

Nos. 22-277 & 22-555

IN THE
Supreme Court of the United States

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

v.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,
Respondents.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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

**BRIEF FOR DEVELOPERS ALLIANCE AND
SOFTWARE & INFORMATION INDUSTRY
ASSOCIATION AS AMICI CURIAE IN
SUPPORT OF NETCHOICE, LLC AND CCIA**

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OTHER AUTHORITIES

<i>About</i> , Etsy, https://www.etsy.com/about (visited Dec. 6, 2023)	20, 21
<i>Adult Nudity and Sexual Activity: Policy Details</i> , Meta Transparency Center, https://transparency.fb.com/en-gb/policies/community-standards/adult-nudity-sexual-activity/ (visited Dec. 6, 2023).....	14, 15
Anti-Defamation League, <i>Sliding Through: Spreading Antisemitism on TikTok by Exploiting Moderation Gaps</i> (Nov. 20, 2023), https://www.adl.org/resources/ blog/sliding-through-spreading-antisemi- tism-tiktok-exploiting-moderation-gaps	27
BBC, <i>Inputs and Outputs</i> , https://www.bbc .co.uk/bitesize/topics/zs7s4wx/arti- cles/z7wckty#z9cybqt (visited Dec. 6, 2023).....	8
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