19, 2022, 5:00 AM), <https://www.washingtonpost.com/national-security/2022/09/19/pentagon-psychological-operations-facebook-twitter/> [https://perma.cc/E58L-DVJ7 (dark archive)] (noting national security concerns associated with Facebook's and Twitter's content-moderation practices); Jamie Metzl & Eleonore Pauwels, *Is America's National Security Facebook and Google's Problem?*, TECHCRUNCH (Apr. 15, 2018, 8:30 PM), <https://techcrunch.com/2018/04/15/is-americas-national-security-facebook-and-googles-problem/> [https://perma.cc/D9DU-4SGC (staff-uploaded archive)] (noting privacy and national security concerns); Keach Hagey & Jeff Horwitz, *Facebook Allows Stolen Content To Flourish, Its Researchers Warned*, WALL ST. J. (Nov. 9, 2021, 4:43 PM), <https://www.wsj.com/articles/facebook-stolen-content-copyright-infringement-facebook-files-11636493887> [https://perma.cc/L2HS-C4ZP (staff-uploaded, dark archive)] (noting intellectual property concerns).

232. California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31, 2022 Cal. Stat. 4916, 4921–22 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31); Gen. Assemb. 4919, 220th Leg., Reg. Sess. (N.J. 2022).

233. Sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. at 4921.

234. Act of June 6, 2022, ch. 204, § 1, 2022 N.Y. Laws 1176, 1177 (codified at N.Y. GEN. BUS. LAW § 394-ccc (2023)).

235. The only way a platform could avoid this problem is by making its hate content policy only applicable outside California. As a preliminary matter, this might not be entirely effective because California has its own laws that require terms of use. And anyway, as we argue in Part III, that would be undesirable as a matter of policy. It would increase regulatory costs on platforms if they had to set up different internet ecosystems in every state and would interfere with the workings of the free internet if users in some states could say things that users in other states could not be allowed to read. This is why, as we argue in Part III, internet content moderation should be regulated, if at all, only by the federal government.

platforms.<sup>236</sup> The law lists as possible “risks” things like “harmful” features, algorithms, and advertising.<sup>237</sup> But these features, algorithms, and advertising are constitutionally protected. Under *Brown*, the government cannot require platforms to “mitigate” constitutional speech just because it is directed to a child.<sup>238</sup> Moreover, the Age-Appropriate Design Code Act would require platforms to create plans to mitigate features designed to induce children to spend more time using the service.<sup>239</sup> But every medium—a novel, a television program, a movie, a video game—tries to keep people reading and watching and playing. There is nothing suspect, let alone subject to regulation, about that. It is inconceivable that the government could adopt a law which says that books or movies for children cannot use techniques that try to keep them engaged or continuing to read or watch.

When the government tries to force social media platforms to host speech they would prefer not to host, or remove speech they would prefer not to remove, the government violates the Constitution.

#### B. *Unconstitutional Vagueness*

Many of the state laws that have been adopted and proposed are not only content regulations in violation of the First Amendment but also unconstitutionally vague.

A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Long ago, the Court declared that a law is unconstitutionally vague when “[people] of common intelligence must necessarily guess at its meaning.”<sup>240</sup> Unduly vague laws violate due process whether or not speech is regulated.<sup>241</sup>

But courts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech. The Court has observed that freedom of speech is “delicate and vulnerable, as well as supremely precious in our society . . . [and] the threat of sanctions may deter [its] exercise almost as potently as the actual application of sanctions.”<sup>242</sup> Thus, “standards of permissible statutory vagueness are strict in the area of free

236. Sec. 2, § 1798.99.31(a)(2), 2022 Cal. Stat. at 4920.

237. Sec. 2, § 1798.99.31(a)(1)(B), 2022 Cal. Stat. at 4920.

238. See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794–95 (2011).

239. Sec. 2, § 1798.99.31(a)(1)(A)(vii), (a)(2), 2022 Cal. Stat. at 4920.

240. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

241. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (declaring vagrancy law unconstitutional); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (declaring loitering law unconstitutionally vague); *Morales v. City of Chicago*, 527 U.S. 41, 42 (1999) (declaring anti-gang ordinance unconstitutional on vagueness grounds).

242. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>243</sup>

The Supreme Court has declared laws regulating speech to be void on vagueness grounds when they are so ambiguous that the reasonable person cannot tell what expression is forbidden and what expression is allowed. For instance, in *Smith v. Goguen*,<sup>244</sup> the Court invalidated a state law that prohibited treating a flag “contemptuously.”<sup>245</sup> The Court said that the law “fail[ed] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not.”<sup>246</sup>

Similarly, in *Baggett v. Bullitt*,<sup>247</sup> the Court declared unconstitutional a State’s loyalty oath that, among other things, prevented any “subversive person” from being employed in the state and required a person to swear that he or she was not such an individual or a part of any subversive organization.<sup>248</sup> The Court found “the oath requirements and the statutory provisions on which they are based . . . invalid on their face because their language [was] unduly vague, uncertain, and broad.”<sup>249</sup> The Court stressed that the ambiguities inherent in the term “subversive” and in the language of the statute gave individuals little guidance as to what speech and associational activities were proscribed.<sup>250</sup>

State laws that have been enacted to regulate the internet and social media are often stunningly vague. The California Age-Appropriate Design Code Act prohibits platforms from using personal information of a child in a way the business “has reason to know[] is materially detrimental to the physical health, mental health, or well-being of a child.”<sup>251</sup> But the law offers no explanation of what this might mean.<sup>252</sup> And it requires platforms to produce a “Data Protection Impact Assessment” before launching any new features.<sup>253</sup> Those platforms also must review their impact assessment every other year and provide the assessment to the state upon request.<sup>254</sup> The assessment requires platforms to identify the purpose of any new feature and evaluate “harms” to children.<sup>255</sup> But the statute does not define the term “harmful” and does not explain what harmful content, algorithms, or advertisements might be. It is hard

243. *Id.* at 432–33 (citations omitted).

244. 415 U.S. 566 (1974).

245. *Id.* at 568.

246. *Id.* at 574.

247. 377 U.S. 360 (1964).

248. *Id.* at 362, 368.

249. *Id.* at 366.

250. *Id.* at 378.

251. California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31(b)(1), 2022 Cal. Stat. 4916, 4921 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(b)(1)).

252. *Id.*

253. Sec. 2, § 1798.99.31(a)(1)(A), 2022 Cal. Stat. at 4920.

254. Sec. 2, § 1798.99.31(a)(1)(A), (a)(4)(A), 2022 Cal. Stat. at 4922–23.

255. Sec. 2, § 1798.99.31(a)(1)(B), 2022 Cal. Stat. at 4920.

to imagine a statute that is more vague than the California law. As discussed above, the California statute also requires platforms to evaluate features designed to encourage children to “increase, sustain, or extend” their use of the new service.<sup>256</sup> But that could be anything that makes a platform engaging and causes people to want to remain on it. Conceivably, this could be used against platforms with attractive graphics or engaging storylines.

A central concern with vague laws regulating speech is that they might chill constitutionally protected expression. That is especially so when there are enormous penalties attached to violations. As we described in Part I, under the California law, negligent violations are punishable through up to \$2,500 in civil penalties per affected child per violation, with intentional violations garnering penalties up to \$7,500 per affected child per violation.<sup>257</sup> Given the number of children on Facebook in California, Facebook could face more than \$2 billion in penalties *per violation*. The combination of (1) a law that is so vague it is impossible to know what, exactly, it requires, and (2) penalties so severe that they could put a big dent in the pocketbook of even the largest companies, will necessarily cause platforms to over-moderate out of caution. It would be better for a platform to remove lawful speech that it would prefer to associate with than risk massive liability for expression that it did not know whether it could host.

### C. *Unconstitutional Disclosure*

We have explained that a common characteristic of many of the laws regulating the internet and social media are disclosure requirements. These disclosure requirements take several forms. Some require platforms to offer particularized explanations for each of their content-moderation decisions, or to respond individually to appeals of those decisions. Some require platforms to issue broad transparency reports revealing data about their content-moderation practices. And some require platforms to publish policies indicating what their content-moderation practices will be (and in some cases to enforce those policies accordingly).

These requirements all burden speech to some degree. As explained in this section, we think some of these disclosure requirements should be upheld as constitutional and some should be declared unconstitutional. But due to unclear and sometimes inconsistent caselaw emerging from the Supreme Court, it should be recognized at the outset that there is great uncertainty about which disclosure requirements *are* constitutional, and even the test that should be used to evaluate their constitutionality.

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256. *Id.*; see *supra* text accompanying notes 236–39.

257. Sec. 2, § 1798.99.35(a), 2022 Cal. Stat. at 4923 (codified at CAL. CIV. CODE § 1798.99.35(a)).

In this section we explain the various constitutional tests that might apply to these disclosure laws and explain why it is unclear which test applies to which form of disclosure. We then go on to suggest what approach we think should apply to each type of law and how those laws might fare under the correct test. Our focus in this section is on whether the disclosure requirements violate the First Amendment. As we argue in Part III, even if they are constitutional, it is undesirable to have a proliferation of state laws which inevitably vary in their requirements.

### 1. What Level of Scrutiny?

The Court has been inconsistent with the level of scrutiny it applies to disclosure laws. In some cases, the Court has used strict scrutiny. In *National Institute of Family and Life Advocates v. Becerra (NIFLA)*,<sup>258</sup> the Court struck down a California law, the Reproductive FACT Act, that required that reproductive health care facilities post a notice to provide information to women seeking care.<sup>259</sup> The law compelled two types of disclosures.<sup>260</sup> Licensed crisis pregnancy centers were required to post a notice stating that the State would “provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women.”<sup>261</sup> Meanwhile, unlicensed facilities were required to disseminate a notice to all clients acknowledging that they were not licensed as a medical facility by the State of California.<sup>262</sup>

In a 5–4 decision, split along ideological lines, the Court held that a preliminary injunction should have been granted on the ground that the law likely violates the First Amendment.<sup>263</sup> Justice Thomas began his opinion by stating that the California statute was a content-based restriction on speech because it prescribed the content of the disclosures required by the facilities.<sup>264</sup> The Court reiterated the familiar principle that content-based restrictions on speech must meet strict scrutiny; that is, they must be narrowly tailored to achieve a compelling government interest.<sup>265</sup>

The Court found that the licensed notice requirement failed strict scrutiny because California could achieve its goal while using alternatives that were less

258. 138 S. Ct. 2361 (2018).

259. *Id.* at 2368. See generally Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61 (2019) (analyzing the decision).

260. Reproductive FACT Act, ch. 700, § 3, 2015 Cal. Stat. 5351, 5352–54, *invalidated by NIFLA*, 138 S. Ct. 2361 (2018).

261. § 3, 2015 Cal. Stat. at 5353.

262. § 3, 2015 Cal. Stat. at 5354.

263. *NIFLA*, 138 S. Ct. at 2378.

264. *Id.* at 2371.

265. *Id.*

restrictive of speech.<sup>266</sup> The Court stated: “California could inform low-income women about its services ‘without burdening a speaker with unwanted speech.’ Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers.”<sup>267</sup>

The Court did not decide what level of scrutiny applied to the unlicensed notices.<sup>268</sup> The parties had disputed whether the test should be strict scrutiny, or the less restrictive inquiry under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.<sup>269</sup> If the law received strict scrutiny, California would have had the burden to demonstrate that the law was narrowly tailored to a compelling state interest. Under *Zauderer*, the issue was whether California could demonstrate the unlicensed notice disclosures were justified and not unduly burdensome.<sup>270</sup> The Court held that a law is “justified” under *Zauderer* only if it remedies a real, and not hypothetical, harm.<sup>271</sup> And a law is unduly burdensome if it extends more broadly than reasonably necessary.<sup>272</sup> Justice Thomas held that the FACT Act’s requirement that unlicensed facilities disclose their nonlicensed status was unconstitutional even under *Zauderer* because (1) the requirement discriminated among speakers, (2) California did not show it remedied a real harm, and (3) the Act was unduly burdensome because the State could have accomplished its goals in a less restrictive way.<sup>273</sup>

*Zauderer* initially applied only to a limited subset of commercial speech: namely advertising and consumer deception.<sup>274</sup> Outside of that subset, another

266. *Id.*

267. *Id.* at 2376 (citations omitted).

268. *Id.* at 2377.

269. *Id.* at 2376–77. In *Zauderer*, the Supreme Court held that although courts apply intermediate scrutiny to government attempts to regulate commercial speech, attempts to regulate deceptive commercial speech receive a less demanding inquiry. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 638 (1985). The *Zauderer* Court held an attorney had no right to deceptively omit information. *Id.* at 654. The Court said that the omission of a statement about the client’s liability for litigation costs could be the basis for discipline because its absence was deceptive. *Id.* at 652. The Court rejected any claim that the lawyer had a First Amendment right to omit the information. *Id.* at 651. The Court said: “Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,” the “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.” *Id.*

270. *NIFLA*, 138 S. Ct. at 2377.

271. *Id.*

272. *Id.*

273. *Id.*

274. *See Zauderer*, 471 U.S. at 638, 651. Commercial speech is speech that proposes an economic transaction, such as advertising and solicitation of business, and that is not what is involved here. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). The fact that a company profits from speech does not make it commercial speech or every publisher over any media would be deemed to be engaging in commercial speech. *Id.* (“Some of our most valued forms of fully protected speech are uttered for a profit.”); *see, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964); *Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (per curiam).

form of heightened scrutiny would apply. But many courts have now expanded *Zauderer* beyond that context and applied it to all government-required disclosures of noncontroversial factual information.<sup>275</sup> For example, the Eleventh Circuit applied *Zauderer* in its decision striking down key aspects of Florida’s content-moderation law and upholding some of the law’s disclosure requirements.<sup>276</sup> The court recognized that *Zauderer* “is typically applied in the context of advertising and to the government’s interest in preventing consumer deception.”<sup>277</sup> But it nevertheless concluded that *Zauderer* “is broad enough to cover S.B. 7072’s disclosure requirements.”<sup>278</sup>

Thus, there are at least two different tests that might apply to the disclosure requirements imposed in state content-moderation laws, *Zauderer* or strict scrutiny, and it is not clear which standard should apply.

Complicating this muddle even further is the Court’s recent decision regarding disclosure laws in *Americans for Prosperity Foundation v. Bonta*,<sup>279</sup> where a majority of the justices could not agree as to the level of scrutiny.<sup>280</sup> A plurality applied a test that courts have used to evaluate the constitutionality of disclosures in the election context—exacting scrutiny—which asks whether the government action is “substantially related” to a “sufficiently important government purpose.”<sup>281</sup> In *Americans for Prosperity*, the Court struck down a California law requiring charities to file copies of their IRS Form 990 with the Attorney General’s office.<sup>282</sup> The law required organizations to disclose the names and addresses of donors who had contributed more than \$5,000 in a particular tax year.<sup>283</sup>

Chief Justice Roberts wrote an opinion that was joined in full by Justices Kavanaugh and Barrett and in part by Justices Thomas, Alito, and Gorsuch.<sup>284</sup> Justice Roberts, Justice Kavanaugh, and Justice Barrett would have struck down the law under exacting scrutiny.<sup>285</sup> Justice Thomas thought the law should fail instead under the more restrictive strict scrutiny inquiry because it was a form

275. These courts point to language in *Zauderer* that laws that require disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available” are permissible unless they are “unjustified or unduly burdensome.” *Zauderer*, 471 U.S. at 651.

276. See *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1230–31 (11th Cir. 2022).

277. *Id.* at 1227.

278. *Id.*

279. 141 S. Ct. 2373 (2021).

280. *Id.* at 2379.

281. *Id.* at 2383. It is unclear how “exacting scrutiny” is different from intermediate scrutiny or how it fits within the traditional levels of scrutiny. See Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 350–51 (2022) [hereinafter Chemerinsky, *Tears of Scrutiny*].

282. *Ams. for Prosperity Found.*, 141 S. Ct. at 2380.

283. *Id.*

284. *Id.* at 2379.

285. *Id.* at 2383.

of content-based compelled speech.<sup>286</sup> Justice Alito and Justice Gorsuch were not inclined to decide that one standard should apply to all disclosure requirements.<sup>287</sup> Thus, it remains unclear if disclosure laws get strict scrutiny, exacting scrutiny, or *Zauderer* review.

## 2. Applying the Level of Scrutiny to State Laws

We will address the constitutionality of the various disclosure laws in terms of the three categories described in Section I.B. We do not think one standard can or should apply to all three categories (or that any individual category should necessarily be subject to only one type of review).

First, “specific disclosure requirements” are laws that require individualized explanations for moderation decisions.<sup>288</sup> These laws may sometimes receive strict scrutiny and sometimes a more lenient test, depending on their purpose. They should nevertheless be unconstitutional in almost all instances.

Second, “general disclosure requirements,” laws requiring platforms to issue broad transparency reports, should receive a less stringent inquiry than strict scrutiny, such as *Zauderer* review, and should be constitutional unless they are unduly burdensome or have a viewpoint-oriented purpose.<sup>289</sup>

And, finally, “content policy requirements,” laws that require platforms to publish terms of use, should, under prevailing precedent, receive strict scrutiny.<sup>290</sup> We are not sure that is the most desirable policy outcome, but these laws are clearly content-based compelled speech and should therefore receive the most rigid inquiry under the Supreme Court’s caselaw. Under strict scrutiny, we do not think these laws can survive.

### a. *Specific Disclosure Laws*

A core theme of First Amendment jurisprudence over the last several decades has been that content-based restrictions and compulsions of expression must satisfy strict scrutiny. The Court has explained that “[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right.”<sup>291</sup> Thus, “[c]ontent-based regulations are presumptively invalid.”<sup>292</sup>

286. *Id.* at 2390 (Thomas, J., concurring).

287. *Id.* at 2391 (Alito, J., concurring).

288. *See supra* Section I.B.1.

289. *See supra* Section I.B.2.

290. *See supra* Section I.B.3.

291. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 612, 641 (1994).

292. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citation omitted); *United States v. Alvarez*, 567 U.S. 709, 716–17 (2012) (plurality opinion) (quotation omitted).

A law can be content based on its face,<sup>293</sup> or content based because of its purpose or justification.<sup>294</sup> A law is facially content based if speech is regulated on the basis of its subject matter (the topic discussed) or viewpoint (the ideology of the message).<sup>295</sup> A law is also content based if “there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction.”<sup>296</sup> When evaluating laws that regulate speech, courts must do a preliminary analysis to determine whether a law is content based “before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.”<sup>297</sup>

When it struck down the Florida law, the Eleventh Circuit noted that the statute required a platform to provide a “detailed justification for every content-moderation action.”<sup>298</sup> There is no doubt that these laws’ specific disclosure requirements are content based. They both require platforms to express messages of a particular content (a justification) and often do so on a viewpoint basis by requiring platforms to explain the rationale for their choices.<sup>299</sup>

Because the Texas and Florida specific disclosure requirements are content based, the Eleventh and Fifth Circuits, respectively, erred in applying a standard less than strict scrutiny. These courts relied on *Zauderer*. This was the wrong choice in two respects.

First, *Zauderer* is a case about requiring factual disclosures to prevent misleading consumers in the context of commercial advertising.<sup>300</sup> The Texas and Florida specific disclosure requirements require platforms to utter a viewpoint—that is, explain why they made a content-moderation decision—and do not relate to commercial advertising.

Second, *Zauderer* only applies to nonburdensome disclosures and uncontroversial disclosures.<sup>301</sup> But the specific disclosure requirements at issue

293. *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015).

294. The Court has been clear that the government must “abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

295. *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022).

296. *Id.* at 1475.

297. *Reed*, 576 U.S. at 166.

298. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1230 (11th Cir. 2022).

299. *Cf. id.* at 1203 (noting that some of the supporters of the Florida law enacted S.B. 7072 with a viewpoint-based purpose to combat efforts by Silicon Valley executives to silence conservative speech in favor of a “radical leftist” agenda). *But see id.* at 1224 (concluding NetChoice was not “substantially likely to succeed on the merits of its claim that the entire Act is impermissibly viewpoint-based.”).

300. The Supreme Court has said that the purpose of the *Zauderer* test is to “combat the problem of inherently misleading commercial advertisements” by mandating “only an accurate statement.” *Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229, 250 (2010). The Court has explained that *Zauderer* permits the government only to “requir[e] the dissemination of ‘purely factual and uncontroversial information’ in the context of ‘commercial advertising.’” *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)).

301. *See Zauderer*, 471 U.S. at 651.

in the Texas and Florida cases were enormously burdensome. In the Fifth Circuit’s case reviewing Texas’s law, the plaintiff pointed out that a platform like YouTube could not possibly hope to offer individualized explanations for each of the *billions* of comments that it moderates each quarter.<sup>302</sup> By compelling platforms to provide detailed justifications, Florida imposed a stunning burden on the internet.<sup>303</sup> In *NIFLA*, the Court held that California’s law requiring unlicensed centers to disclose their nonlicensed status unconstitutionally burdened speech because a two-word advertisement would be drowned out by the twenty-nine-word notice.<sup>304</sup> A requirement that platforms explain all of their content-moderation decisions should fail because it is infinitely more burdensome.

Thus, the specific disclosure laws in Florida and Texas, as well as in any other state that might adopt such laws in the future,<sup>305</sup> should not receive *Zauderer* review under current law. They also should not receive exacting scrutiny under *Americans for Prosperity*, which to this point has largely been limited to election-related disclosures.<sup>306</sup> The appropriate test for specific disclosures like these is strict scrutiny.

Most specific disclosure laws—and certainly the ones in Texas and Florida—cannot hope to withstand strict scrutiny. Even assuming the state has a compelling interest in forcing platforms to disclose information to users affected by content-moderation choices (which we doubt), there is no way specific disclosure provisions can be considered narrowly tailored. Platforms moderate far too much content each year and the regulatory costs of providing a state-mandated level of due process, either by explaining each decision or

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302. Brief of Appellees at 52–53, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178). Judge Andrew Oldham’s opinion rejected this argument on the ground that it was only one example of the burden Texas’s specific disclosure requirement would impose—the plaintiffs fell short of “showing that ‘a substantial number of [Section 2’s] applications are unconstitutional.’” *Paxton*, 49 F.4th at 487. But this one example shows the absurdity of requiring that platforms offer an explanation of every content-moderation decision. YouTube comments are but one of many situations in which platforms, large and small, profitable and unprofitable, moderate speech at an enormous scale. In its petition for writ of certiorari seeking review of Judge Oldham’s decision, *NetChoice* noted the law “require[s] covered websites to develop procedures applicable to billions of editorial judgments across websites’ international operations. Over a single three-month period in 2021, YouTube removed 9.5 million videos and 1.16 billion comments. Over a similar period, Facebook removed over 40 million pieces of bullying, harassing, and hateful content.” Petition for Writ of Certiorari at 32, *Paxton*, 49 F.4th 439 (No. 22-555) (citations omitted) (emphasis omitted); see also Douek, *Governing Online Speech*, *supra* note 86, at 791 & 791 n.211 (discussing the “truly unfathomable” scale of content moderation on major social media platforms).

303. Petition for Writ of Certiorari, *supra* note 302, at 32.

304. *NIFLA*, 138 S. Ct. at 2378.

305. For example, the Utah Governor vetoed a bill that would have required individualized explanations of content-moderation decisions, would have created a compulsory appeal process, and would have imposed penalties for any moderation decision that violated the Act. See S. 228, 64th Leg., Gen. Sess. (Utah 2021); Schott, *supra* note 19.

306. See Chemerinsky, *Tears of Scrutiny*, *supra* note 281, at 374.

hearing appeals from each decision, would be astronomical. For-profit platforms, like Google and YouTube, Facebook and Instagram, Twitter, and Reddit would likely struggle immensely to meet the burden—if they could even meet the burden at all. It is simply unrealistic to ask those platforms to explain the billions of moderation choices they make each year. In addition, platforms with weaker profit streams, like Wikipedia, could not possibly hope to comply, at least not without forgoing a great deal of moderation the platforms would prefer to conduct.

This does not mean that users will never get explanations from platforms when their accounts or posts are removed or moderated. Many platforms, including Twitter and Facebook, have long responded to users' desires for individual fairness in moderation by setting up appeal structures. Platforms have experimented with a variety of methods to achieve objectivity in moderation decisions. Facebook created the Oversight Board.<sup>307</sup> Parler announced it would establish juries to review content-moderation appeals.<sup>308</sup> This free-market experimentation should be encouraged. It will allow each platform to accommodate users' desires with an eye to what is feasible for the platform to provide—something that clearly was ignored in Florida and Texas.

Although most specific disclosure laws are unconstitutional, some are not.<sup>309</sup> We think a law that merely requires a platform to notify a user that its speech has been modified, without providing detailed explanations or burdensome appeal procedures, would not be unconstitutionally burdensome.<sup>310</sup>

307. Nick Clegg, *Welcoming the Oversight Board*, META (May 6, 2020), <https://about.fb.com/news/2020/05/welcoming-the-oversight-board/> [<https://perma.cc/4VY6-BV2X>]. For the most thorough discussion of the Oversight Board to date, see generally Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution To Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020).

308. *Why We Worked with Parler To Implement Effective Content Moderation*, HIVE (May 17, 2021), <https://thehive.ai/blog/why-hive-worked-with-parler-content-moderation> [<https://perma.cc/9R7H-B4NX>]. Parler was recently acquired by new owners, who shut down the conservative-leaning social media platform. See Rebecca Klar, *Parler App Once Hailed as Conservative Twitter Alternative Yanked by New Owners*, THE HILL (Apr. 14, 2023, 1:18 PM), <https://thehill.com/policy/technology/3950834-parler-app-once-hailed-as-conservative-twitter-alternative-yanked-by-new-owners/> [<https://perma.cc/P42C-SM6D>].

309. Specific disclosure laws are different from content-moderation laws or general disclosure laws in that they are more focused on procedure rather than substance. We agree with other commentators that this may be a desirable goal in some form. Cf. Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 532 (2022) (noting that “regulators are right to focus on procedure not substance”). But, as we have explained, the procedural requirements that have been imposed by state law are too burdensome. In Part III we will argue that, to the extent these procedural requirements might be desirable, they should be imposed by the federal government.

310. Appeal requirements like these may also be misguided because they are motivated too much by individual fairness on a post-by-post basis without contending with the systemic, often preemptive, nature of contemporary content-moderation decision-making. In a recent article, Professor Evelyn Douek argues that legislators err by treating platforms' editorial decisions in a legalistic, post-hoc

Indeed, the Digital Millennium Copyright Act (“DMCA”) requires platforms to take reasonable steps to provide notice to users whose posts have been removed due to alleged copyright infringement.<sup>311</sup> Many platforms already do this for moderated speech.<sup>312</sup> Although we think the majority of specific disclosure laws will be (and should be) unconstitutional, we acknowledge that more narrowly tailored requirements might pass muster. But, as we argue in Part III, if those laws are to exist, they should come only from the federal government. It will be hard enough for platforms to accommodate the dictates of one specific disclosure law. It will be impossible for a platform to adjust to specific disclosure laws if all fifty states develop their own.

*b. General Disclosure Laws*

Texas’s H.B. 20 and California’s Age-Appropriate Design Code Act require platforms to produce biannual reports regarding their content-moderation practices, including data.<sup>313</sup> These sorts of requirements, which we refer to as “general disclosure” laws, are different from specific disclosure laws in that they compel platforms to produce broader, aggregated transparency data. We treat this sort of disclosure separately from specific disclosure laws in the content-moderation context because they are likely to be, in most instances, less burdensome.<sup>314</sup> It is simply easier for a platform to provide overall aggregate data about its moderation practices once or twice a year than it is to explain each and every content-moderation decision. If tailored appropriately, laws requiring limited transparency reports could help facilitate an informed dialogue without unduly burdening content-moderation decisions. The platforms’ obligations regarding these transparency disclosures will remain relatively similar without regard to the total quantity of content-moderation actions taken by the platforms.

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fashion. *See id.* at 530. Professor Douek contends that rather than focusing on whether a platform provided adequate process on a post-by-post basis, it would be better to focus on platforms’ moderation approaches in a systemic fashion. *Id.*

311. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2882 (1998) (codified at 17 U.S.C. § 512(g)(2)(A)).

312. *See, e.g., Our Range of Enforcement Options*, TWITTER, <https://help.twitter.com/en/rules-and-policies/enforcement-options> [<https://perma.cc/H4RS-X87T>]; *Appeal a Facebook Content Decision to the Oversight Board*, FACEBOOK, <https://www.facebook.com/help/346366453115924> [<https://perma.cc/E4G8-FRH2>].

313. Act of Sept. 9, 2021, ch. 3, sec. 2, § 120.053, 2021 Tex. Gen. Laws 2d Sess. 3904, 3906–07 (codified at TEX. BUS. & COM. CODE ANN. § 120.053 (2021)); California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31(a)(1)(A), 2022 Cal. Stat. 4916, 4920 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(a)(1)(A)).

314. We have already explained that the Age-Appropriate Design Code Act’s general disclosure requirement is unconstitutionally vague. *See supra* Section II.B. But as discussed below, we think it is possible to draft a disclosure requirement that is not unconstitutionally vague. *See infra* Sections II.C.2.b, II.C.2.c.

But, like specific disclosure laws, it remains unclear what test courts should apply to evaluate the constitutionality of general disclosure laws. As with specific disclosure laws, these might receive strict scrutiny because they are content-based, speaker-based, and/or viewpoint-based compelled speech; or exacting scrutiny because they are compelled disclosures that could be similar in form to that in *Americans for Prosperity* and many election finance disclosure cases;<sup>315</sup> or *Zauderer* review because they require disclosure of factual information by a commercial enterprise.<sup>316</sup>

General disclosure laws could take so many different forms that it is hard to generalize as to the test that should be used, let alone as to the appropriate results. It must depend on the specifics of the disclosure requirements.

For general disclosure laws that are viewpoint based, strict scrutiny should apply because courts have (rightly) been very unwilling to permit viewpoint-based restrictions on speech.<sup>317</sup> Thus, a general disclosure law that clearly had the purpose of coercing platforms into moderating (or not moderating) a particular viewpoint should fail under strict scrutiny because that would just be an indirect way of a state forcing platforms to do something the state could not force platforms to do directly: regulate speech based on viewpoint.

But disclosure laws that are viewpoint neutral should get a lower level of scrutiny. It could be very helpful if platforms were required to show users how they moderate speech. General disclosure requirements could enhance the public's understanding of the online market and facilitate users' ability to pressure platforms into behaving how they believe is desirable. This would be beneficial for users of platforms of all types. Conservative users, who might prefer to use platforms that do not moderate political speech, could find those platforms that fit this preference. And progressive users, who also might prefer platforms that take an aggressive approach against hate speech or misinformation, could find their space too.

For general disclosure laws that are content neutral in effect and purpose, and that only require disclosure of factual information, we think the most appropriate inquiry is *Zauderer*. This is in accord with recent decisions that have applied *Zauderer* to required disclosure of noncontroversial factual information even where it is outside of *Zauderer's* traditional commercial advertising context.<sup>318</sup> Application of *Zauderer* does not mean that those laws would be categorically upheld. A general disclosure law that was too burdensome, or which required disclosures for which the government did not have a legitimate

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315. See Chemerinsky, *Tears of Scrutiny*, *supra* note 281, at 374.

316. See, e.g., *NIFLA v. Becerra*, 138 S. Ct. 2361, 2378 (2018).

317. See, e.g., *Matal v. Tam*, 582 U.S. 218, 243–44 (2017) (striking down provision of the Lanham Act as viewpoint discrimination).

318. See, e.g., *NIFLA*, 138 S. Ct. at 2378.

justification, would still fail even under *Zauderer*.<sup>319</sup> Even if courts use intermediate or exacting scrutiny, asking whether the government’s action is narrowly tailored to an important interest, they will be able to uphold nonburdensome, beneficial disclosure requirements, while striking down vague or unduly burdensome ones.

We hasten to note, though, that as more and more states adopt general disclosure laws, the aggregate burden may become significant. As we argue in Part III, it would be best if general disclosure requirements came from a single source—federal law—rather than five or ten or fifty states. One national law could provide just as much transparency to users as fifty state statutes with just a fraction of the burden on platforms. This would reduce the likelihood that general disclosure requirements would impinge on platforms’ editorial discretion.

*c. Policy Disclosure Laws*

Statutes that require platforms to develop a policy and announce it are content-based compelled speech. Thus, the New York law we discussed in Section I.B, which requires platforms to develop hate speech policies, is content based.<sup>320</sup> The state law might not dictate what such a policy would provide—a platform might theoretically endorse hate speech—but the law would compel platforms to speak a message. Under *NIFLA*, the New York law would receive strict scrutiny because it requires that platforms engage in the speech activity of devising a policy, committing it to writing, and then publicizing it.<sup>321</sup>

In *NIFLA*, the Supreme Court held that California’s attempt to compel certain healthcare facilities to tell clients about state-provided healthcare and abortion services was compelled speech that warranted strict scrutiny.<sup>322</sup> New York’s law is similar in that it requires platforms to speak a message about a controversial subject (in this case, hate speech rather than abortion). The controversial nature of the subject means *Zauderer* cannot apply, no matter how far the *Zauderer* test is removed from its initial commercial-advertising-related roots. *Zauderer* only applies to disclosures about noncontroversial subjects.<sup>323</sup> This will often be true because the online speech that platforms moderate—terrorist content, hate speech, bullying, pornography, and more—is so frequently controversial.

319. *See id.* at 2377.

320. *See supra* Section I.B.

321. Act of June 6, 2022, ch. 204, § 1, 2022 N.Y. Laws 1176, 1177 (codified at N.Y. GEN. BUS. LAW § 394-ccc(1)(a), (3) (2023)).

322. *NIFLA*, 138 S. Ct. at 2371–72.

323. *Id.* at 2372 (striking down a compelled notice about “abortion,” which is “anything but an ‘uncontroversial’ topic”); *see Chemerinsky, Tears of Scrutiny, supra* note 281, at 359.

Content policy laws like New York's will therefore almost always be unconstitutional. We do not see how they can satisfy strict scrutiny. Even if developing policies and informing the public of them is a compelling interest, in light of *NIFLA*, it is unlikely that broad mandates to develop and publish policies would be regarded as a "narrowly tailored" restriction on speech.

As to New York's law, we think strict scrutiny and the unconstitutionality that it entails is appropriate. New York's hate speech content policy law has an obvious viewpoint-based purpose. The clear intention of this law is to encourage platforms to promulgate anti-hate speech policies. This is a laudable goal—we hope platforms adopt anti-hate speech policies on their own. But when the government mandates such content-based disclosure with the purpose of regulating speech based on its content, it is a viewpoint-based compelled speech requirement that would need to meet strict scrutiny. Also, as we discuss above, the definition of hate speech is so vague as to run afoul of the First Amendment.<sup>324</sup>

We also group, under the umbrella of "content policy laws," statutes like California's Age-Appropriate Design Code Act, which try to coerce platforms into enforcing content policies.<sup>325</sup> Laws requiring platforms to enforce policies are not disclosure requirements; these laws compel speech by platforms by forcing them to devise policies, and these laws are motivated by the goal of restricting speech. These laws would likely therefore merit strict scrutiny because they are merely indirect ways for the government to force states to moderate content they might otherwise choose to leave alone. Indeed, we are concerned that there could be an interaction between a content policy law that requires a platform to develop a policy—like New York's—and a content policy law that requires a state to enforce a policy—like California's—that could directly interfere with editorial discretion.

But although we think such laws are likely to be invalidated, we recognize that the broad application of strict scrutiny to content policy laws is not necessarily desirable. Some content policy laws could be desirable for the same reason general disclosure laws can be desirable: they could facilitate transparency without unduly burdening speech. Although it may be unconstitutional under current caselaw, we would prefer that content policy laws that merely require a policy—but do not intimate how that policy should apply or require enforcement of that policy—be evaluated under the *Zauderer* test.

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324. See ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 87–106 (2017) (discussing the inherent vagueness of "hate speech" regulations).

325. See California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. 4916, 4921 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(a)(9)) (requiring platforms to enforce its promulgated policies).

Texas's content policy law is a good example of a law that we believe should get a lower level of scrutiny. It requires social media platforms to publish acceptable use policies that inform users about the types of content allowed on the platform, explain the steps the platform will take to ensure content complies with the policy, and explain how users can notify platforms about content that violates the policy.<sup>326</sup> This requirement does not dictate what should go into an acceptable use policy or how that policy should be enforced. If severed from the many unconstitutional provisions in Texas's H.B. 18, it would enhance transparency and impose a minimal burden on platforms.

One interesting content policy requirement is the portion of Florida's law that requires platforms to disclose the algorithms the platforms use.<sup>327</sup> As it exists in Florida's law, the provision has an obvious content-based purpose. It is clearly intended to curb algorithmic moderation and perhaps restrict platforms' abilities to employ new algorithms. Indeed, that provision of the Florida law requires platforms to permit users to opt-out of algorithmic moderation.<sup>328</sup> The opt-out provision is clearly a restriction on speech of internet and social media companies that should merit strict scrutiny because it limits platforms' editorial discretion. But there have been calls to enact laws compelling platforms to disclose their policies regarding algorithmic moderation without such an obvious content-based purpose. For example, Texas requires platforms that algorithmically moderate content available to children to disclose how their algorithms work.<sup>329</sup> Whether laws like Texas's and Florida's are unconstitutional depends on whether the laws are burdensome or are content based by applying only to controversial subjects. If a court answers yes to either question, the law is and should be unconstitutional. But a law that is properly crafted and has a permissible purpose, like Texas's, which just requires general disclosures about algorithmic practices, should receive the *Zauderer* test and be upheld.

### III. STATES SHOULD STAY OUT OF THE CONTENT-MODERATION GAME

To this point, we have explained why it is hard for any government entity to regulate the content of speech on the internet without violating the First Amendment. The Constitution puts significant limitations on any effort by the government to control content moderation, whether directly or indirectly, or to

326. Act of Sept. 9, 2021, ch. 3, sec. 2, § 120.052(b), 2021 Tex. Gen. Laws 2d Sess. 3904, 3905–06 (codified at TEX. BUS. & COM. CODE ANN. § 120.052(b) (2021)).

327. Act of May 24, 2021, ch. 32, § 4, 2021 Fla. Laws 503, 513 (codified as amended at FLA. STAT. § 501.2041(2)(f)–(g) (2022)).

328. *Id.*

329. Securing Children Online Through Parental Empowerment Act, ch. 795, § 2.01, 2023 Tex. Sess. Law Serv. (West) (effective Sept. 1, 2024) (codified at TEX. BUS. & COM. CODE ANN. § 509.056 (2021)).

compel disclosures about content-moderation decisions. But it is even harder for state governments to do so. In addition to violating the First Amendment, state content-moderation laws are preempted by federal law. As we explain below, federal law permits states to regulate internet content in, at most, only four very limited areas.

And this is a good thing. The internet stretches across state borders and connects people affected by the laws of many different states. If each state promulgated its own varied and burdensome requirements for platforms, it would impose massive regulatory costs on internet speech and would make the internet unusable. In this part, we explain why most state efforts to regulate content moderation are preempted, and why they should remain that way.

#### A. *Federal Law Preempts State Regulation of Content Moderation*

Several federal laws limit the states' ability to regulate internet content. For example, the Copyright Act and the Digital Millennium Copyright Act preempt almost all state attempts to control copyright infringement online.<sup>330</sup> The Federal Communications Commission ("FCC") can regulate the internet—and preempt contrary state laws—through its broad authority to regulate interstate communications.<sup>331</sup> The most significant source of preemption related to content moderation appears in 47 U.S.C. § 230(e)(3), which prohibits causes of action that conflict with the immunity provided by Section 230.<sup>332</sup>

Section 230 provides platforms a broad protection against liability for the content they host and the decisions they make about what content to exclude.<sup>333</sup> Platforms can neither be treated as the speaker of most of the content on their websites<sup>334</sup> nor be sued for removing access to content they do not want to host.<sup>335</sup> Courts have thus held that platforms (and users<sup>336</sup>) are immune from

330. Copyright Act of 1976, Pub. L. No. 94-553, § 301, 90 Stat. 2541, 2572 (1976) (codified as amended at 17 U.S.C. § 301); Digital Millennium Copyright Act, Pub. L. 105-304, § 202, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 512).

331. CHRIS D. LINEBAUGH & ERIC N. HOLMES, CONG. RSCH. SERV., R46736, STEPPING IN: THE FCC'S AUTHORITY TO PREEMPT STATE LAWS UNDER THE COMMUNICATIONS ACT 1-2, 10-20 (2021) (noting that "the FCC has broad authority to preempt state laws that conflict with or frustrate its actions" and going on to discuss some examples that at least indirectly concern internet content, such as voice-over internet protocols—essentially phone calls over the internet—and net neutrality). *But see* Mozilla Corp. v. FCC, 940 F.3d 1, 86 (D.C. Cir. 2019) (vacating the FCC's attempt to preempt state net neutrality laws).

332. 47 U.S.C. § 230(e)(3).

333. *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) (noting that "the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity" and collecting cases).

334. 47 U.S.C. § 230(c)(1).

335. *Id.* § 230(c)(2).

336. *Barrett v. Rosenthal*, 146 P.3d 510, 528-29 (Cal. 2006) (holding that Section 230 immunizes a user against liability for reposting defamatory content).

liability<sup>337</sup> for third-party content that violates a duty owed under tort law,<sup>338</sup> the Fair Housing Act and similar laws,<sup>339</sup> state antiterrorism laws,<sup>340</sup> state criminal laws,<sup>341</sup> state securities laws,<sup>342</sup> state cyberstalking laws,<sup>343</sup> some state intellectual property laws,<sup>344</sup> and the law of antitrust and unfair competition.<sup>345</sup> As we explained in Part II, the First Amendment already protects platforms

337. Courts generally require parties asserting Section 230 immunity to satisfy a three-part test requiring them to show: (1) they are a provider or user of an interactive computer service; (2) the content in question contains information provided by another entity; and (3) the lawsuit seeks to hold them liable as a publisher or speaker of that content. *See, e.g., Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018).

338. *See, e.g., id.* at 1164; *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 402, 417 (6th Cir. 2014); *Hassell v. Bird*, 420 P.3d 776, 788 (Cal. 2018) (collecting cases). Section 230 was expressly intended to overrule a New York state court decision that held an internet forum strictly liable for defamation. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)). The House Report accompanying Section 230 provided that it had the specific purpose of “overrul[ing] *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own.” H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10, 208. For a history of Section 230 and the cases leading to its passage, see generally KOSSEFF, TWENTY-SIX WORDS, *supra* note 2.

339. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc); *Chi. Laws.’s Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008).

340. *See Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019); *Gonzalez v. Google LLC*, 2 F.4th 871, 913 (9th Cir. 2021), *aff’d on other grounds*, 143 S. Ct. 1191 (2023); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014) (holding Section 230 precluded a lawsuit for “intentional assault and negligence” based on Facebook’s dilatory response to terrorism content). In two recent cases, the Supreme Court unanimously rejected arguments that social media platforms should be liable under the Antiterrorism Act for failing to adequately moderate terrorist content. *See Gonzalez v. Google LLC*, 143 S. Ct. 1191, 1192 (2023); *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1230–31 (2023). Under the Court’s reasoning, it will be very difficult for plaintiffs to state a claim based on the theory that platforms knowingly aid and abet terrorism simply based on allegedly insufficient moderation practices. *See Taamneh*, 143 S. Ct. at 1220–28 (holding that (1) to state a claim under 18 U.S.C. § 2333(d)(2), a plaintiff must show that the defendant knowingly provided substantial assistance to a tortious act of terrorism, and (2) Twitter did not aid and abet terrorism by taking insufficient steps to ensure terrorist-related content was removed from its platform). Interestingly, *Taamneh* rejected the argument that a platform aids and abets terrorism when its algorithms affirmatively recommend terrorist content. *Id.* at 1227. The Court reasoned that the algorithms were neutral among users and, “[o]nce the platform and sorting-tool algorithms were up and running, defendants at most allegedly stood back and watched; they are not alleged to have taken any further action with respect to” terrorist content. *Id.*

341. *See, e.g., People v. Gourlay*, No. 278214, 2009 WL 529216, at \*3 (Mich. Ct. App. Mar. 3, 2009) (“[T]he phrase ‘any state or local law’ includes civil and criminal laws.”); *Voicenet Commc’ns, Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318, at \*3 (E.D. Pa. Aug. 30, 2006) (holding Section 230 preempts inconsistent state criminal laws); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 823 (M.D. Tenn. 2013).

342. *Universal Commc’ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007).

343. *Id.*

344. As we note below, there is a circuit split regarding whether state intellectual property laws are preempted by Section 230. *Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (holding Section 230 immunizes platforms from liability under state intellectual property laws), *with Hepp v. Facebook*, 14 F.4th 204, 214 (3d Cir. 2021) (holding it does not).

345. *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1272 (D.C. Cir. 2019).

from liability for much of this content.<sup>346</sup> But the categorical nature of Section 230's immunity makes it easier to resolve content-moderation cases based on preemption on a motion to dismiss. In doing so, Section 230 protects websites "not merely from ultimate liability, but from having to fight costly and protracted legal battles."<sup>347</sup>

Section 230 preempts all state laws "inconsistent with" this immunity.<sup>348</sup> Courts have construed Section 230 preemption broadly.<sup>349</sup> As the D.C. Circuit recently put it, "courts uniformly recognize" that Section "230 immunizes internet services for third-party content that they publish . . . against causes of action of all kinds."<sup>350</sup>

But Section 230's protection from liability for social media platforms is not limitless. Section 230 contains significant exceptions, particularly for speech in violation of federal laws.<sup>351</sup> Courts have uniformly held that Section 230 does not protect the original speaker of a post, who may still be held directly liable.<sup>352</sup> Although state criminal laws are preempted, Section 230 expressly does *not* immunize platforms from liability under federal criminal laws,<sup>353</sup> intellectual property laws,<sup>354</sup> violations of state laws that would constitute a violation of three federal sex trafficking laws,<sup>355</sup> and some

346. See discussion *supra* Part II.

347. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process.")

348. 47 U.S.C. § 230(e)(3).

349. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (holding Section 230 unmistakably preempts common law causes of action).

350. *Marshall's Locksmith Serv. Inc.*, 925 F.3d at 1267. Courts have been unpersuaded by attempts to limit Section 230's immunity through publisher liability theories. See *Rigsby v. GoDaddy Inc.*, 59 F.4th 998, 1008 (9th Cir. 2023).

351. 47 U.S.C. § 230(e)(1)–(5).

352. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021) (holding Snapchat could be sued on a negligent design theory, for creating a filter that allowed users to post the speed at which they were traveling); *Fair Hous. Council*, 521 F.3d at 1165 ("[Section 230] does not grant immunity for inducing third parties to express illegal preferences. [The defendant's] own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 . . . does not apply to them."); *Chi. Laws.'s Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008) (holding that although landlords who discriminate can be held directly liable, under Section 230(c)(1) a plaintiff "cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."); *Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) ("Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content . . .").

353. § 230(e)(1).

354. § 230(e)(2); *Hepp v. Facebook*, 14 F.4th 204, 214 (3d Cir. 2021) (holding a statutory right of publicity claim could proceed because it fell under Section 230's intellectual property exception). The Digital Millennium Copyright Act, Pub. L. 105–304, § 202(a), 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 512), provides a different safe-harbor immunity for much online copyright infringement.

355. § 230(e)(5).

communications privacy laws.<sup>356</sup> Moreover, breach of contract claims may sometimes proceed against platforms because they turn on the platforms' own conduct, not merely third-party content that platforms do or do not host.<sup>357</sup>

Although Section 230 has limits, those limits mostly apply to *federal* law. States only may regulate internet content moderation in four very limited respects. First, and most significantly, state laws of all varieties may be used for actions against platforms for their own speech or conduct. Although the First Amendment may put limits on such suits, they are categorically outside the scope of Section 230, which only applies to third-party generated content.<sup>358</sup> Section 230 does not immunize platforms when they are responsible for developing or creating the unlawful content.<sup>359</sup> Courts have allowed many such suits to proceed.

In *Lemmon v. Snap, Inc.*,<sup>360</sup> the Ninth Circuit reversed a district court order dismissing a products liability action against Snapchat.<sup>361</sup> Four parents sued Snapchat after their sons died in a car crash while using the popular cellphone application.<sup>362</sup> At the time, Snapchat had a feature that allowed users to record how fast they were moving at the time a photo was taken.<sup>363</sup> The parents alleged that the boys had died while trying to record themselves going over 100 miles per hour.<sup>364</sup> The district court dismissed the parents' negligent design suit on the ground that Snapchat was immune for the content it hosts under Section 230(c)(1).<sup>365</sup> But the Ninth Circuit reversed, reasoning that the suit only sought to hold Snapchat liable for its own speech—that is, “principally for *the creation* of the Speed Filter.”<sup>366</sup>

356. § 230(e)(4).

357. *Compare* *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009) (holding the plaintiff's promissory estoppel claim was not preempted by Section 230(c)(1)), *with* *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 42 (2021) (holding the plaintiff's claims for breach of contract, promissory estoppel, and unfair competition were barred by Section 230).

358. *See* *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (holding a website cannot be held liable for content it does not create or develop); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (concluding that a website that did not “contribute[] to the allegedly fraudulent nature of the comments at issue” was protected by Section 230).

359. § 230(f)(3).

360. 995 F.3d 1085 (9th Cir. 2021).

361. *Id.* at 1095.

362. *Id.* at 1087.

363. *Id.* at 1088.

364. *See id.* at 1089.

365. *Id.* at 1090.

366. *Id.* at 1093 (quoting *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018)). But the *Lemmon* exception is limited. Courts have generally held platforms are not liable for negligence because their websites are structured in a way that enables users to experience harms. *See, e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) (holding a platform was immune from a suit that alleged a website failed to take sufficient steps to prevent an underage girl from lying about her age in

*Lemmon* built on a strong line of Ninth Circuit caselaw limiting Section 230(c)(1)'s immunity solely to content posted by third parties. In an important en banc decision, the court held that a website lost the ordinary immunity for user-generated content when it required users to answer a questionnaire in a way that necessarily violated the Fair Housing Act and state housing discrimination laws.<sup>367</sup> That website, Roommates.com, required users to fill out a questionnaire using a set of pre-populated answers to indicate the sex, sexual orientation, and parental status of the people they were willing to live with.<sup>368</sup> This fell outside the scope of Section 230's protection because it was the platform's own speech.<sup>369</sup> The Ninth Circuit also has previously allowed a suit to proceed in which a plaintiff alleged a website breached its duty, owed under California law, to warn her about a possible rape scheme.<sup>370</sup> Her suit fell outside Section 230 because it sought to impose liability solely on the basis of the platform's conduct, not based on the speech of a third party.<sup>371</sup>

Many other circuits have followed suit. For instance, the Tenth Circuit allowed a suit by the Federal Trade Commission to proceed against a platform that "solicited requests for confidential information protected by law, paid researchers to find it, knew that the researchers were likely to use improper methods, and charged customers who wished the information to be disclosed."<sup>372</sup> The court reasoned that the website was not a neutral intermediary; it was actively responsible for developing the unlawful content.<sup>373</sup> And the Second Circuit has held an Instagram user was not immune from liability for the defamatory content of a post she created.<sup>374</sup> Moreover, the Seventh Circuit held

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order to create a profile that ultimately led her to be sexually assaulted by a person she met on the website).

367. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc). In a recent unpublished decision relying on *Roommates.com*, the Ninth Circuit held that Facebook was not entitled to immunity under Section 230 in a case alleging that an algorithm on Facebook Marketplace violated the Fair Housing Act. *See Vargas v. Facebook, Inc.*, No. 21-16499, 2023 WL 4145434, at \*2-3 (9th Cir. June 23, 2023). In *Vargas*, the plaintiff was a "single parent, disabled, female, and of Hispanic descent" who alleged that Facebook's algorithm caused her to receive fewer housing advertisements than a white friend. *Id.* at \*2. The panel held that Facebook could be sued based on its allegedly discriminatory algorithmic advertising practices because Facebook's targeted algorithmic recommendations "contributed materially to the alleged illegality of the conduct." *Id.* at \*3 (quoting *Roommates.com*, 521 F.3d at 1168).

368. *Roommates.com*, 521 F.3d at 1165.

369. *Id.* By contrast, Roommates.com would not have been liable if it merely hosted content that violated the Fair Housing Act or state housing discrimination laws. *See Chi. Laws.'s Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).

370. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016).

371. *Id.*

372. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009).

373. *See id.* at 1999-1201.

374. *See La Liberte v. Reid*, 966 F.3d 79, 89 (2d Cir. 2020).

a blog was not immune from a suit that alleged that the blog's own employees created defamatory comments.<sup>375</sup>

Platforms do not, however, immediately lose Section 230's protections if they are involved in dictating the content of user posts. Courts have recognized that platforms can perform some editorial actions, like removing spaces, changing spelling, or altering font without being deemed responsible for creating or developing a post (provided that the editorial actions are unrelated to the post's illegality).<sup>376</sup> And platforms are free to amplify or endorse unlawful statements if they do not contribute to their content.<sup>377</sup>

Second, state privacy laws may regulate the internet if they are similar to the Electronic Communications Privacy Act ("ECPA") of 1986.<sup>378</sup> The scope of this exception is unclear because the statute does not define what it means for a law to be "similar" to ECPA. Among other things, ECPA prohibits the intentional interception or eavesdropping of electronic communications, disclosure of intercepted communications, or the manufacture and distribution of devices for intercepting communications.<sup>379</sup> Various state laws, such as the California Invasion of Privacy Act, contain prohibitions that might be deemed similar to this.<sup>380</sup>

Although the ECPA exception might initially appear broad because modern platforms obtain so much information about users, it is narrower than it seems. In an early case analyzing this question, the Seventh Circuit noted that one could say a webhosting service was a "device" to intercept communications, but that such a broad reading "would be equally applicable to a phone company whose lines were used to spread gossip."<sup>381</sup> Despite the Seventh Circuit's concerns, in practice, this exception is probably quite narrow because ECPA-similar rights such as the ones in the California Invasion of

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375. See *Huon v. Denton*, 841 F.3d 733, 741–43 (7th Cir. 2016).

376. See *O'Kroy v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016) (explaining that Google retained its immunity even though it performed automated editorial acts on content, such as removing spaces and altering font); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (en banc) ("A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.").

377. See *Vasquez v. Buhl*, 90 A.3d 331, 344 (Conn. App. Ct. 2014).

378. 47 U.S.C. § 230(e)(4).

379. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, §§ 101, 102, 100 Stat. 1848, 1848–53 (codified as amended at 18 U.S.C. §§ 2511, 2512).

380. See California Invasion of Privacy Act, ch. 27, § 1, 2022 Cal. Stat. 163, 163 (codified as amended at CAL. PENAL CODE § 631 (2023)) (creating criminal liability for anyone who "reads, or attempts to read, or to learn the contents" of a communication "without the consent of all parties to the communication").

381. *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003).

Privacy Act usually turn on the nonconsent of the party being listened to.<sup>382</sup> So liability can often be avoided through contracts like website terms of use.

Third, states may bring civil actions or criminal prosecutions for violation of state trafficking laws if the violation would also constitute a violation of 18 U.S.C. §§ 1591 (sex trafficking of children by force, fraud, or coercion), 1595 (civil remedies for sex trafficking), or 2421A (promotion or facilitation of prostitution and sex trafficking).<sup>383</sup>

Finally, states (probably) can regulate internet content related to intellectual property. There is a circuit split over whether Section 230 preempts state intellectual property regulations. The Ninth Circuit has held that the intellectual property exception found in Section 230(e)(2) applies only to *federal* intellectual property rights.<sup>384</sup> But other courts have not yet joined this interpretation.<sup>385</sup> Even if the exception applies to state intellectual property rights, it is a narrow exception to Section 230's immunity because copyright and patent law are both preempted by different provisions of federal law.<sup>386</sup> The intellectual property exception is thus at most limited to a few types of rights, such as state trademark laws,<sup>387</sup> as well as perhaps trade secrets and the right of publicity.

Perhaps the most interesting of the state intellectual property rights at issue is the right of publicity. In a recent decision, *Hepp v. Facebook*,<sup>388</sup> the Third Circuit allowed a right of publicity suit to go forward on the theory that Pennsylvania's right of publicity law was related to intellectual property.<sup>389</sup> In

382. See *Javier v. Assurance IQ, LLC*, No. 21-16351, 2022 WL 1744107, at \*2 (9th Cir. May 31, 2022); California Invasion of Privacy Act § 1.

383. 18 U.S.C. §§ 1591, 1595, 2421A. For a discussion of the law that created this Section 230 exception, see generally Kendra Albert, Emily Armbruster, Elizabeth Brundige, Elizabeth Denning, Kimberly Kim, Lorelei Lee, Lindsey Ruff, Korica Simon & Yueyu Yang, *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084 (2021).

384. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007).

385. See, e.g., *Hepp v. Facebook*, 14 F.4th 204, 210–11 (3d Cir. 2021) (disagreeing with the Ninth Circuit interpretation); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415–16 (1st Cir. 2007) (implying that a suit based on Florida's trademark dilution law fell within the intellectual property exception); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (declining to follow the Ninth Circuit interpretation).

386. 17 U.S.C. § 301; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) (citing *Lear, Inc. v. Adkins*, 395 U.S. 653, 656 (1969)) ("By offering patent-like protection for ideas deemed unprotected under the present federal scheme, the Florida statute conflicts with the 'strong federal policy favoring free competition in ideas which do not merit patent protection.' We therefore agree with the majority of the Florida Supreme Court that the Florida statute is preempted by the Supremacy Clause, and the judgment of that court is hereby affirmed.>").

387. Interstate trademark laws are governed by the federal Lanham Act. Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141n).

388. 14 F.4th 204 (3d Cir. 2021).

389. *Id.* at 206. It remains unclear whether Congress intended for state right of publicity claims to fall under the intellectual property exception. See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323–

that case, a newscaster sued Facebook, Reddit, and Imgur because those platforms hosted advertisements that used her image without her consent.<sup>390</sup> The district court followed the Ninth Circuit’s interpretation of the intellectual property exception and dismissed the suit on the ground that Section 230(e)(2) only excepts federal intellectual property rights.<sup>391</sup> The Third Circuit reversed. It held Section 230(e)(2) encompasses state laws and held the right of publicity is a form of intellectual property.<sup>392</sup> In support of the latter conclusion, the court noted that the Supreme Court has described “the right of publicity [a]s an individual property right that is ‘closely analogous to . . . patent and copyright.’”<sup>393</sup> Although the court acknowledged that some, but not all, dictionaries define “intellectual property” in a way that would encompass a right of publicity, it held the language of Section 230(e)(2) was broad enough to permit the newscaster’s right of publicity suit.<sup>394</sup>

Putting all of this together, it is clear that the space provided for state regulation of content moderation online is quite thin. States may regulate as to: (1) a platform’s own speech or conduct; (2) some privacy laws; (3) three sex trafficking laws; and (4) intellectual property. But the first category is not really an exception; Section 230 only applies to user-generated content. The second is narrow. The third was recently upheld by the D.C. Circuit as it rejected a constitutional challenge to FOSTA.<sup>395</sup> And in terms of the fourth, because federal law preempts state regulation of copyrights, patents, and interstate trademarks, states only have authority over a very small number of intellectual property doctrines—and only in states outside of the Ninth Circuit.

Many of the content-moderation regulations found in the laws in Florida, Texas, and California are preempted by Section 230. These laws, and many others that have been proposed in states across the country, attempt to restrict speech in a manner that does not fit into the four areas that Section 230 does not preempt.

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24 (11th Cir. 2006) (noting that the legislative history provides no clues as to whether Congress intended the exception to reach the right of publicity); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 414 (S.D.N.Y. 2001) (same). But courts appear to generally recognize that the right of publicity often is a form of intellectual property. *See, e.g., Almeida*, 456 F.3d at 1322–23 (collecting authorities and citing a Black’s Law Dictionary definition to this effect); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003). However, some courts have held certain right of publicity claims are otherwise preempted by copyright law. *See generally* Jennifer Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002) (examining the tensions between the right of publicity and copyright protection, particularly how the former challenges both the provisions and purpose of the Copyright Act).

390. *Hepp*, 14 F.4th at 207.

391. *Hepp v. Facebook, Inc.*, 465 F. Supp. 3d 491, 500–01 (E.D. Pa. 2020).

392. *Hepp*, 14 F.4th at 206.

393. *Id.* at 213 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977)).

394. *Id.* at 213–14.

395. *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1292 (D.C. Cir. 2023).

For example, Florida law prohibits affected platforms from deleting, banning, or using shadow banning or post-prioritization practices against candidates for office.<sup>396</sup> This is preempted because it is directly contradicted by Section 230, which protects platforms from liability for restricting access to material the platform finds “objectionable.”<sup>397</sup> Nor can the Florida law restrict platforms’ ability to “censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.”<sup>398</sup> Section 230 also surely preempts the provision in the Florida law that requires platforms to permit users to opt out of algorithmic moderation practices because those practices, in addition to being protected by the First Amendment, involve restricting access to posts the platform finds objectionable.<sup>399</sup> Indeed, Section 230 contains a separate provision that expressly authorizes platforms to use technical means of restricting access to users’ posts.<sup>400</sup>

Contrary to the Fifth Circuit’s decision in *Paxton*, Texas’s law is similarly preempted. Section 230 obviously preempts Texas’s attempt to prevent platforms from moderating content based on viewpoint or geographic location.<sup>401</sup> It is impossible to square that prohibition with Section 230’s provisions expressly authorizing moderation of speech by internet and social media platforms.

Laws that may require moderation, like California’s Age-Appropriate Design Code Act, are likely to run into preemption issues too.<sup>402</sup> The California law requires platforms to document and make “a timed plan to mitigate or eliminate” a variety of content-moderation-related harms.<sup>403</sup> But platforms’ moderation practices are protected by Section 230, whether or not they are theoretically harmful to children. Indeed, a district court in Texas recently

396. Act of May 24, 2021, ch. 32, § 2, 4, 2021 Fla. Laws 503, 505, 511, 513–14 (codified as amended at FLA. STAT. §§ 106.072(2), 501.2041(1)(c), 501.2041(2)(h) (2022)).

397. 47 U.S.C. § 230(c)(2)(A). The same would be true of a Utah law vetoed by the governor in 2021, S.B. 228, that would’ve restricted platforms’ ability to act on viewpoint biases in their moderation practices. S. 228, 64th Leg., Gen. Sess. (Utah 2021); Schott, *supra* note 19.

398. Act of May 24, 2021 § 4.

399. *Id.*

400. 47 U.S.C. § 230(c)(2)(B).

401. Act of Sept. 9, 2021, ch. 3, sec. 7, § 143A.002(a), 2021 Tex. Gen. Laws 2d Sess. 3904, 3909 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (2023)).

402. Although we have argued that New York’s S. 4511A unconstitutionally requires platforms to promulgate hateful content policies, *see supra* Section II.C.2.c, we do not think a hateful content policy law, alone, is preempted by Section 230. Section 230 would only preempt state attempts to require platforms to enforce those policies, to impose liability based on content, or to impose liability based on a platform’s editorial decisions. New York’s S. 4511A lacks a provision compelling platforms to do anything other than promulgate a viewpoint-based policy. It is only in combination with a law like California’s Age-Appropriate Design Code Act, which might force platforms to enforce that policy, *see supra* Section I.A.2, that preemption issues would come into play.

403. California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.31(a)(2), 2022 Cal. Stat. 4916, 4920 (effective July 1, 2024) (to be codified at CAL. CIV. CODE § 1798.99.31(a)(2)).

enjoined a law that would have imposed significant monetary fines for certain platforms that allowed children to view pornographic content.<sup>404</sup> The court enjoined the law in part on the ground that it was preempted by Section 230.<sup>405</sup>

As we explained in Part I, it appears the California law anticipates a very broad interpretation of what is “harmful” to children, though the word harmful is not defined in the statute. The California law also requires platforms to enforce their terms of service and policies in a manner “not limited to” children.<sup>406</sup> California courts, however, have rightly held that Section 230 preempts attempts to force platforms to adhere to their terms of service because a platform’s right to remove or not remove content without liability cannot be limited by state contract law.<sup>407</sup> Also, the “best practices” promulgated by the regulatory agency that the California law creates likely will be used as a basis for negligence claims against platforms.<sup>408</sup> But these inevitable negligence suits will be preempted as well<sup>409</sup> because the whole point of Section 230 is to preclude state tort liability.<sup>410</sup>

There are many proposed state laws percolating around the country that would impose requirements similar to those already in existence in Florida, Texas, and California. For example, Ohio,<sup>411</sup> Utah,<sup>412</sup> Minnesota,<sup>413</sup> Wisconsin,<sup>414</sup> and Georgia<sup>415</sup> (among other states) have considered bills that would restrict editorial discretion. New Jersey has proposed a bill similar to the Age-Appropriate Design Code Act.<sup>416</sup> New York is considering a bill that would

404. *See* Free Speech Coal., Inc. v. Colmenero, No. 23-CV-917, 2023 WL 5655712, at \*7–8 (W.D. Tex. Aug. 31, 2023) (explaining that Texas’s H.B. 1181 permitted damages of up to \$10,000 per day for each violation, and up to \$250,000 if a minor was shown to have viewed adult content).

405. *Id.* at 69–74.

406. Sec. 2, § 1798.99.31(a)(9), 2022 Cal. Stat. at 4921.

407. *See, e.g.*, Murphy v. Twitter, Inc., 60 Cal. App. 5th 12, 17–42 (2021).

408. Sec 2, § 1798.99.32(d), 2022 Cal. Stat. at 4922 (codified at CAL. CIV. CODE § 1798.99.32(d) (2023)).

409. There are many cases holding Section 230 prevents platforms from being held liable for negligently permitting users to experience posts that cause them harm. *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1355 (D.C. Cir. 2014) (holding Section 230 precluded a lawsuit for “intentional assault and negligence” based on Facebook’s dilatory response to terrorism content). These cases apply with equal force to underage users. *See, e.g.*, Doe v. MySpace, Inc., 528 F.3d 413, 414 (5th Cir. 2008) (holding a platform was immune from a suit that alleged a website failed to take sufficient steps to prevent an underage girl from lying about her age in order to create a profile that ultimately led her to be sexually assaulted by a person she met on the website).

410. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (noting that Section 230 was intended to overrule a defamation case, Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

411. H.R. 441, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

412. S. 228, 64th Leg., Gen. Sess. (Utah 2021).

413. S. 3933, 92d Leg., Reg. Sess. (Minn. 2022).

414. Assemb. 530, 2021–22 Leg., Reg. Sess. (Wis. 2021); Assemb. 589, 2021–22 Leg., Reg. Sess. (Wis. 2021).

415. S. 393, 2021–22 Gen. Assemb., Reg. Sess. (Ga. 2022).

416. Gen. Assemb. 4919, 220th Leg., Reg. Sess. (N.J. 2022).

prohibit targeted advertisement toward children.<sup>417</sup> Each of these laws, if enacted, would likely raise preemption issues.

All government regulation of internet content must withstand the formidable challenge imposed by the Constitution. But state and local regulations face the even more significant hurdle of withstanding a preemption challenge under laws like Section 230. For the most part, state content-moderation regulations have no hope of survival.

B. *States Should Not Regulate the Internet*

And this preemption is a good thing. Federal law preempts state regulation, for the most part, in precisely the places states should not be permitted to regulate. As discussed below, the preemption of state regulation of copyright, medical devices, and telecommunications all are analogous in that they involve areas where there is need for uniform national regulation, not many different state approaches. The internet is too important for free speech, too complex, and too geographically diverse to place it under the control of state regulation.

1. The More Significant and Varied the Regulatory Burdens Become, the More Platforms Are Incentivized To Over-Moderate Speech—or Not Host It At All

a. *Disclosure Requirements*

For each state attempt to regulate content moderation—and there are many—internet platforms have to deal with an ever-increasing number of regulatory burdens. The burden imposed by a modest disclosure requirement would quickly become unworkable when that burden is multiplied by fifty laws, often with different and sometimes even conflicting requirements.

If every state adopted similar requirements, platforms might be able to adjust. But there is little hope that every state would choose similar requirements. The current landscape of content-moderation disclosure laws demonstrates that different states are focused on different things. New York passed a law focused on hate speech; California requires disclosures about how moderation practices affect children in California; Texas requires disclosures about how Texans' speech is censored; and Florida's law, which requires advance notice before certain content-moderation actions could be taken, is more particularly focused on political candidates and journalistic enterprises.<sup>418</sup> And these are just the first few laws to be enacted, with many more likely to quickly follow. The burden of these laws, individually, could be significant. But

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417. S. 3281, 246th Leg., Reg. Sess. (N.Y. 2023).

418. See *supra* Sections I.A.1, I.B.

combined, there is little hope that any except the largest and most profitable internet companies could cope. These concerns are particularly troubling in the context of the many platforms that provide socially desirable services without significant profit streams, like Wikipedia.

As the quantity of regulatory burdens increases, it will not just be platforms that feel the pressure. As platforms struggle to make the changes necessary for it to be feasible to comply with regulations, users of those platforms will inevitably have their speech restricted as platforms either over-moderate content or stop hosting some speech entirely. If platforms are required to issue disclosures about each individual content-moderation decision in some states, they will moderate less in those states. If these challenges become too significant, it could lead platforms to simply host less speech. If each comment on YouTube, each review on Yelp, each subreddit, or each page on Wikipedia could potentially entail a new disclosure in some number of states, a platform that is struggling to comply with its disclosure requirements would have every incentive to stop hosting comments, reviews, subreddits, or wikis. Whole internet ecosystems that thrive on the currently free web could cease to exist.

Unfortunately, the possibility that a multiplicity of state disclosure requirements could burden speech is not hypothetical. It could even happen under current law. Section 230 is silent about disclosure requirements, and many such requirements would not be currently preempted under federal law (though, as we have explained, many might otherwise violate the First Amendment). We have endorsed the possibility that limited disclosure requirements could enhance transparency without significantly burdening speech.<sup>419</sup> But those disclosure requirements should come almost exclusively from federal law or else the burden on platforms' speech—and therefore users' speech—could rapidly multiply.

*b. Content-Moderation Laws*

Unlike disclosure laws, content-moderation laws *are* almost uniformly preempted by Section 230. There are many calls to amend Section 230 in ways that would change that.<sup>420</sup> Those calls should be firmly resisted.

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419. See Chemerinsky & Chemerinsky, *supra* note 10, at 100–01.

420. Because Section 230(e)(4) preempts all state laws “inconsistent” with Section 230, almost all proposals to change the scope of Section 230’s protection would change the scope of Section 230 preemption. For commentary arguing that Section 230 should be amended, see generally Mary Anne Franks, *The Free Speech Industry*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY, *supra* note 10, at 65; Chemerinsky & Chemerinsky, *supra* note 10, at 87; Sheldon Whitehouse, *Section 230 Reforms*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY, *supra* note 10, at 103; Candeub, *supra* note 40; Danielle Keats Citron & Benjamin

At the most extreme end, if states like Texas were able to prohibit platforms from moderating the speech of Texans and states like California could prohibit platforms from letting Californian children view speech that is potentially harmful to them, we might reach a point where platforms were required to host speech in Texas that Californians could not be allowed to read. We hope this extreme never becomes a reality in the United States. The internet is, to a certain degree, already compartmentalized across national boundaries. It is hard for users in America to communicate with users in more restrictive countries, like Russia, and extremely difficult to reach users in China. Within the United States, though, Americans can communicate with each other so freely that you cannot know before you make a post where your audience will be. This is an amazing development that democratizes, nationalizes, and, indeed, globalizes free speech. It connects similar people in states as far away as Alaska and Florida or Maine and Hawaii. For perhaps the first time in history, in the last quarter century, we have reached a point where geographic separation no longer prevents people from forming a community. Whether users can connect to audiences and communities in different states should not turn on whether their state legislature has decided platforms cannot be permitted to make their own editorial choices.<sup>421</sup>

The obvious counterargument to this is that the First Amendment would significantly restrict the most extreme forms of these restrictions.<sup>422</sup> But there

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Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453 (2018); Dean Baker, *Getting Serious About Repealing Section 230*, CTR. FOR ECON. & POL'Y RSCH.: BEAT PRESS (Dec. 18, 2020), <https://cepr.net/getting-serious-about-repealing-section-230/> [<https://perma.cc/UDQ9-PMHD>]. Accord Jeff Kossel, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)*, 37 BERKELEY TECH. L.J. 757, 788 (2022) [hereinafter Kossel, *A User's Guide*] (“[S]ince 2019, members of Congress have introduced more than thirty-five bills that would either amend or repeal § 230.”).

421. Professor Eugene Volokh has suggested that federal preemption of state laws protective of free speech might violate the First Amendment. Eugene Volokh, *Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment?*, VOLOKH CONSPIRACY (Jan. 23, 2021, 7:02 PM), <https://reason.com/volokh/2021/01/23/might-federal-preemption-of-speech-protective-state-laws-violate-the-first-amendment/> [<https://perma.cc/3U5J-QX6Q>] [hereinafter Volokh, *Might Federal Preemption*]; see also *Biden v. Knight*, First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1226 n.5 (2021) (Thomas, J., concurring). However, we are inclined to disagree with Professor Volokh's suggestion that Section 230 might violate the First Amendment by empowering private entities to restrict speech because, as we explained above, that is the platform's own First Amendment right. (Indeed, Professor Volokh did not clearly endorse the position and rather just quoted an op-ed that advocated it.) Volokh, *Might Federal Preemption*, *supra* (citing Vivek Ramaswamy & Jed Rubenfeld, *Save the Constitution from Big Tech*, WALL ST. J. (Jan. 11, 2021, 12:45 PM), <https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105> [<https://perma.cc/Z9NV-EFR7> (staff-uploaded, dark archive)]).

422. Moreover, the First Amendment implications of these regulations would be considered on a state-by-state and challenge-by-challenge basis. By contrast, a challenge to a federal regulation would consider the burden imposed by the entire regulation.

are a large number of ways that state law might restrict content moderation and harm speech in a manner that would not violate the First Amendment.

For example, state tort law would significantly affect free speech on the internet if it were not preempted. This is not just idle speculation. Section 230 was enacted specifically to overrule a New York state court's decision to hold a platform liable for a defamatory comment it did not post.<sup>423</sup> If platforms could be held liable for any possible defamatory post, there is a great deal of internet content that would quickly cease to exist. Billions of comments are posted on the internet on various platforms on a daily basis. If each platform faced potential liability for each comment or review or forum, why would they host that speech?

Of course, some platforms might try to lessen the risk of defamation liability through content moderation.<sup>424</sup> But that is easier said than done.<sup>425</sup> It would be extremely difficult to determine whether each statement of fact made on Wikipedia is true. The burden of fact-checking would be immense. And even if a platform could accommodate that burden—and few could—platforms will inevitably make mistakes. Content moderation cannot be done perfectly at scale.<sup>426</sup> As Professor Evelyn Douek has argued:

Speech decisions in any context are difficult—courts get them wrong all the time. Even if there were clearly “right” answers, and even if platform content moderators had unlimited time and resources to devote to every decision, the inevitability of error means that the sheer number of decisions would still result in a very large number of mistakes.<sup>427</sup>

For every mistake, a platform could face significant penalties in civil liability.

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423. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (noting that Section 230 was intended to overrule a defamation case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

424. Even determining which user is in which state and then applying the appropriate content moderation and disclosure practices to that user could be a significant challenge when done at a massive scale. This will require platforms not only to identify users by location and, in states like California, age, but also to have staffs of moderators who are familiar with the peculiarities of each state's laws. This is a tall order. The application of law to fact can be difficult even for lawyers and judges in the context of speech torts. But unlike lawyers and judges, who benefit from having evidence that is collected after the fact, platforms often would not have a way to know important background information about a post (such as whether it is true or false) before deciding whether it violates a state law.

425. See *Goldman & Miers*, *supra* note 137, at 204–05 (“Superficially, the distinction between ‘legal’ and ‘illegal’ material sounds simple enough, but in practice there is a significant zone of uncertainty where it’s not clear if the material is legal or illegal—a zone that would further expand if a must-carry rule overwrites or replaces Section 230.”).

426. Douek, *Governing Online Speech*, *supra* note 86, at 792 (“It is not just *hard* to get content moderation right at this scale; it is *impossible*.”).

427. *Id.*

Negligence suits would be even more concerning than defamation litigation if Section 230's preemption were lifted. Platforms would likely be held to owe a duty to every user. It is difficult to know what might breach that duty. But there are many suits that have been brought (almost all of which have failed because of Section 230) that alleged platforms did not moderate quickly enough or permitted underage users to experience harmful interactions. These suits often fundamentally misunderstand the significant challenge of performing content moderation at the scale of a major web platform.

Negligence suits could quickly expand as litigants seek to hold platforms responsible for all sorts of alleged social harms. For example, the California Age-Appropriate Design Code Act authorizes a state agency to promulgate "best practices" for content-moderation decisions regarding children.<sup>428</sup> If a platform did not comply with one of these best practices, would it be held liable for negligence? There are certainly examples in other areas of such a two-step negligence theory in which noncompulsory best practices are established and then made compulsory through tort judgments. Evidence that manufacturers did not comply with state regulations is often offered in products liability cases. But unlike in products liability cases, negligence suits against platforms would not just be about how goods are made and sold—they would pose the very real risk of limiting the free speech on all internet users.

Even in a hypothetical world in which platforms could moderate perfectly, there would be powerful incentives for platforms not to host speech. As courts have recognized, Section 230's immunity works precisely because it is an *immunity*<sup>429</sup>—it encourages courts to stop lawsuits at the earliest possible moment in litigation.<sup>430</sup> Without Section 230's preemption, there would be a huge number of lawsuits based on state laws that could proceed against platforms past the motion to dismiss stage. Litigation costs would skyrocket. And so too would the incentives for platforms to either over-moderate or host less speech, or both. Platforms would err toward the side of removing, or not

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428. California Age-Appropriate Design Code Act, ch. 320, sec. 2, § 1798.99.32(d), 2022 Cal. Stat. 4916, 4922 (codified at CAL. CIV. CODE § 1798.99.32(d) (2023)).

429. Almost every court is in agreement that Section 230 is an immunity. To our knowledge, only one court—the Eastern District of Wisconsin—has decided otherwise. *See* *Bauer v. Armslist, LLC*, 572 F. Supp. 3d 641, 659 (E.D. Wis. 2021). That court interpreted a Seventh Circuit opinion to hold Section 230 does not create an immunity. *See id.* at 662 (citing *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003)). In our view, however, the underlying Seventh Circuit opinion does not make such a ruling and instead merely suggests Section 230's broad protections *might* not ultimately constitute an immunity—a view the great majority of courts (including every other Section 230 case cited in this Article) have since rejected.

430. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process.").

hosting, any post that might theoretically lead to expensive legal fees and potentially to damages.<sup>431</sup>

But the risk of runaway tort liability would not even be the most concerning or censorious outcome if Section 230's protection were lifted. The renewed availability of state criminal prosecutions against platforms would dramatically change the internet.

There are calls from many powerful state attorneys general and senators to subject platforms to state criminal liability.<sup>432</sup> Unlike federal criminal laws, which can be used under current law, state criminal laws are categorically preempted by Section 230.<sup>433</sup> This is for good reason. The risk of criminal prosecution would be an even more powerful incentive for platforms to restrict speech than the possibility of tort liability. Simply put, developers and executives do not want to go to prison. But that would be a very real risk if platforms could be prosecuted for all sorts of harms that are creatures of state law, which might occur if a platform's algorithm happened to promote content that violated state criminal law. This might be true even if no human at the platform knew of the unlawful post.<sup>434</sup>

Although we recognize that there is a great deal of speech on the internet that is harmful, there is also much speech that is beneficial.<sup>435</sup> We are steadfastly opposed to ending Section 230's preemption—that is, permitting states to

431. See Kosseff, *A User's Guide*, *supra* note 420, at 793–94 (“If Congress changes the law to impose more potential liability for particular types of content, platforms likely will more aggressively moderate not only the content that is clearly illegal but other user content that could possibly fall within that category. Even if it is unclear whether the § 230 exception would apply, or whether the platform would face liability without § 230 protection, the platform would likely avoid risking the cost of litigating a case on the merits.”).

432. See Mike Masnick, *States Attorneys General Want Special Exception To Blame Sites for Actions of Users*, TECHDIRT (June 18, 2013, 3:50 PM), <https://www.techdirt.com/2013/06/18/states-attorneys-general-want-to-special-exception-to-blame-sites-actions-users/> [https://perma.cc/32TJ-6L49] (“[S]tates Attorneys General are planning to ask Congress for an exemption to Section 230 when . . . states AGs bring a case.”); Mike Masnick, *How the EARN IT Act Is Significantly More Dangerous than FOSTA*, TECHDIRT (Feb. 4, 2022, 9:40 AM), <https://www.techdirt.com/2022/02/04/how-earn-it-act-is-significantly-more-dangerous-than-fosta/> [https://perma.cc/X6XC-2PZF] (noting that Senators Richard Blumenthal and Lindsey Graham co-sponsored a bill that would have eliminated Section 230's preemption of state criminal prosecutions).

433. 47 U.S.C. § 230(e)(1), (e)(3)–(4).

434. See Goldman & Miers, *supra* note 137, at 204–05 (arguing that it is difficult to distinguish between legal and illegal material). Twenty-six states (including California and New York) and the District of Columbia joined an amicus brief to the Supreme Court in *Gonzalez v. Google LLC*. See *generally* Brief for the States of Tenn. et al. as Amici Curiae in Support of Petitioners, *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023) (per curiam) (No. 21-1333) (arguing that platforms should be held liable when their algorithms promote unlawful content). The States' brief did not engage with the fact that it would be difficult for platforms to identify which content is unlawful, and perhaps impossible for an algorithm to adequately do so. The Supreme Court's decision in *Gonzalez* did not address the States' algorithmic moderation argument. See *Gonzalez*, 143 S. Ct. at 1192 (affirming on the ground that the complaint failed to state a claim under the Antiterrorism Act).

435. Chemerinsky & Chemerinsky, *supra* note 10, at 88–95.

adopt regulations that, individually or in concert, would destroy the unprecedented free speech that the internet has created.

## 2. The Lowest-Common-Denominator Problem

As we noted above, if states were to promulgate content-moderation rules, it is unlikely that every state would come up with substantially identical regulations. Inevitably, the law would vary from state-to-state as various states would try to accomplish different goals and state courts interpreted criminal and tort law in different ways. This is evident in the laws that have already been adopted. Assuming for a moment that the risk of liability did not destroy internet speech, platforms would face a different problem: How many versions of the internet could and should they operate? Could platforms really operate with different rules in every state? We doubt it. The most likely occurrence would be that a few states with the most severe regulations would become the lowest-common-denominators.

Imagine that legislators in a state like Alaska decided to respect the free speech rights of platforms and their users by declining to impose regulatory burdens. Meanwhile, legislators in California might impose the most significant regulatory requirements the Constitution will allow. If a platform could satisfy Alaska's content-moderation requirements by complying with California's, and in doing so saved money by decreasing the complexity of satisfying the platform's regulatory obligations, the platform would be incentivized to effectively impose California's content-moderation laws on users in Alaska. Platforms could try to comply with every state's regulations by just focusing on the few states that have the most overlap. But it would ultimately let more restrictive states effectively override the decisions made by legislators in less restrictive states to have less regulation of the internet. In this example, voters in Alaska would get no say on the laws that platforms chose to follow in Alaska; California would control that.

Companies often apply a lowest-common-denominator approach. For example, after California adopted an ambitious (but vague<sup>436</sup>) consumer privacy law, the California Consumer Privacy Act ("CCPA"), Microsoft announced it

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436. Jeff Kosseff, *Ten Reasons Why California's New Data Protection Law Is Unworkable, Burdensome, and Possibly Unconstitutional*, TECH. & MKTG. L. BLOG (July 9, 2018), <https://blog.ericgoldman.org/archives/2018/07/ten-reasons-why-californias-new-data-protection-law-is-unworkable-burdensome-and-possibly-unconstitutional-guest-blog-post.htm/> [<https://perma.cc/U83N-MWPC> (staff uploaded-archive)]; Mike Masnick, *Yes, Privacy Is Important, but California's New Privacy Bill Is an Unmitigated Disaster in the Making*, TECHDIRT (July 9, 2018, 10:44 AM), <https://www.techdirt.com/2018/07/09/yes-privacy-is-important-californias-new-privacy-bill-is-unmitigated-disaster-making/> [<https://perma.cc/3V8G-ZT68> (staff-uploaded archive)].

would apply the law's provisions to all users in the United States.<sup>437</sup> Microsoft had previously announced that it would apply Europe's General Data Privacy Regulation ("GDPR") worldwide.<sup>438</sup> Facebook also changed some worldwide privacy practices after the GDPR took effect.<sup>439</sup>

And California automotive regulations often set the norm nationwide. For example, after the Trump Administration rolled back some emissions standards, California brokered a deal with four automotive manufacturers regarding emissions standards for vehicles to be sold in California.<sup>440</sup> Some states immediately moved to adopt California's standards; some moved to reject them.<sup>441</sup> According to CNN, states that have adopted one of California's vehicle emissions rules account for over one third of car sales in the United States and 40% of United States population.<sup>442</sup> Most manufacturers have no incentive to produce different vehicles for these states than the other states that have declined to adopt California's more restrictive rules, so California effectively gets to dictate nationwide policy.

Sometimes the dormant commerce clause can be used by courts to solve the lowest-common-denominator problem.<sup>443</sup> The Dormant Commerce Clause is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce.<sup>444</sup> It is easy to see how state regulations of the internet, limiting content available in other states, does this. It is easy to see how state regulations of the internet, limiting content available in other

437. Julie Brill, *Microsoft Will Honor California's New Privacy Rights Throughout the United States*, MICROSOFT (Nov. 11, 2019), <https://blogs.microsoft.com/on-the-issues/2019/11/11/microsoft-california-privacy-rights/> [<https://perma.cc/5YMH-UGW7>].

438. Julie Brill, *Microsoft's Commitment to GDPR, Privacy and Putting Customers in Control of Their Own Data*, MICROSOFT (May 21, 2018), <https://blogs.microsoft.com/on-the-issues/2018/05/21/microsofts-commitment-to-gdpr-privacy-and-putting-customers-in-control-of-their-own-data/> [<https://perma.cc/GRX7-R3UB>].

439. Scott Neuman, *Facebook To Offer Users Opt-Outs That Comply with New European Privacy Rules*, NPR (Apr. 19, 2018, 2:50 AM), <https://www.npr.org/sections/thetwo-way/2018/04/19/603824213/facebook-to-offer-users-opt-outs-that-comply-with-new-european-privacy-rules/> [<https://perma.cc/YE5X-R9TW>].

440. *California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emissions Standards*, OFF. GOVERNOR GAVIN NEWSOM (July 25, 2019), <https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/> [<https://perma.cc/M55J-3PCS>].

441. Zach Bright, *States Ride Shotgun with California To Rev Up Clean Cars Rules*, BLOOMBERG L. (Sept. 2, 2022, 6:00 AM), <https://news.bloomberglaw.com/environment-and-energy/states-ride-shotgun-with-california-to-rev-up-clean-cars-rules/> [<https://perma.cc/J3U7-MFZY> (staff-uploaded, dark archive)]; *California Urges EPA To Let State Set Car Emissions Standard*, SPECTRUM NEWS 1 (June 2, 2021, 3:39 PM), <https://spectrumnews1.com/ca/la-west/politics/2021/06/02/ca-urges-epa-to-let-state-set-car-emissions-standard/> [<https://perma.cc/QZ42-TAWC>].

442. Peter Valdes-Dalpena, *How California Ended Up in the Zero-Emissions Driver's Seat*, CNN, <https://www.cnn.com/2022/09/06/business/california-emissions-regulations/index.html/> [<https://perma.cc/U6Z8-Q9NV>] (last updated Sept. 6, 2022, 6:34 PM).

443. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 398–99 (1977).

444. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 137 (1970).

states, do this. But the application of the dormant commerce clause is uncertain. The Supreme Court has held that state laws that do not discriminate against out-of-staters violate the dormant commerce clause if the burden on interstate commerce outweighs the benefits of the law.<sup>445</sup> It is inherently uncertain how a court will strike that balance.<sup>446</sup> Indeed, a plausible argument could be made that the California Consumer Privacy Act poses significant dormant commerce clause problems, but no successful challenge has been made.<sup>447</sup>

Ultimately, it would be better not to rely on the dormant commerce clause. In the context of privacy law, there is no federal privacy law (though one is desperately needed), so relying on the dormant commerce clause may be the only solution to unduly burdensome state laws.<sup>448</sup> But internet content moderation is subject to well-analyzed and effective, if not perfect, laws like Section 230 and the Digital Millennium Copyright Act. There is no need for state regulation. State regulation would just create a lowest-common-denominator problem, allowing the most restrictive states to dictate the online speech rights of all Americans. State internet content regulations should remain either preempted or left on the cutting room floor.

### 3. State Content-Moderation Regulations Should Be Preempted for the Same Reasons Preemption Is Justified in Other Areas of the Law

Preemption makes sense in the internet context for the same reasons it makes sense elsewhere. We briefly address a few examples.

445. *Id.* at 142 (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”). For a discussion of the origins of this balancing test, see David S. Day, *Revisiting Pike: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause*, 27 *HAMLIN L. REV.* 46, 48 (2004).

446. Last term, the Supreme Court decided the case of *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (U.S. 2023), in which petitioners argued that California unduly burdened interstate commerce by effectively imposing its pork regulations on farmers across the country. *Id.* at 1150.

447. Several scholars and law students have suggested the CCPA violates the Dormant Commerce Clause. See, e.g., Russell Spivak, *Too Big a Fish in the Digital Pond? The California Consumer Privacy Act and the Dormant Commerce Clause*, 88 *CIN. L. REV.* 475, 478 (2020); Kiran K. Jeevanjee, *Nice Thought, Poor Execution: Why the Dormant Commerce Clause Precludes California’s CCPA from Setting National Privacy Law*, 70 *AM. U. L. REV.* 75, 120–21 (2020); Alexandra Henry, Comment, *The California Consumer Privacy Act’s Potential Incompatibility with the United States’ Legal and Economic Landscape*, 23 *SMU SCI. & TECH. L. REV.* 227, 240–41 (2020).

448. See Ari Ezra Waldman, *Privacy, Practice, Performance*, 110 *CALIF. L. REV.* 1221, 1228 (2022) (analyzing comprehensive federal privacy legislation proposals); Bridget Fahey, *Data Federalism*, 135 *HARV. L. REV.* 1007, 1008 (2022) (arguing data federalism is “unwieldy” and has the ability to unsettle federalism in both function and theory).

Virtually all legal subject matter within copyright law is preempted by the 1976 Copyright Act.<sup>449</sup> States are prohibited to pass any law that provides rights akin to copyright for property roughly within copyright's subject matter.<sup>450</sup> This arose because Congress was dissatisfied with the way pluralized state regulation of copyright permitted copyright piracy.<sup>451</sup> By enacting comprehensive federal copyright law, and precluding all state law, Congress dramatically improved copyright law's protection and copyright remedies.<sup>452</sup> For example, in the Music Modernization Act of 2018, Congress recently extended copyright preemption to one of the last remaining enclaves of state copyright law: pre-1972 sound recordings.<sup>453</sup> The Music Modernization Act came in the wake of calls by many commentators, and the United States Copyright Office, to federalize protections for pre-1972 sound recordings in the name of uniformity and consistency.<sup>454</sup>

Medical devices are also subject to broad preemption from state tort claims under the Medical Device Amendments Act of 1976 ("MDAA").<sup>455</sup> Until the MDAA became law, FDA approval was not required before medical devices could be introduced to the market.<sup>456</sup> Medical devices were instead left largely to state regulation.<sup>457</sup> But in the 1960s and 1970s, several complex devices were introduced that caused significant adverse side effects.<sup>458</sup> Most notable among these was the Dalkon Shield intrauterine device, which was linked to serious,

449. Copyright Act of 1976, Pub. L. No. 94-553, § 301, 90 Stat. 2541, 2572 (1976) (codified as amended at 17 U.S.C. § 301); *see also* H.R. REP. NO. 94-1476, at 131 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5747 ("As long as a work fits within one of the general subject matter categories [of federal statutory copyrights], the bill prevents the [s]tates from protecting it even if it fails to achieve [f]ederal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.").

450. *Crow v. Wainwright*, 720 F.2d 1224, 1225–26 (11th Cir. 1983).

451. Henry Lee Mann, *As Our Heritage Crumbles into Dust: The Threat of State Law Protection for Pre-1972 Sound Recordings*, 6 WAKE FOREST INTELL. PROP. L.J. 45, 49 (2006).

452. *Id.* at 49–50.

453. Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified at 17 U.S.C. § 1401); *see also* *Goldstein v. California*, 412 U.S. 546, 560 (1973).

454. Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 330–42 (2014); Elizabeth Townsend Gard & Erin Anapol, *Federalizing Pre-1972 Sound Recordings: An Analysis of the Current Debate*, 15 TUL. J. TECH. & INTELL. PROP. 123, 125 (2012); Mann, *supra* note 451; *see also* Julie L. Ross, *[Un]happy Together: Why the Supremacy Clause Preempts State Law Digital Performance Rights in Radio-Like Streaming of Pre-1972 Sound Recordings*, 62 J. COPYRIGHT SOC'Y U.S.A. 545, 599 (2015) (collecting these sources and noting some benefits from federalization but declining to express a preference regarding federalization).

455. Medical Device Amendments Act of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified at 21 U.S.C. § 360k); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 315 (2008).

456. *Riegel*, 552 U.S. at 315.

457. *Id.*; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475–76 (1996).

458. *Riegel*, 552 U.S. at 315.

and sometimes deadly, infections.<sup>459</sup> Many tort suits followed.<sup>460</sup> But, as the Supreme Court has noted, many believed that tort suits were inadequate to manage the risks associated with medical devices.<sup>461</sup> States passed laws requiring pre-approval of medical devices,<sup>462</sup> which were eventually replaced by the MDAA. In *Riegel v. Medtronic, Inc.*,<sup>463</sup> the Supreme Court held that the federal Medical Devices Act preempts states from imposing “requirements” greater than federal law for medical devices approved by the federal government.<sup>464</sup>

Telecommunications laws are also preempted in large part by federal law. The Communications Act of 1934—the same act which now contains Section 230—created the FCC and gave it broad authority to regulate communications.<sup>465</sup> Congress passed the Communications Act following a request from President Franklin Delano Roosevelt for centralized communications regulation.<sup>466</sup> A predecessor to the FCC, the Federal Radio Commission,<sup>467</sup> had recommended to Roosevelt that “the communications service . . . should be regulated by a single body” rather than by the many states.<sup>468</sup> So Congress passed the Communications Act to centralize telecommunications in the federal government to encourage nondiscrimination and make services more available, efficient, and reasonably priced.<sup>469</sup> Much like

459. *Id.*

460. *Id.* (“Thousands of tort claims followed.”).

461. *Id.*

462. Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After Medtronic*, 64 TENN. L. REV. 691, 703 & n.66 (1997) (identifying thirteen state statutes governing medical devices as of 1976).

463. *Riegel*, 552 U.S. at 316 (citing 21 U.S.C. § 360c).

464. Specifically, it states:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360(k) (2008). Unlike copyright law, the MDAA does not preempt substantially identical state laws. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496–97 (quoting 21 C.F.R. § 808.1(d)(2) (1995)).

465. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–624).

466. *Communications Act of 1934*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Communications-Act-of-1934/> [<https://perma.cc/2PQF-Y7ZR>] (last updated Aug. 13, 2023) (noting that the FCC was created at the request of President Franklin Delano Roosevelt).

467. The Federal Radio Commission was created by the Federal Radio Act of 1927. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 213 (1943).

468. FCC, BROADCAST PRIMER 3 (1964), [https://books.google.com/books?id=Af-0vuN4eNYC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0](https://books.google.com/books?id=Af-0vuN4eNYC&printsec=frontcover&source=gbs_ge_summary_r&cad=0) [<https://perma.cc/YE9R-RND3>].

469. 47 U.S.C. § 151.

in copyright law, the point of this broad, unified federal preemption was to encourage a unified and comprehensive approach to regulation.<sup>470</sup>

Preemption in each of these areas of law was justified because Congress believed centralized regulation of a nationwide commodity was preferable. In the absence of federal preemption, regulation was left to the inconsistent—and often ineffective—requirements imposed by many state laws or state court interpretations of the common law. In copyright law, these state laws left many gaps and did not provide adequate remedies. For medical devices, state regulation and application of state common law was unwieldy and proved unsatisfactory at ensuring safety. And for communications, Congress understandably sought to centralize control over a common resource. It similarly makes sense, for all of the reasons we have argued, for internet regulation to be centralized.

Section 230 (and the copyright law, in general and through the DMCA) constitute broad forms of federal regulation of internet content moderation. They centralize control over a common resource and ensure that nationwide entities are not subject to many unwieldy, and potentially contradictory, requirements.

Of course, unlike in the example of copyright, medical devices, or communications, Section 230 is a form of broad federal *deregulation*. But this too has precedent. In the Airline Deregulation Act of 1978, Congress significantly simplified the regulation of domestic air transportation to “better promote efficiency in the industry.”<sup>471</sup> The federal statute prevents states from enacting laws “related to a price, route, or service of an air carrier” so as to prevent states from interfering with the federal government’s deregulatory policy.<sup>472</sup> Similarly, the ICC Termination Act of 1995 prohibits state interference with a federal policy of deregulating the trucking industry.<sup>473</sup> Our suggestion that states be preempted from interfering with the federal deregulatory policy regarding the internet would serve the same underlying purpose as these provisions. Proliferation of state regulations would significantly drive up operating costs and would interfere with the efficiency, usability, accessibility, and cost of internet platforms.

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470. *Nat’l Broad. Co.*, 319 U.S. at 214; *see also* *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

471. Eric E. Murphy, *Federal Preemption of State Law Relating to an Air Carrier’s Services*, 71 U. CHI. L. REV. 1197, 1199 (2004); *see* Airline Deregulation Act of 1978, Pub. L. No. 95-504, sec 4, § 105, 92 Stat. 1705, 1708 (codified as amended in scattered sections of 49 U.S.C.).

472. 49 U.S.C. § 41713(b)(1); *see* Murphy, *supra* note 471, at 1200; Paul Dempsey, *Federal Preemption of State Regulation of Airline Pricing, Routes, and Services: The Airline Deregulation Act*, 10 FIU L. REV. 435, 436–37 (2015).

473. ICC Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899 (1994) (codified as amended at 49 U.S.C. § 14501).

The internet is extremely complex. Platforms are required to make thousands-to-millions of decisions each day that balance the platforms' values against one another. Sometimes free speech interests' triumph, sometimes safety, sometimes personal interests, and sometimes choices are just made for the sake of advertising revenues. Many of these choices are easy and many are much harder. Many (and for some platforms, most) are automated; many are not.<sup>474</sup> These choices are possible because the current regulatory environment provides platforms significant leeway to balance their interests in a way that is most likely to accomplish what would be best for the platform.

If the government feels that platforms are not balancing interests properly, there are some things it can do to step in. But introducing a multiplicity of state regulations, state tort laws, or state criminal prosecutions is not the way to do it. The cacophony of regulatory action that would result from lifting Section 230's broad preemption (or if states all enacted onerous disclosure requirements) would at best severely limit free speech and at worst destroy the internet as we know it. Despite all of the internet's flaws, we do not believe that clumsy, contradictory state regulation is the solution. In sum, there are only a few narrow areas in which states can regulate content moderation, and it should stay that way.

#### CONCLUSION

There is widespread, understandable frustration with the internet and social media. States have begun to act, and the first laws to be adopted in Florida, Texas, California, New York, Utah, and Arkansas are undoubtedly the harbinger of many, many more to come. There are bills pending in state legislatures throughout the country.<sup>475</sup>

Regulating at the state level is a bad idea for national media platforms. Much of what has been enacted and proposed is unconstitutional, many of the laws that do not violate the First Amendment are preempted, and the rest of the state regulation is inadvisable. Courts, and ultimately, the Supreme Court, should invalidate these laws, and states should not enact them. Failing to do so, allowing a proliferation of state regulations of all sorts, will dramatically limit the speech that all of us can express and receive.

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474. For perhaps the most thorough discussion of algorithmic moderation, see generally Professor Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT'L L.J. 41 (2020).

475. See *supra* Part I.