No. _____

In the Supreme Court of the United States

ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.,
Petitioners,
v.
NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Florida has enacted a law that attempts to prevent social-media companies from abusing their enormous power to censor speech.

The questions presented are:

1. Whether the First Amendment prohibits a State from requiring that social-media companies host third-party communications, and from regulating the time, place, and manner in which they do so.

2. Whether the First Amendment prohibits a State from requiring social-media companies to notify and provide an explanation to their users when they censor the user's speech.

PARTIES TO THE PROCEEDING

Petitioners are the Attorney General, State of Florida, in her official capacity, Joni Alexis Poitier, in her official capacity as Commissioner of the Florida Elections Commission, Jason Todd Allen, in his official capacity as Commissioner of the Florida Elections Commission, John Martin Hayes, in his Commissioner of the Florida Elections Commission, Kymberlee Curry Smith, in her official capacity as Commissioner of the Florida Elections Commission, the Commissioner of the Florida Elections Commission, in their official capacity, and the Deputy Secretary of Business Operations of the Florida Department of Management Services, in their official capacity.

Respondents are Netchoice, LLC, and the Computer & Communications Industry Association.

RELATED PROCEEDINGS

United States District Court (N.D. Fla.):

> *Netchoice v. Moody*, No. 4:21-cv-00220 (June 30, 2021)

United States Court of Appeals (11th Cir.):

> *Netchoice v. Moody*, No. 21-12355 (May 23, 2022)

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Florida officials sued in their official capacities, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App.1a–67a) is reported at 34 F.4th 1196. The district court's order (App.68a–96a) is reported at 546 F. Supp. 3d 1082.

JURISDICTION

The court of appeals entered its judgment on May 23, 2022. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App.96a–108a.

INTRODUCTION

This petition raises "issues of great importance that" several members of this Court have concluded "plainly merit this Court's review." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting). Social media has become "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). That status has given social-media behemoths like Twitter and Facebook "enormous control over speech." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

Historically, States regulated entities that transmitted large amounts of third-party speech by demanding that such entities provide equal access to the public. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2320–21 (2021); *NetChoice, LLC v. Paxton*, --- F. 4th ---, No. 21-51178, 2022 WL 4285917, at *24–29 (5th Cir. Sept. 16, 2022). Consistent with that history, many States have considered using their traditional regulatory authority to prevent large platforms from abusing their massive control over the channels of speech.

Florida was among the first to act. It enacted S.B. 7072—the law at issue here—to combat censorship by large social-media companies. The law does that in two main ways. *First*, it requires disclosure about how and when the platforms censor speech. And *second*, it requires that the platforms host some speech that they might otherwise prefer not to host.

The social-media companies challenged Florida's law, and the Eleventh Circuit mostly upheld a preliminary injunction that was entered before the law even took effect. Under the Eleventh Circuit's reasoning, social-media behemoths have a First Amendment right to cut any person out of the modern town square, for any reason, even when they do not follow their own rules or otherwise act in bad faith. That ruling strips States of their historic power to protect their citizens' access to information, implicating questions of nationwide importance. *See NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting).

The Eleventh Circuit's decision also conflicts with a Fifth Circuit decision that reversed an injunction against a Texas law much like S.B. 7072. *See Paxton*, 2022 WL 4285917. That irreconcilable divide warrants this Court's review.

The petition for certiorari should be granted.

STATEMENT

1. Social-media use has boomed in the last 20 years. "The percentage of US adults who use social media increased from 5% in 2005 to 79% in 2019." Esteban Ortiz-Ospina, *The Rise of Social Media*, Our World in Data (Sept. 18, 2019), https://tinyurl.com/mwz4946s. In the United States, 240 million people (out of about 330 million) use social media. *See* Social Media Statistics Details, University of Maine (Sept. 2, 2021), https://tinyurl.com/ypmx7f7d.

Those 240 million people use social media for a range of purposes. Almost half of American adults use social media to get their news. *See* Mason Walker &

Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, Pew Research Center (Sept. 20, 2021), https://tinyurl.com/28b53saw. Social media is also where Americans engage about politics—about one-third of the posts on Twitter are "political in nature." Sam Bestvater et al., *Politics on Twitter: One-Third of Tweets from U.S. Adults are Political*, Pew Research Center (June 16, 2022), https://tinyurl.com/ynu3ptuu.

Yet social-media companies have developed a censorial streak. Of late, "Silicon Valley's commitment to free speech" appears to have "eroded." *See* Danielle Keats Citron, *What to Do about the Emerging Threat of Censorship Creep on the Internet*, CATO Institute (Nov. 28, 2017), https://tinyurl.com/2p8jb3ka. When they censor, social-media companies manipulate "a critical forum in our marketplace of ideas." *See* Kate Ruane et al., *The Oversight Board's Trump Decision Highlights Problems with Facebook's Practices*, ACLU (May 6, 2021), https://tinyurl.com/2mcby5r4.

2. In S.B. 7072, Florida took point in preventing social-media platforms from abusing their power over the public square. The Act, as relevant here, requires disclosure about how and when the platforms censor speech and requires the platforms to host some speech that they would otherwise prefer not to host.

As to disclosure, the Act requires covered platforms[1] to "publish the standards . . . used for determining how to censor, deplatform, and shadow ban."

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[1] Broadly, S.B. 7072 covers platforms that do business in Florida and have over $100 million in annual revenue or over 100 million users. Fla. Stat. § 501.2041(1)(g).

Fla. Stat. § 501.2041(2)(a).[2] Platforms must notify users when censoring, deplatforming, or shadow banning users or their posts, and provide a basis for the platform's action. *Id.* § 501.2041(2)(d)(1). Platforms must also inform users of forthcoming changes to "user rules, terms, and agreements," which may not be made more than once every 30 days. *Id.* § 501.2041(2)(c). And platforms must allow users to see how many other users have viewed their posts, so that users can determine for themselves whether they have been censored or shadow banned. *Id.* § 501.2041(2)(e).

The Act also establishes hosting rules. In general, the "hosting" function of social-media platforms entails storing posts on a digital platform and distributing those posts to other users who seek them out. Thus, when a social-media platform provides users the ability to have their own pages or own feeds, the platform is serving as a host to users' posts. For instance, a user can post speeches, photos, and videos to

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[2] The Act defines "censor" as "any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform." Fla. Stat. § 501.2041(1)(b). Deplatform "means the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c). And shadow ban "means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." *Id.* § 501.2041(1)(f).

her Facebook page, and other users can visit that page.

In the main, the Act regulates hosting by requiring that platforms adhere to their own rules. Platforms must apply their own content-moderation rules consistently. That rule leaves a platform generally free to adopt content- and viewpoint-discriminatory standards. It simply requires the platform to apply whatever censorship, deplatforming, and shadow banning standards it adopts "in a consistent manner among its users." *Id.* § 501.2041(2)(b).

The Act also restricts platforms' control over these "hosting" functions for users likely to have important contributions to the public square. In particular, the Act provides that platforms "may not willfully deplatform" users who are qualified candidates for political office in Florida. *Id.* § 106.072(2). Platforms also may not deplatform a "journalistic enterprise based on the content of its publication or broadcast," with "journalistic enterprise" defined based on, among other things, the number of words or other content the entity publishes and the number of viewers or subscribers it receives. *Id.* § 501.2041(1)(d), (2)(j).

Finally, to prevent silencing and to make these "hosting" provisions effective, the Act prohibits censorship and shadow banning of journalistic enterprises based on what they say, *id.* § 501.2041(1)(d), (2)(j), and prohibits the use of algorithms to shadow ban material posted by or about candidates during the campaign, *id.* § 501.2041(2)(h).

3. Respondents—two associations of internet companies—challenged S.B. 7072 in the Northern District

of Florida days after it was enacted. They sought a preliminary injunction, arguing that they were likely to succeed on three claims, namely that S.B. 7072 is preempted by 47 U.S.C. § 230, that it violates the First Amendment on its face, and that it is unconstitutionally vague. Pointing to First Amendment and § 230 concerns, the district court enjoined Florida from enforcing any of S.B. 7072's disclosure or hosting rules before the law even took effect.

4. The Eleventh Circuit affirmed in part and reversed in part—affirming the preliminary injunction as to the hosting rules but reversing as to all the disclosure rules save one.

At the gate, the court found that the First Amendment robustly protects social-media platforms' decisions to host speech. App.18a, 28a. Although the court recognized that this Court has upheld requirements for one speaker to host another's speech, it distinguished those "'hosting' cases." App.31a; *see also* App.31a–40a. On the court's view, the social-media platforms act much like a newspaper editor in curating the speech that they will publish and, therefore, merit substantial First Amendment protection. App.25a–28a. The court also held that platform censorship decisions—even if not speech—were inherently expressive. App.28a–30a.

Turning to scrutiny, the Eleventh Circuit held that some provisions of S.B. 7072 should be subject to strict scrutiny, while others only demanded intermediate scrutiny. App.55a ("At the other end of the spectrum, the candidate-deplatforming (§ 106.072(2)) and user-opt-out (§ 501.2041(2)(f), (g)) provisions are pretty obviously content-neutral."). Yet the court believed that

S.B. 7072's hosting rules could not survive either form of heightened judicial review. App.56a–62a. It dismissed the States' interest in combating censorship as either illegitimate or insubstantial. App.58a. But with one exception, it upheld the disclosure rules under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which asks whether the rules are reasonably related to the State's interest in preventing consumer deception and whether they are overly burdensome. App.62a–65a. The only disclosure rule that the court rejected as overly burdensome was the requirement that social-media companies provide notice and an explanation to the affected user of a censorship decision. App.64a–65a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE.

Three members of this Court have already explained that the issues raised in this petition are ones "of great importance that . . . plainly merit this Court's review." *NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting). They are right. Social media has become a dominant method of communication. That dominance, however, comes at a price. When social-media companies abuse their market dominance to silence speech, they distort the marketplace of ideas. The question whether the First Amendment essentially disables the States—and presumably the federal government too—from meaningfully addressing those distortions should be answered by this Court, and it should be answered now.

The importance of the questions presented starts with the sheer scope of social-media use in this country. As this Court has recognized, social-media platforms have become the gatekeepers of a digital "modern public square." *Packingham*, 137 S. Ct. at 1737. This Court is not alone in reaching that conclusion. The Department of Justice, for example, has concluded that the "biggest platforms" "effectively own and operate digital public squares." Dep't of Justice, *Section 230 – Nurturing Innovation or Fostering Unaccountability? Key Takeaways & Recommendations* at 21 (June 2020). As modern town commons, the platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737.

With that power, "[s]ocial media platforms have transformed the way people communicate with each other and obtain news." *NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting). More than half of people "say they get news from social media." Elisa Shearer, *More Than Eight-in-Ten Americans Get News From Digital Devices*, Pew Research Center (Jan. 12, 2021), https://tinyurl.com/48muh3rp. And for other sources of information, the number is likely much higher. *See* Peter Suciu, *Americans Spent on Average More Than 1,300 Hours on Social Media Last Year*, Forbes (June 24, 2021), https://tinyurl.com/2p8za3x7.

All that has given social-media companies "enormous influence over the distribution of news" and other speech. *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting in part). Companies like "Facebook and Twitter" can now "greatly narrow a person's information flow"

by "deindexing or downlisting a search result or by steering users away from certain content." *Knight First Amend. Inst.*, 141 S. Ct. at 1224–25 (Thomas, J., concurring).

"Troubling, therefore, has been a series of recent moves by Big Tech that has, intentionally or not, undermined Americans' ability to communicate their ideas." Gregory M. Dickinson, *Big Tech's Tightening Grip on Internet Speech*, 55 Ind. L. Rev. 101, 109 (2022). Today, "users of social media are subject to a regime of private censorship that was only recently unimaginable." Kyle Langvardt, *Regulating Online Content Moderation*, 106 Geo. L.J. 1353, 1355 (2018). In this censorship regime, "social media giants' using their enormous power to suppress particular views is reality." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 394 (2021).

For example, in February 2021, Facebook announced that it would expand its content moderation on COVID-19 to include "false" and "debunked" claims such as that "COVID-19 is man-made or manufactured." App.122a–123a. It blocked the *New York Post*'s article written that month suggesting that the virus could have leaked from a Chinese virology lab. App.118a. But then, given "ongoing investigations into the origin of COVID-19 and in consultation with public health experts," Facebook decided that it would no longer "remove the claim that COVID-19 is man-made or manufactured." App.123a. Similarly, in the fall of 2020, Twitter locked the *New York Post*'s account and demanded that it delete six tweets that linked to the *Post*'s exposé on Hunter Biden.

App.126a. Meanwhile, Facebook reduced the distribution of the story on its site. App.128a, 131a. Twitter CEO Jack Dorsey later called the move a "total mistake," describing it as the result of a "process error." App.118a, 125a. That same year, Facebook censored the satirical news site *Babylon Bee*'s page for posting a story titled "Senator Hirono Demands ACB Be Weighed Against a Duck to See If She Is a Witch." App.110a. Facebook apparently determined that the story "incited violence" because of its reference to witch burning. App.110a.

Normally, the answer to this type of censorship would be competition. Given the "astronomical profit margins" of the social-media platforms, a "new entrant[]" would usually be expected to enter the market promoting a freer platform. *Knight First Amend. Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). But "network effects," whereby the presence of some users on the network attracts ever more users, "entrench" the current platforms' hegemony. *Id.*

With no market-based solution forthcoming, government has sought to defend the free exchange of ideas. Federal officials, for example, have expressed concerns about the platforms' efforts to control private-party speech. The platforms' representatives have been asked to testify before both the House and Senate—under Republican and Democratic control—about their practices.[3] As recently as this month, the

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[3] *E.g.*, *Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (July 17, 2018); *Stifling Free Speech: Technological Censorship and the Public Discourse: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the*

Biden Administration acknowledged that the "rise of tech platforms has introduced new and difficult challenges," and endorsed "legislative reforms" to "[i]ncrease transparency about platform's algorithms and content moderation decisions" and to "[s]top discriminatory algorithmic decision-making." *See* Readout of White House Listening Session on Tech Platform Accountability, The White House (Sept. 8, 2022), https://tinyurl.com/mrvh9cvz.

States have become concerned about online censorship as well. Along with Florida, Texas has passed a law aimed at protecting its citizens from unfair online censorship. *See Paxton*, 2022 WL 4285917. Many other States are considering similar legislation.[4] By

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Constitution, 116th Cong. (Apr. 10, 2019); *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 116th Cong. (Oct. 28, 2020); *Breaking the News: Censorship, Suppression, and the 2020 Election: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Nov. 17, 2020); *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation: Hearing Before the H. Comm. on Energy & Commerce, Subcomms. on Communications & Technology*, 117th Cong. (Mar. 25, 2021).

[4] *See, e.g.*, Jake Zuckerman, *Committee Passes Bill to Block Social Media from "Censoring" Users*, Ohio Capital J. (May 9, 2022) (describing a proposed law in Ohio), https://tinyurl.com/2p89fjdx; Jeff Amy, *Georgia Senate Panel Advances Ban on Social Media Censorship*, U.S. News (Feb. 15, 2022), https://tinyurl.com/2p8whx2m; Agenda, *Bus. & Labor Interim Comm.*, 2021 Leg. (Utah Sept. 15, 2021), https://tinyurl.com/3zavhy9m; *Hearing*, *H. Comm. on Sci. & Tech.*, 2021 Leg. (Ga. May 20, 2021), https://tinyurl.com/muxjpyyn; *Social Media Censorship Complaint Form*, Ala. Att'y Gen. Office, https://tinyurl.com/nb8rpz3j; *Social Media Complaint Form*, Att'y Gen., La. Dep't of Justice, https://tinyurl.com/338meu8h;

one count, "lawmakers in 34 states" are considering laws that would regulate social media platforms to prevent unfair censorship. *See Rebecca Kern, Push to Rein in Social Media Sweeps the States*, Politico (July 1, 2022), https://tinyurl.com/57zh8y8b.

Yet the Eleventh Circuit concluded that Florida's effort to regulate social media violated the First Amendment. On the Eleventh Circuit's view, social-media platforms themselves speak—or at least engage in expressive conduct—when they censor third-party users on their sites. App.25a–30a. Thus, the Eleventh Circuit concluded that the First Amendment demands that any law that seeks to prevent silencing on social-media sites must satisfy heightened scrutiny. App.55a–62a. In applying heightened scrutiny, the Eleventh Circuit gave short shrift to the States' interests, concluding that the States have no "substantial governmental interest" in this area. App.58a. The court thus dealt a mortal blow to the power of governments, state and federal, to protect their citizens' access to information in the modern public square.

II. THE DECISION BELOW CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *NETCHOICE V. PAXTON*.

The decision below squarely conflicts with the Fifth Circuit's recent decision to uphold Texas's similar social-media law.

Idaho House Bill No. 323 (2021), https://tinyurl.com/ys6ua9c8; Illinois House Bill 4145 (2022), https://tinyurl.com/5n73hd2n.

1. The Fifth Circuit split with the decision below on the threshold question of whether the platforms are speaking at all when they censor a user's speech.

The Eleventh Circuit below said "yes." It reasoned that "[w]hen a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in 'speech' within the meaning of the First Amendment." App.19a–20a. And it reached that conclusion because it thought that "editorial judgments" are protected by the First Amendment. App.20a.

The Fifth Circuit said "no." In rejecting the Eleventh Circuit's reasoning, it explained that the Eleventh Circuit's "'editorial-judgment principle' conflicts with" this Court's cases. *Paxton*, 2022 WL 4285917, at *39. As the Fifth Circuit pointed out, this Court has held that some hosts can be denied the "right to decide whether to disseminate or accommodate a" speaker's message. *Id.* (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 (2006) ("*FAIR*")). That is because hosting (at least generally) is not speech—it does not limit what the host may say, nor does it require the host to say anything. *Id.*; *see also id.* at *42 (Jones, J., concurring) ("It is ludicrous to assert, as NetChoice does, that in forbidding the covered platforms from exercising viewpoint-based 'censorship,' the platforms' 'own speech' is curtailed."). In sum, platforms "cannot invoke 'editorial discretion' as if uttering some sort of First Amendment talisman to protect their censorship." *Id.* at *16.

2. The Fifth and Eleventh Circuits also parted ways on whether the platforms make "editorial judgments" at all.

The Eleventh Circuit held that they do. It thought that the "platforms' content-moderation decisions are . . . closely analogous to the editorial judgments" made by a newspaper editor. App.26a. In explaining that view, the Eleventh Circuit emphasized that "[p]latforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups." *Id.* For example, YouTube seeks to create "a welcoming community" and Facebook seeks to foster "authenticity." App.26a–27a.

The Fifth Circuit begged to differ. It reasoned that the platforms' "editorial judgments" differ markedly from the type of editorial speech—most prominently newspaper editors' selection of pieces—that this Court has protected. *Paxton*, 2022 WL 4285917, at *40. After all, newspapers "publish a narrow 'choice of material' that's been reviewed and edited beforehand, and they are subject to legal and reputational responsibility for that material." *Id.* The platforms do not do that—they screen out some spam and obscenity with algorithms and then "virtually everything else is just posted to the Platform with *zero* editorial control or judgment." *Id.* at *13. That is why the platforms have repeatedly told Congress, courts, and the public that they are "not editors" and do not exercise "editorial judgment over the content" in a user's feed. *Id.*

3. The Fifth and Eleventh Circuits also disagreed on whether the platforms' censorship decisions are inherently expressive.

In the Eleventh Circuit's view, a "reasonable person would likely infer 'some sort of message' from, say, Facebook removing hate speech or Twitter banning a politician." App.28a. And it thought that "unless posts and users are removed randomly," platform censorship "necessarily convey[s] some sort of message—most obviously, the platforms' disagreement with or disapproval of certain content, viewpoints, or users." App.29a (emphasis omitted).

The Fifth Circuit was "perplexed" by that reasoning. *Paxton*, 2022 WL 4285917, at *38 n.41. In *FAIR*, this Court held that a law school's decision to eject a military recruiter was not "inherently expressive" conduct because "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." 547 U.S. at 66. The Fifth Circuit thought the same was true of the platforms: "An observer who merely sees a post on 'The Democratic Hub,' could not know *why* the post appeared there. Maybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason." *Paxton*, 2022 WL 4285917, at *38 n.41. Because additional speech by the platforms would be needed to explain the expressive aspect of censorship, the Fifth Circuit found that such censorship was not "inherently expressive." *Id.*

4. Underscoring the doctrinal disagreement in this area, Judge Oldham parted ways with the Eleventh

Circuit's views on whether the platforms could be regulated as common carriers.

The Eleventh Circuit panel thought not. On its view, "social-media platforms are not . . . common carriers" because the platforms make "individualized" decisions about "whether to publish particular messages." App.41a–42a. Nor could Florida choose to treat the platforms as common carriers because, on the Eleventh Circuit's view, "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier." App.43a–44a.

Judge Oldham, writing for himself on the common-carrier points, disagreed. As he noted, the Eleventh Circuit's analysis is "circular"—"a firm can't become a common carrier unless the law already recognizes it as such, and the law may only recognize it as such if it's already a common carrier." *Paxton*, 2022 WL 4285917, at * 41. Worse, the Eleventh Circuit's analysis is "inconsistent with the common-law history and tradition" of common carriage. *Id.* At common law, "private enterprises providing essential public services must serve the public, do so without discrimination, and charge a reasonable rate." *Id.* at *21. Those public services came to include communications enterprises like the telegraph and telephone. *Id.* at *22–23. Social-media companies stand in no different position. *Id.* at *24–29.

5. Finally, the Fifth and Eleventh Circuits starkly broke on the States' interest in regulating the censorship of speech.

The Eleventh Circuit dismissed Florida's interest in regulating the censorship of speech as either illegitimate or insubstantial. App.58a. By contrast, the Fifth Circuit recognized "'a governmental purpose of the highest order,'" namely the State's interest in assuring "the widespread dissemination of information from a multiplicity of sources." *Paxton*, 2022 WL 4285917, at * 32 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

* * *

All in all, the Fifth and Eleventh Circuits fundamentally disagreed about the First Amendment principles applicable to social-media censorship. That disagreement centers not on some fact-bound disagreement about how scrutiny plays out, but on whether the platforms are speaking at all, whether the platforms' conduct is inherently expressive, whether the platforms can be treated as common carriers, and whether States have a substantial interest in regulating the platforms. This Court should settle these disputes.

III. THE DECISION BELOW IS WRONG.

Review is also warranted because the decision below is wrong in multiple, significant ways.

1. The Eleventh Circuit erred at the outset when it concluded that the hosting regulations in Florida's social-media law triggered heightened First Amendment scrutiny. App.18a, 19a–24a, 25a–30a. At its core, Florida's law requires platforms to host certain speech that they might otherwise prefer not to host. But, as the Fifth Circuit concluded, mandatory hosting regulates conduct, not speech, and therefore "does

not violate [the] freedom of speech." *FAIR*, 547 U.S. at 68; *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

The Fifth Circuit supported that rule with first principles. *See Paxton*, 2022 WL 4285917, at *8. The First Amendment says that "Congress shall make no law" "abridging the freedom of speech." U.S. Const. amend. I. "At the Founding and '[f]or most of our history, speech and press freedoms entailed two common-law rules—first, a prohibition on prior restraints and, second, a privilege of speaking in good faith on matters of public concern.'" *Paxton*, 2022 WL 4285917, at *8 (quoting Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861, 874–75 (2022)). But hosting rules do not implicate those restrictions—a hosting rule permits the host to say whatever they like; they just cannot remove protected third-party speech. *Id.* at *9. And hosting rules were commonplace around the time of the ratification of the Fourteenth Amendment. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–22.

This Court's cases support the view that hosting regulations do not trigger close First Amendment scrutiny. In *PruneYard*, the Court held that the First Amendment permitted California to require that the owner of a shopping center allow handbillers to collect signatures and distribute handbills on shopping center property. 447 U.S. at 86–88. The Court explained that holding by pointing to three facts. *First*, the shopping center was "open to the public to come and go as they please," which mattered because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will

not likely be identified with those of the owner." *Id.* at 87. *Second*, the California law did not "dictate[]" a "specific message." *Id.* And *third*, the mall owners could "expressly disavow any connection with the message by simply posting signs." *Id.*

The Court extended *PruneYard* in *FAIR*. There, the Court held that a speech-hosting requirement regulated the host's "conduct, not speech." 547 U.S. at 60. In *FAIR*, the Court examined the Solomon Amendment, which required that universities host military recruiters on the same terms that they hosted other potential employers. *Id.* at 55–58. This Court rejected the law schools' First Amendment claim because the Solomon Amendment "d[id] not sufficiently interfere with any message of [a] school" to trigger First Amendment scrutiny. *Id.* at 64. The law schools' hosting obligation instead "affect[ed]" only "what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60.

S.B. 7072 is of a piece with the laws upheld in *PruneYard* and *FAIR*. As in *PruneYard*, there is little likelihood that the public will misattribute a user's speech to the platform. Platforms are designed with usernames, pages, and the like so that user's speech is identified with the user. To reduce any minimal risk of misattribution, platforms can—and do—make clear that they do not endorse their users' speech. *See Paxton*, 2022 WL 4285917, at *15. Nor does S.B. 7072 require that platforms host any particular message; it requires that all candidates and journalists are hosted—regardless of message. *See* Fla. Stat.

§ 106.072(2); *id.* § 501.2041(2)(h), (j). And for other users, it demands merely that they be treated consistently. Fla. Stat. § 501.2041(2)(b).

In that way, S.B. 7072 is less intrusive than the law upheld in *FAIR*. There, the Solomon Amendment required law schools to affirmatively speak—law schools could be required to "send e-mails or post notices on bulletin boards on an employer's behalf." *FAIR*, 547 U.S. at 61. The same is not true of S.B. 7072's hosting regulations, which merely require that platforms refrain from affirmatively squelching user posts under limited circumstances.[5]

In finding a First Amendment violation, the Eleventh Circuit relied on another line of cases exemplified by *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). In *Tornillo*, this Court held that the First Amendment prohibited laws requiring newspapers to print editorials that the paper otherwise did not want to print. 418 U.S. at 258. Building on that precedent, *Hurley* held that parade organizers had First Amendment rights to exclude "marchers . . . imparting a message the organizers d[id] not wish to convey." 515 U.S. at 559.

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[5] The addendum provision—which says that platforms censor when they add an addendum to a user's speech, Fla. Stat. § 501.2041(1)(b)—works in much the same way as the Solomon Amendment. Just as it would have violated the equal-access requirement for a law school dean to enter a military recruiting session and shout down the recruiter, it is also censorship for a platform to bury a user's speech in a wall of addenda.

Those cases are inapposite. As this Court held in *FAIR*, cases like *Tornillo* and *Hurley* are better categorized as "compelled-speech" cases because the hosting rules examined there "interfere[d] with a speaker's desired message." *FAIR*, 547 U.S. at 64. That feature is absent here. Hosting others' speech does not interfere with the platforms' own message because the platforms have no message. *See, e.g.*, Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. at 426.

2. The Eleventh Circuit also erred in its alternative holding that the platforms' hosting decisions were inherently expressive. App.28a–30a. The court reached that conclusion because it thought that "[a] reasonable person would likely infer 'some sort of message' from, say, Facebook removing hate speech or Twitter banning a politician." App.28a.

But in *FAIR*, this Court rejected the argument that refusing access to a military recruiter is expressive, explaining that "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military [or] all the law school's interview rooms are full." 547 U.S. at 66. Same for social-media sites: An observer who sees a post removed has no way to know the site's message unless the "conduct"—removing the post—is accompanied by explanatory "speech." *Id.* As the Fifth Circuit observed, there are many reasons a post could be removed, maybe it was "banned," but maybe it was "some other reason," like the user deleting his own post. *See Paxton*, 2022 WL 4285917, at *38 n.41. An observer has no way to

know the platform's message unless it is joined by additional speech.

3. Next, the Eleventh Circuit erroneously concluded that Florida could not regulate social-media platforms as common carriers, and in doing so, require the platforms to openly accept users. App.41a.

As Justice Thomas has explained, there are strong reasons why social-media companies can be treated as common carriers—meaning that they can be required by law to generally "serve all comers." *Knight First Amend. Inst.*, 141 S. Ct. at 1222 (Thomas, J., concurring). This Court "long ago suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when 'a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.'" *Id.* at 1223 (quoting *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914)). Defining the "public concern" may be nebulous in some cases, but "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers." *Id.* Social-media companies easily fall into this historical understanding because "they are at bottom communications networks, and they 'carry' information from one user to another." *Id.* at 1224.

The Eleventh Circuit rejected this view by observing that common carriers "make a public offering" and reasoned that social-media companies are not common carriers because they "make individualized decisions" about what speech to host. App.41a–42a. That view misunderstands what the common law meant by "mak[ing] a public offering." App.41a.

At common law, making a public offering did not preclude some individualized decision making. An innkeeper could, for example, remove a prospective patron who "c[ame] to injure his house, or if his business operates directly as an injury." *Markham v. Brown*, 8 N.H. 523, 530 (1837). But that individualized decision making did not relieve an innkeeper of his general obligation not "to discriminate." *Id.* at 529. Likewise, although telephone companies had a duty to provide "impartial service," they were still permitted to establish "reasonable conditions [with] which applicants must comply." Herbert H. Kellogg, *The Law of the Telephone*, 4 Yale L.J. 223, 226–27 (1895). Thus, the common law required not a complete lack of individualization, but rather a general openness for business. *See Paxton*, 2022 WL 4285917, at *25. And social-media platforms meet that metric in spades. By their own admission, they provide "widely available services" like "telephone companies providing run-of-the-mill telecommunications services." Pet. for Cert., *Twitter, Inc. v. Taamneh*, No. 21-1496, at 4 (May 26, 2022).

The Eleventh Circuit also reasoned that social-media companies are not regulated as common carriers under federal law and concluded that the State cannot label them as such. App.43a–44a. But that view ignores the long history of States doing just that. For instance, when early telegraph operators distorted the flow of information, States treated them as common carriers. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–21. The Eleventh Circuit rejected this history because it thought that the social-media platforms were "engaging in speech" whereas the "telegraph companies"

were not. App.45a. But if the social-media platforms are speaking when they choose not to carry a message because they dislike the speaker, then so was Western Union when it declined to carry pro-union messages. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–22. States nonetheless treated telegraph companies as akin to common carriers, and this Court approved those decisions. *E.g.*, *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894).

4. Having erroneously concluded that S.B. 7072's hosting rules triggered First Amendment scrutiny, the Eleventh Circuit then compounded the error by misapplying the scrutiny analysis.

At the outset, the Eleventh Circuit erred in characterizing the journalistic and candidate provisions in S.B. 7072 as content-based merely because they prohibit a platform from censoring certain kinds of content or speakers. App.55a. In asking whether a regulation is content based, the question is not whether the regulation requires "any examination of speech or expression." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022). Rather, the question is whether the regulation targets a "particular message spoken by" the regulated speaker. *Turner*, 512 U.S. at 655. Prohibiting *social-media companies* from censoring the speech of *others* does not do that.

Next, in applying intermediate scrutiny to the Act's remaining hosting requirements, the Eleventh Circuit wrongly concluded that the Act "do[es] not further any substantial governmental interest—much less any compelling one." App.58a. But ensuring that

"public has access to a multiplicity of information sources is a government purpose of the highest order," which "promotes values central to the First Amendment." *Turner*, 512 U.S. at 663.

The Eleventh Circuit recognized *Turner*'s holding but reasoned that it did not apply because "political candidates and large journalistic enterprises have numerous ways to communicate with the public besides any particular social-media platform." App.60a. The evidence shows the opposite. About half of Americans are getting their news from the largest social-media sites. *Supra* Part I. And thus, cutting off certain speakers from those key platforms definitionally will ensure that the public does not have access to "a multiplicity of information sources." *Turner*, 512 U.S. at 663.

Nor did the Eleventh Circuit properly analyze the State's interests in the consistency provision. It posited that the State had no legitimate interest. App.60a–61a. But the State has an interest in ensuring that citizens hear from each other just as it does in ensuring that citizens hear from politicians and journalists. *See Turner*, 512 U.S. at 663. And even apart from *Turner*'s rationale, the State has a consumer-protection interest in ensuring that platforms moderate in conformity with their disclosed terms. (The same interest supports the 30-day rule change requirement—users cannot truly know a platforms' rules when they are ever-changing). The consistency provision also serves to prevent discrimination. *See Fulton v. City of Phila.,* 141 S. Ct. 1868, 1882 (2021) (describing state interest in non-discrimination rules as "weighty").

The Eleventh Circuit erred on the other side of the scrutiny analysis too. It held that S.B. 7072 was not narrowly tailored, assuming that S.B. 7072 would allow "journalistic enterprises" to host "soft-core pornography." App.62a. But the Act expressly permits any content moderation allowed under federal law, *see* Fla. Stat. § 501.2041(9), and under federal law, platforms can generally remove "obscene, lewd, lascivious, [or] filthy" material, as long as they do so in "good faith." 47 U.S.C. § 230(c)(2).

5. One final error. Although the Eleventh Circuit correctly recognized that S.B. 7072's disclosure provisions should be tested under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), it erred in concluding that notifying users when they are censored is too burdensome. App.64a–65a. The platforms themselves, after all, have called for notice to "each user whose content is removed [or] whose or account is suspended" "about the reason for the removal [or] suspension" and to offer "detailed guidance and examples of permissible and impermissible content." *See* The Santa Clara Principles on Transparency and Accountability in Content Moderation, https://tinyurl.com/mtd3u49n; Gennie Gebhart, *Who Has Your Back? Censorship Edition 2019*, Electronic Frontier Foundation (June 12, 2019), https://tinyurl.com/t27vv89m.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR CONSIDERING THESE QUESTIONS.

This case is also an ideal vehicle. For one thing, the issue of whether social-media platforms are "speaking" when they host third-party speech is a legal ques-

tion and arises in a pre-enforcement posture. This posture allows the Court to decide the standard that applies to social-media hosting without having to decide potentially fact-intensive application questions about how a scrutiny analysis should come out on more idiosyncratic facts.

Additionally, the legal questions raised have been thoroughly aired. The applicability of the First Amendment to the platforms' hosting took up substantial chunks of the opinions below. App.18a–49a; 82a–88a. And the courts below received extensive briefing from both the parties and several amici.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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September 21, 2022

APPENDIX

TABLE OF APPENDICES

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Appendix A

In The
United States Court of Appeals
For the Eleventh Circuit

No. 21-12355

NETCHOICE, LLC,
d.b.a. NetChoice,
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
d.b.a. CCIA,

Plaintiffs-Appellees,

versus

ATTORNEY GENERAL, STATE OF FLORIDA,
in their official capacity,
JONI ALEXIS POITIER,
in her official capacity as Commissioner of the Florida Elections Commission,
JASON TODD ALLEN,
in his official capacity as Commissioner of the Florida Elections Commission,
JOHN MARTIN HAYES,
in his official capacity as Commissioner of the Florida Elections Commission,
KYMBERLEE CURRY SMITH, in her official capacity as Commissioner of
Florida Elections Commission,

DEPUTY SECRETARY OF BUSINESS OPERATIONS OF THE FLORIDA DEPARTMENT OF MANAGEMENT
SERVICES, in their official capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:21-cv-00220-RH-MAF

Before NEWSOM, TJOFLAT, and ED CARNES, Circuit Judges.
NEWSOM, Circuit Judge:

Not in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or Tik-Tok. But "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quotation marks omitted). One of those "basic principles"—indeed, the most basic of the basic—is that "[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Put simply, with minor exceptions, the government

can't tell a private person or entity what to say or how to say it.

The question at the core of this appeal is whether the Facebooks and Twitters of the world—indisputably "private actors" with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms. The State of Florida insists that they aren't, and it has enacted a first-of-its-kind law to combat what some of its proponents perceive to be a concerted effort by "the 'big tech' oligarchs in Silicon Valley" to "silenc[e]" "conservative" speech in favor of a "radical leftist" agenda. To that end, the new law would, among other things, prohibit certain social-media companies from "deplatforming" political candidates under any circumstances, prioritizing or deprioritizing any post or message "by or about" a candidate, and, more broadly, removing anything posted by a "journalistic enterprise" based on its content.

We hold that it is substantially likely that social-media companies even the biggest ones are "private actors" whose rights the First Amendment protects, *Manhattan Cmty.*, 139 S. Ct. at 1926, that their so-called "content-moderation" decisions constitute protected exercises of editorial judgment, and that the provisions of the new Florida law that restrict large platforms' ability to engage in content moderation unconstitutionally burden that prerogative. We further conclude that it is substantially likely that one of the law's particularly onerous disclosure provisions—which would require covered platforms to provide a

"thorough rationale" for each and every content-moderation decision they make—violates the First Amendment. Accordingly, we hold that the companies are entitled to a preliminary injunction prohibiting enforcement of those provisions. Because we think it unlikely that the law's remaining (and far less burdensome) disclosure provisions violate the First Amendment, we hold that the companies are not entitled to preliminary injunctive relief with respect to them.

I

A

We begin with a primer: This is a case about social-media platforms. (If you're one of the millions of Americans who regularly use social media or can't remember a time before social media existed, feel free to skip ahead.)

At their core, social-media platforms collect speech created by third parties—typically in the form of written text, photos, and videos, which we'll collectively call "posts"—and then make that speech available to others, who might be either individuals who have chosen to "follow" the "post"-er or members of the general public. Social-media platforms include both massive websites with billions of users—like Facebook, Twitter, YouTube, and TikTok— and niche sites that cater to smaller audiences based on specific interests or affiliations—like Roblox (a child-oriented gaming network), ProAmericaOnly (a network for conservatives), and Vegan Forum (self-explanatory).

Three important points about social-media platforms: First—and this would be too obvious to mention if it weren't so often lost or obscured in political rhetoric—platforms are private enterprises, not governmental (or even quasi-governmental) entities. No one has an obligation to contribute to or consume the content that the platforms make available. And correlatively, while the Constitution protects citizens from governmental efforts to restrict their access to social media, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), no one has a vested right to force a platform to allow her to contribute to or consume social-media content.

Second, a social-media platform is different from traditional media outlets in that it doesn't create most of the original content on its site; the vast majority of "tweets" on Twitter and videos on YouTube, for instance, are created by individual users, not the companies that own and operate Twitter and YouTube. Even so, platforms do engage in some speech of their own: A platform, for example, might publish terms of service or community standards specifying the type of content that it will (and won't) allow on its site, add addenda or disclaimers to certain posts (say, warning of misinformation or mature content), or publish its own posts.

Third, and relatedly, social-media platforms aren't "dumb pipes": They're not just servers and hard drives storing information or hosting blogs that anyone can access, and they're not internet service providers reflexively transmitting data from point A to

point B. Rather, when a user visits Facebook or Twitter, for instance, she sees a curated and edited compilation of content from the people and organizations that she follows. If she follows 1,000 people and 100 organizations on a particular platform, for instance, her "feed"—for better or worse—won't just consist of every single post created by every single one of those people and organizations arranged in reverse-chronological order. Rather, the platform will have exercised editorial judgment in two key ways: First, the platform will have removed posts that violate its terms of service or community standards—for instance, those containing hate speech, pornography, or violent content. *See, e.g.*, Doc. 26-1 at 3–6; *Facebook Community Standards*, Meta, https://transparency.fb.com/policies/community-standards (last accessed May 15, 2022). Second, it will have arranged available content by choosing how to prioritize and display posts—effectively selecting which users' speech the viewer will see, and in what order, during any given visit to the site. *See* Doc. 26-1 at 3.

Accordingly, a social-media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby participate in the community it has created. In that way, the platform creates a virtual space in which every user—private individuals, politicians, news organizations, corporations, and advocacy groups—can be both speaker and listener. In playing this role, the platforms invest significant time and resources into editing and organizing—the best word, we think, is *curating*—users' posts into collections of

content that they then disseminate to others. By engaging in this content moderation, the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints.

B

The State of Florida enacted S.B. 7072—in the words of the Act's sponsor, as quoted in Governor DeSantis's signing statement—to combat the "biased silencing" of "our freedom of speech as conservatives . . . by the 'big tech' oligarchs in Silicon Valley." *News Release: Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech* (May 24, 2021).[1] The bill, the Governor explained, was passed to take "action to ensure that 'We the People'—real Floridians across the Sunshine State—are guaranteed protection against the Silicon Valley elites" and to check the "Big Tech censors" that "discriminate in favor of the dominant Silicon Valley ideology." *Id.* By signing the bill, the Governor sought to "fight[] against [the] big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative." *Id.*

S.B. 7072's enacted findings are more measured. They assert that private social-media platforms are important "in preserving first amendment protections for all Floridians" and, comparing platforms to "public utilities," argue that they should be "treated similarly to common carriers." S.B. 7072 § 1(5), (6).

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[1] *See* https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech.

That, the Act says, is because social-media platforms "have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians" and because "[t]he state has a substantial interest in protecting its residents from inconsistent and unfair actions" by the platforms. *Id.* § 1(9), (10).

To these ends, S.B. 7072 contains several new statutory provisions that apply to "social media platforms." The term "social media platform" is defined using size and revenue thresholds that appear to target the "big tech oligarchs" about whose "narrative" and "ideology" the bill's sponsor and Governor DeSantis had complained. Even so, the definition's broad conception of what a "social media platform" *does* may well sweep in other popular websites, like the crowdsourced reference tool Wikipedia and virtual handmade craft-market Etsy:

> [A]ny information service, system, Internet search engine, or access software provider that:
>
> 1. Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
> 2. Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
> 3. Does business in the state; and
> 4. Satisfies at least one of the following thresholds:
>
> > a. Has annual gross revenues in excess of $100 million . . .

> b. Has at least 100 million monthly individual platform participants globally.

Fla. Stat. § 501.2041(1)(g). As originally enacted, the law's definition of "social media platform" expressly excluded any platform "operated by a company that owns and operates a theme park or entertainment complex." *Id.* But after the onset of this litigation—and after Disney executives made public comments critical of another recently enacted Florida law—the State repealed S.B. 7072's theme-park-company exemption. See S.B. 6-C (2022).

The relevant provisions of S.B. 7072—which are codified at Fla. Stat. §§ 106.072 and 501.2041[2]—can be divided into three categories: (1) content-moderation restrictions; (2) disclosure obligations; and (3) a user-data requirement.

Content-Moderation Restrictions

- **Candidate deplatforming**: A social-media platform "may not willfully deplatform a candidate for office." Fla. Stat. § 106.072(2). The term "deplatform" is defined to mean "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c).

[2] While S.B. 7072 also enacted antitrust-related provisions, only §§ 106.072 and 501.2041 are at issue in this appeal.

- **Posts by or about candidates**: "A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about . . . a candidate." *Id.* § 501.2041(2)(h). "Post prioritization" refers to the practice of arranging certain content in a more or less prominent position in a user's feed or search results. *Id.* § 501.2041(1)(e).[3] "Shadow banning" refers to any action to "limit or eliminate the exposure of a user or content or material posted by a user to other users of [a] . . . platform." *Id.* § 501.2041(1)(f).
- **"Journalistic enterprises"**: A social-media platform may not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." *Id.* § 501.2041(2)(j). The term "journalistic enterprise" is defined broadly to include any entity doing business in Florida that either (1) publishes in excess of 100,000 words online and has at least 50,000 paid subscribers or 100,000 monthly users, (2) publishes 100 hours of audio or video online and has at least 100 million annual viewers, (3) operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable subscribers, or (4) operates under an FCC broadcast license. *Id.* § 501.2041(1)(d). The term "censor" is also defined broadly to include not only actions taken to "delete," "edit," or "inhibit the publication of" content, but also any effort to "post an

[3] For purposes of this appeal, the State does not defend the Act's post-prioritization provisions.

addendum to any content or material." *Id.* § 501.2041(1)(b). The only exception to this provision's prohibition is for "obscene" content. *Id.* § 501.2041(2)(j).

- **Consistency**: A social-media platform must "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." *Id.* § 501.2041(2)(b). The Act does not define the term "consistent."
- **30-day restriction**: A platform may not make changes to its "user rules, terms, and agreements . . . more than once every 30 days." *Id.* § 501.2041(2)(c).
- **User opt-out**: A platform must "categorize" its post-prioritization and shadow-banning algorithms and allow users to opt out of them; for users who opt out, the platform must display material in "sequential or chronological" order. *Id.* § 501.2041(2)(f). The platform must offer users the opportunity to opt out annually. *Id.* § 501.2041(2)(g).

Disclosure Obligations

- **Standards**: A social-media platform must "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." *Id.* § 501.2041(2)(a).
- **Rule changes**: A platform must inform its users "about any changes to" its "rules, terms, and agreements before implementing the changes." *Id.* § 501.2041(2)(c).

- **View counts**: Upon request, a platform must provide a user with the number of others who viewed that user's content or posts. *Id.* § 501.2041(2)(e).
- **Candidate free advertising**: Platforms that "willfully provide[] free advertising for a candidate must inform the candidate of such in-kind contribution." *Id.* § 106.072(4).
- **Explanations**: Before a social-media platform deplatforms, censors, or shadow-bans any user, it must provide the user with a detailed notice. *Id.* § 501.2041(2)(d). In particular, the notice must be in writing and be delivered within 7 days, and must include both a "thorough rationale explaining the reason" for the "censor[ship]" and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision. *Id.* § 501.2041(3). (The notice requirement doesn't apply "if the censored content or material is obscene." *Id.* § 501.2041(4).)

User-Data Requirement

- **Data access**: A social-media platform must allow a deplatformed user to "access or retrieve all of the user's information, content, material, and data for at least 60 days" after the user receives notice of deplatforming. *Id.* § 501.2041(2)(i).

Enforcement of § 106.072—which contains the candidatede platforming provision—falls to the

Florida Elections Commission, which is empowered to impose fines of up to $250,000 per day for violations involving candidates for statewide office and $25,000 per day for those involving candidates for other offices. *Id.* § 106.072(3). Section 501.2041—which contains S.B. 7072's remaining provisions—may be enforced either by state governmental actors or through civil suits filed by private parties. Id. § 501.2041(5), (6). Private actions under this section can yield up to $100,000 in statutory damages per claim, actual damages, punitive damages, equitable relief, and, in some instances, attorneys' fees. *Id.* § 501.2041(6).

C

The plaintiffs here—NetChoice and the Computer & Communications Industry Association (together, "NetChoice")—are trade associations that represent internet and social-media companies like Facebook, Twitter, Google (which owns YouTube), and TikTok. They sued the Florida officials charged with enforcing S.B. 7072 under 42 U.S.C. § 1983. In particular, they sought to enjoin enforcement of §§ 106.072 and 501.2041 on a number of grounds, including, as relevant here, that the law's provisions (1) violate the social-media companies' right to free speech under the First Amendment and (2) are preempted by federal law.

The district court granted NetChoice's motion and preliminarily enjoined enforcement of §§ 106.072 and 501.2041 in their entirety. The court held that the provisions that impose liability for

platforms' decisions to remove or deprioritize content are likely preempted by 47 U.S.C. § 230(c)(2), which states that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

On NetChoice's free-speech challenge, the district court held that the Act's provisions implicated the First Amendment because they restrict platforms' constitutionally protected exercise of "editorial judgment." The court then applied strict First Amendment scrutiny because it concluded that some of the Act's provisions were content-based and, more broadly, because it found that the *entire bill* was motivated by the state's viewpoint-based purpose to defend conservatives' speech from perceived liberal "big tech" bias: "This viewpoint-based motivation, without more, subjects the legislation to strict scrutiny, root and branch." Doc. 113 at 23–26. The court held that the Act's provisions "come nowhere close" to surviving strict scrutiny because, it said, "leveling the playing field" for speech is not a legitimate state interest, the provisions aren't narrowly tailored, and the State hadn't even argued that the provisions could survive such scrutiny. *Id.* at 27. The court further noted that even if more permissive intermediate scrutiny applied, the provisions wouldn't survive

because they don't meet the narrow-tailoring requirement and instead "seem designed not to achieve any governmental interest but to impose the maximum available burden on the social media platforms." *Id.* at 28. The court concluded that the plaintiffs easily met the remaining requirement for a preliminary injunction.

The State appealed. Before us, the State first argues that the plaintiffs are unlikely to succeed on their preemption challenge because some applications of the Act are consistent with § 230. Second, and more importantly for our purposes, the State contends that S.B. 7072 doesn't even *implicate*—let alone violate—the First Amendment because the platforms aren't engaged in protected speech. Rather, the State asserts that the Act merely requires platforms to "host" third-parties' speech, which, it says, they may constitutionally be compelled to do under two Supreme Court decisions— *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* , 547 U.S. 47 (2006). Alternatively, the State says, the Act doesn't trigger First Amendment scrutiny because it reflects the State's permissible decision to treat social-media platforms like "common carriers."

NetChoice responds that platforms' content-moderation decisions—i.e., their decisions to remove or deprioritize posts or deplatform users, and thereby curate the material they disseminate—are "editorial judgments" that are protected by the First Amendment under longstanding Supreme

Court precedent, including *Miami Herald Publishing Co. v. Tornillo* , 418 U.S. 241 (1974), *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). According to NetChoice, strict scrutiny applies to the entire law "several times over" because it is speaker-, content-, and viewpoint-based. Moreover, and in any event, NetChoice says, the law fails *any* form of heightened scrutiny because there is no legitimate state interest in equalizing speech and because the law isn't narrowly tailored. NetChoice briefly defends the district court's preemption holding, but focuses on the First Amendment issues because they fully dispose of the case and because, it contends, a First Amendment violation is a quintessential irreparable injury for injunctive-relief purposes.

D

"We review the grant of a preliminary injunction for abuse of discretion, reviewing any underlying legal conclusions de novo and any findings of fact for clear error." *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270 (11th Cir. 2020). Ordinarily, "[a] district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant

outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). Likelihood of success on the merits "is generally the most important" factor. *Gonzalez*, 978 F.3d at 1271 n.12 (quotation marks omitted).

* * *

We will train our attention on the question whether NetChoice has shown a substantial likelihood of success on the merits of its First Amendment challenge to Fla. Stat. §§ 106.072 and 501.2041. Because we conclude that the Act's content-moderation restrictions are substantially likely to violate the First Amendment, and because that conclusion fully disposes of the appeal, we needn't reach the merits of the plaintiffs' preemption challenge.[4]

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[4] The only provisions that NetChoice challenges as preempted are, for reasons we'll explain, also substantially likely to violate the First Amendment. Of course, federal courts should generally "avoid reaching constitutional questions if there are other grounds upon which a case can be decided," but that rule applies only when "a dispositive nonconstitutional ground is available." *Otto v. City of Boca Raton*, 981 F.3d 854, 871 (11th Cir. 2020) (quotation marks and emphasis omitted). Here, whether or not the preemption ground is "dispositive," *but cf. id.*, it isn't "nonconstitutional" because federal preemption is rooted in the Supremacy Clause of Article VI, *see La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).*

In assessing whether the Act likely violates the First Amendment, we must initially consider whether it triggers First Amendment scrutiny in the first place—*i.e.*, whether it regulates "speech" within the meaning of the Amendment at all. *See Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.* , 6 F.4th 1247, 1254 (11th Cir. 2021). In other words, we must determine whether social-media platforms engage in First-Amendment-protected activity. If they do, we must then proceed to determine what level of scrutiny applies and whether the Act's provisions survive that scrutiny. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021) ("*FLFNB II*").

For reasons we will explain in the balance of the opinion, we hold as follows: (1) S.B. 7072 triggers First Amendment scrutiny because it restricts social-media platforms' exercise of editorial judgment and requires them to make certain disclosures; (2) strict scrutiny applies to some of the Act's content-moderation restrictions while intermediate scrutiny applies to others; (3) the Act's disclosure provisions should be assessed under the standard articulated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); (4) it is substantially likely that the Act's content-moderation restrictions will not survive even intermediate scrutiny; (5) it is also substantially likely that the requirement that platforms provide a "thorough rationale" for each content-moderation decision will not survive under *Zauderer*; (6) it is not sub-

stantially likely that the Act's remaining disclosure provisions are unconstitutional; and (7) the preliminary-injunction factors favor enjoining the provisions of the Act that are substantially likely to be unconstitutional.

II

A

Social-media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights, *see First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781–84 (1978), and when they (like other entities) "disclos[e]," "publish[]," or "disseminat[e]" information, they engage in "speech within the meaning of the First Amendment," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (quotation marks omitted). More particularly, when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site. As the officials who sponsored and signed S.B. 7072 recognized when alleging that "Big Tech" companies harbor a "leftist" bias against "conservative" perspectives, the companies that operate social-media platforms express themselves (for better or worse) through their content-moderation decisions. When a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby

engages in "speech" within the meaning of the First Amendment.

Laws that restrict platforms' ability to speak through content moderation therefore trigger First Amendment scrutiny. Two lines of precedent independently confirm this commonsense conclusion: first, and most obviously, decisions protecting exercises of "editorial judgment"; and second, and separately, those protecting inherently expressive conduct.

1

We'll begin with the editorial-judgment cases. The Supreme Court has repeatedly held that a private entity's choices about whether, to what extent, and in what manner it will disseminate speech—even speech created by others—constitute "editorial judgments" protected by the First Amendment.

Miami Herald Publishing Co. v. Tornillo is the pathmarking case. There, the Court held that a newspaper's decisions about what content to publish and its "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment" that the First Amendment was designed to safeguard. 418 U.S. at 258. Florida had passed a statute requiring any paper that ran a piece critical of a political candidate to give the candidate equal space in its pages to reply. *Id.* at 243. Despite the contentions

(1) that economic conditions had created "vast accumulations of unreviewable power in the modern media empires" and (2) that those conditions had resulted in "bias and manipulative reportage" and massive barriers to entry, the Court concluded that the state's attempt to compel the paper's editors to "publish that which reason tells them should not be published is unconstitutional." *Id.* at 250–51, 256 (quotation marks omitted). Florida's "intrusion into the function of editors," the Court held, was barred by the First Amendment. *Id.* at 258.

The Court subsequently extended *Miami Herald's* protection of editorial judgment beyond newspapers. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California* , the Court invalidated a state agency's order that would have required a utility company to include in its billing envelopes the speech of a third party with which the company disagreed. 475 U.S. at 4, 20 (plurality op.). A plurality of the Court reasoned that the concerns underlying *Miami Herald* applied to a utility company in the same way that they did to the institutional press. *Id.* at 11–12. The challenged order required the company "to use *its* property as a vehicle for spreading a message with which it disagree[d]" and therefore was subject to (and failed) strict First Amendment scrutiny. *Id.* at 17–21.

So too, in *Turner Broadcasting Systems, Inc. v. FCC*, the Court held that cable operators—companies that own cable lines and choose which stations to offer their customers—"engage in and transmit

speech." 512 U.S. at 636. "[B]y exercising editorial discretion over which stations or programs to include in [their] repertoire," the Court said, they "seek to communicate messages on a wide variety of topics and in a wide variety of formats." Id. (quotation marks omitted); *see also Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."). Because cable operators' decisions about which channels to transmit were protected speech, the challenged regulation requiring operators to carry broadcast-TV channels triggered First Amendment scrutiny. 512 U.S. at 637.[5]

Most recently, the Court applied the editorial-judgment principle to a parade organizer in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, explaining that parades (like newspapers and cable-TV packages) constitute protected expression. 515 U.S. at 568. The Supreme Judicial Court of Massachusetts had attempted to apply the state's public-accommodations law to require the organizers of a privately run parade to allow a gay-pride group to march. *Id.* at 564. Citing *Miami Herald*, and using words equally applicable here, the Court observed that "the presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First

[5] In *Turner*, the Court applied intermediate scrutiny because the law was content-neutral. *See* 512 U.S. at 662. The point for present purposes is that the Court held that the must-carry provision triggered First Amendment scrutiny.

Amendment security" and that the "selection of contingents to make a parade is entitled to similar protection." *Id.* at 570. The Court concluded that it didn't matter that the state was attempting to apply a public-accommodations statute because "once the expressive character of both the parade and the marching [gay-rights] contingent [was] understood, it bec[ame] apparent that the state courts' application of the statute had the effect of declaring the [parade] sponsors' speech itself to be the public accommodation," which "violates the fundamental rule of . . . the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. Nor did it matter, the Court explained, that the parade didn't produce a "particularized message": The parade organizer's decision to "exclude a message it did not like from the communication it chose to make" was "enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another"—a choice "not to propound a particular point of view" that is "presumed to lie beyond the government's power to control." *Id.* at 574–75.

Together, *Miami Herald, Pacific Gas*, and particularly *Turner* and *Hurley* establish that a private entity's 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. For reasons we will explain, social media platforms' content-moderation decisions constitute the same

sort of editorial judgments and thus trigger First Amendment scrutiny.

2

Separately, we might also assess social-media platforms' content-moderation practices against our general standard for what constitutes inherently expressive conduct protected by the First Amendment. We recently explained that standard in *Coral Ridge Ministries, Inc. v. Amazon.com, Inc.*:

> In determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message. If we find that the conduct in question is expressive, any law regulating that conduct is subject to the First Amendment.

6 F.4th at 1254 (cleaned up).

In *Coral Ridge*, a Christian ministry and media organization sued Amazon.com, alleging that Amazon's decision to exclude the organization from the company's "AmazonSmile" charitable-giving program—based on the Southern Poverty Law Center's designation of the organization as a "hate group"—constituted religious discrimination in violation of Title II of the Civil Rights Act of 1964. *Id.* at 1250–51. We held that "Amazon's choice of what charities are eligible to receive donations through AmazonSmile" was expressive conduct—and notably, in so holding,

we analogized Amazon's determination to the parade organizer's decisions in *Hurley* about which groups to include in the march. *Id.* at 1254–55. "A reasonable person would interpret" Amazon's exclusion of certain charities from the program based on the SPLC's hate-group designations, we said, "as Amazon conveying '*some* sort of message' about the organizations it wishes to support." *Id.* (quoting *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) ("*FLFNB I*")).

The *Coral Ridge* case built on our earlier decision in *Fort Lauderdale Food Not Bombs*. That case concerned a non-profit organization that distributed free food in a city park to communicate its view that society should end hunger and poverty by redirecting resources away from the military. 901 F.3d at 1238–39. When the city enacted an ordinance that would have prohibited distributing food in parks without prior authorization, the organization sued, arguing that its food-sharing events constituted inherently expressive conduct protected by the First Amendment. *Id.* At 1239–40. We held that given the surrounding context, the organization's food-sharing events would convey "some sort of message" to the reasonable observer—and were therefore "'a form of protected expression.'" *Id.* at 1244–45 (quoting *Spence v. Washington*, 418 U.S. 405, 410 (1974)).

3

Whether we assess social-media platforms' content-moderation activities against the *Miami Herald* line of cases or against our own decisions explaining

what constitutes expressive conduct, the result is the same: Social-media platforms exercise editorial judgment that is inherently expressive. When platforms choose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity.

Social-media platforms' content-moderation decisions are, we think, closely analogous to the editorial judgments that the Supreme Court recognized in *Miami Herald, Pacific Gas, Turner*, and *Hurley*. Like parade organizers and cable operators, social-media companies are in the business of delivering curated compilations of speech created, in the first instance, by others. Just as the parade organizer exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social-media platforms regularly make choices "not to propound a particular point of view." *Hurley*, 515 U.S. at 575. Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups. A few examples:

- YouTube seeks to create a "welcoming community for viewers" and, to that end, prohibits a

wide range of content, including spam, pornography, terrorist incitement, election and public-health misinformation, and hate speech.[6]

- Facebook engages in content moderation to foster "authenticity," "safety," "privacy," and "dignity," and accordingly, removes or adds warnings to a wide range of content—for example, posts that include what it considers to be hate speech, fraud or deception, nudity or sexual activity, and public-health misinformation.[7]
- Twitter aims "to ensure all people can participate in the public conversation freely and safely" by removing content, among other categories, that it views as embodying hate, glorifying violence, promoting suicide, or containing election misinformation.[8]
- Roblox, a gaming social network primarily for children, prohibits "[s]ingling out a user or group for ridicule or abuse," any sort of sexual content, depictions of and support for war or violence, and any discussion of political parties or candidates.[9]

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[6] *Policies and Guidelines*, YouTube, https://www.youtube.com/creators/ how-things-work/policies guidelines (last accessed May 15, 2022).

[7] *Facebook Community Standards*, Meta, https://transparency.fb.com/policies/ community-standards (last accessed May 15, 2022).

[8] *The Twitter Rules*, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-rules (last accessed May 15, 2022).

[9] *Roblox Community Standards*, Roblox, https://en.help.roblox.com/hc/enus/articles/203313410-Roblox-Community-Standards (last accessed May 15, 2022).

- Vegan Forum allows non-vegans but "will not tolerate members who promote contrary agendas."[10]

And to be clear, some platforms exercise editorial judgment to promote explicitly political agendas. On the right, ProAmericaOnly promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS."[11] And on the left, The Democratic Hub says that its "online community is for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology."[12]

All such decisions about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on platforms' own particular values and views—fit comfortably within the Supreme Court's editorial-judgment precedents.

Separately, but similarly, platforms' content-moderation activities qualify as First-Amendment-protected expressive conduct under *Coral Ridge* and *FLFNB I*. A reasonable person would likely infer "some sort of message" from, say, Facebook removing hate speech or Twitter banning a politician. Indeed, unless posts and users are removed *randomly*, those

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[10] *Membership Rules*, Vegan Forum, https://www.vegan-forum.org/help/terms (last accessed May 15, 2022).

[11] ProAmericaOnly, https://proamericaonly.org (last accessed May 15, 2022).

[12] The Democratic Hub, https://www.democratichub.com (last accessed May 15, 2022).

sorts of actions necessarily convey *some* sort of message—most obviously, the platforms' disagreement with or disapproval of certain content, viewpoints, or users. Here, for instance, the 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.

In an effort to rebut this point, the State responds that because the vast majority of content that makes it onto social-media platforms is never reviewed—let alone removed or deprioritized—platforms aren't engaged in conduct of sufficiently expressive quality to merit First Amendment protection. *See* Reply Br. of Appellant at 16. With respect, the State's argument misses the point. The "conduct" that the challenged provisions regulate—what this entire appeal is about—is the platforms' "censorship" of users' posts—*i.e.*, the posts that platforms *do* review and remove or deprioritize.[13] The question, then, is whether

[13] The fact that some social-media platforms choose to allow most content doesn't undermine their claim to First Amendment protection. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissental) (explaining that the fact that platforms "have not been aggressively exercising their editorial discretion does not mean that they have no *right* to exercise their editorial discretion").

that conduct is expressive. For reasons we've explained, we think it unquestionably is.[14]

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[14] Texas and several other states as amici insist that social-media platforms' "censorship, deplatforming, and shadow banning" activities aren't inherently expressive conduct for First Amendment purposes because the platforms don't "inten[d] to convey a particularized message." States' Amicus Br. at 6–7 (quoting *FLFNB I*, 901 F.3d at 1240). They note that the platforms' most prominent CEOs have denied accusations that their content rules are based on ideology or political perspective. But while an "intent to convey a particularized message" was once necessary to qualify as expressive conduct, *FLFNB I* explained that "[s]ince then . . . the [Supreme] Court has clarified that a 'narrow, succinctly articulable message is not a condition of constitutional protection' because 'if confined to expressions conveying a "particularized message" [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.'" *FLFNB I*, 901 F.3d at 1240 (last alteration in original) (quoting *Hurley*, 515 U.S. at 569)). Instead, as explained in text, we require only that a "reasonable person would interpret [the conduct] as some sort of message." *Id.* (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11thCir. 2004)).

To the extent that the states argue that social-media platforms lack the requisite "intent" to convey a message, we find it implausible that platforms would engage in the laborious process of defining detailed community standards, identifying offending content, and removing or deprioritizing that content if they *didn't* intend to convey "*some* sort of message." Unsurprisingly, the record in this case confirms platforms' intent to communicate messages through their content-moderation decisions—including that certain material is harmful or unwelcome on their sites. *See, e.g.*, Doc. 25-1 at 2 (declaration of YouTube executive explaining that its approach to content moderation "is to remove content that violates [its] policies (developed with outside experts to prevent real-world harms), reduce the spread of harmful misinformation. . . and raise authoritative and trusted content"); *Facebook Community Standards, supra* (noting that

B

In the face of the editorial-judgment and expressive-conduct cases, the State insists that S.B. 7072 doesn't even implicate, let alone violate, the First Amendment. The State's first line of argument relies on two cases—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*")—in which the Supreme Court upheld government regulations that effectively compelled private actors to "host" others' speech. The State's second argument seeks to evade—or at least minimize—First Amendment scrutiny by labeling social-media platforms "common carriers." We find neither argument convincing.

1

We begin with the "hosting" cases. The first decision to which the State points, *PruneYard*, is readily distinguishable. There, the Supreme Court affirmed a state court's decision requiring a privately owned shopping mall to allow members of the public to circulate petitions on its property. 447 U.S. at 76–77, 88. In that case, though, the only First Amendment interest that the mall owner asserted was the right "not to be forced by the State to use [its] property as a forum for the speech of others." *Id.* at 85. The Supreme Court's subsequent decisions in *Pacific Gas* and *Hurley* distinguished and cabined *PruneYard*. The *Pacific Gas* plurality explained that "[n]otably absent from

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Facebook moderates content "in service of" its "values" of "authenticity," "safety," "privacy," and "dignity").

PruneYard was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets." 475 U.S. at 12 (plurality op.); *see also id.* at 24 (Marshall, J., concurring in the judgment) ("While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest."); *Hurley*, 515 U.S. at 580 (noting that the "principle of speaker's autonomy was simply not threatened in" *PruneYard*). Because NetChoice asserts that S.B. 7072 interferes with the platforms' own speech rights by forcing them to carry messages that contradict their community standards and terms of service, *PruneYard* is inapposite.

FAIR may be a bit closer, but it, too, is distinguishable. In that case, the Supreme Court upheld a federal statute—the Solomon Amendment—that required law schools, as a condition to receiving federal funding, to allow military recruiters the same access to campuses and students as any other employer. 547 U.S. at 56. The schools, which had restricted recruiters' access because they opposed the military's "Don't Ask, Don't Tell" policy regarding gay servicemembers, protested that requiring them to host recruiters and post notices on their behalf violated the First Amendment. *Id.* at 51. But the Court held that the law didn't implicate the First Amendment because it "neither limit[ed] what law schools may say nor require[d] them to say anything." *Id.* at 60. In so holding, the Court rejected two arguments for why the First Amendment should apply—(1) that the Solomon

Amendment unconstitutionally required law schools to host the military's speech, and (2) that it restricted the law schools' expressive conduct. *Id.* at 60–61.

With respect to the first argument, the Court distinguished *Miami Herald, Pacific Gas*, and *Hurley* on the ground that, in those cases, "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. The Solomon Amendment's requirement that schools host military recruiters did "not affect the law schools' speech," the Court said, "because the schools [were] not speaking when they host[ed] interviews and recruiting receptions": Recruiting activities, the Court reasoned, simply aren't "inherently expressive"—they're not *speech*—in the way that editorial pages, newsletters, and parades are. *Id.* at 64. Therefore, the Court concluded, "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *Id.* Nor did the Solomon Amendment's requirement that schools send notices on behalf of military recruiters unconstitutionally compel speech, the Court held, as it was merely incidental to the law's regulation of conduct. *Id.* at 62.

The *FAIR* Court also rejected the law schools' second argument—namely, that the Solomon Amendment restricted their inherently expressive conduct. The schools' refusal to allow military recruiters on campus was expressive, the Court emphasized, "only because [they] accompanied their conduct with speech explaining it." *Id.* at 66. In the normal course, the Court said, an observer "who s[aw] military recruiters

interviewing away from the law school [would have] no way of knowing" whether the school was expressing a message or, instead, the school's rooms just happened to be full or the recruiters just preferred to interview elsewhere. Id. Because "explanatory speech" was necessary to understand the message conveyed by the law schools' conduct, the Court concluded, that conduct wasn't "inherently expressive." *Id.*

FAIR isn't controlling here because social-media platforms warrant First Amendment protection on both of the grounds that the Court held that law-school recruiting services didn't.

First, S.B. 7072 interferes with social-media platforms' own "speech" within the meaning of the First Amendment. Social-media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech. A social-media platform that "exercises editorial discretion in the selection and presentation of" the content that it disseminates to its users "engages in speech activity." *Ark. Educ. TV Comm'n*, 523 U.S. at 674; *see Sorrell*, 564 U.S. at 570 (explaining that the "dissemination of information" is "speech within the meaning of the First Amendment"); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." (cleaned up)). Just as the must-carry provisions in *Turner* "reduce[d] the number of channels over which cable operators exercise[d] unfettered control" and therefore triggered First Amendment scrutiny, 512

U.S. at 637, S.B. 7072's content-moderation restrictions reduce the number of posts over which platforms can exercise their editorial judgment. Because a social-media platform itself "spe[aks]" by curating and delivering compilations of others' speech—speech that may include messages ranging from Facebook's promotion of authenticity, safety, privacy, and dignity to ProAmericaOnly's "No BS | No LIBERALS"—a law that requires the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights.

Second, social-media platforms are engaged in inherently expressive conduct of the sort that the Court found lacking in *FAIR*. As we were careful to explain in *FLFNB I, FAIR* "does not mean that conduct loses its expressive nature just because it is also accompanied by other speech." 901 F.3d at 1243–44. Rather, "[t]he critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct." *Id.* at 1244. And we held that an advocacy organization's food-sharing events constituted expressive conduct from which, "due to the context surrounding them, the reasonable observer would infer some sort of message"—even without reference to the words "Food Not Bombs" on the organization's banners. *Id.* at 1245. Context, we held, is what differentiates "activity that is sufficiently expressive [from] similar activity that is not"—*e.g.*, "the act of sitting down" from "the sit-in by African Americans at a Louisiana library" protesting segregation. *Id.* at 1241 (citing *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966)).

Unlike the law schools in *FAIR*, social-media platforms' content-moderation decisions communicate messages when they remove or "shadow-ban" users or content. Explanatory speech isn't "*necessary* for the reasonable observer to perceive a message from," for instance, a platform's decision to ban a politician or remove what it perceives to be misinformation. *Id.* at 1244. Such conduct—the *targeted removal of users' speech* from websites whose primary function is to serve as speech platforms—conveys a message to the reasonable observer "due to the context surrounding" it. *Id.* at 1245; *see also Coral Ridge*, 6 F.4th at 1254. Given the context, a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval.[15] Thus, social-media platforms engage in content moderation that is inherently expressive notwithstanding *FAIR*.

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[15] One might object that users know that social-media platforms remove content, deplatform users, or deprioritize posts only because of the platforms' speech explaining those decisions—so the conduct itself isn't inherently expressive. *See FAIR*, 547 U.S. at 66. But unlike the person who observes military recruiters interviewing away from a law school and has no idea whether the school is thereby expressing a message, *see id.*, we find it unlikely that a reasonable observer would think, for instance, that the reason he rarely or never sees pornography on Facebook is that none of Facebook's billions of users ever posts any. The more reasonable inference to be drawn from the fact that certain types of content rarely or never appear when a user browses a social-media site—or why certain posts disappear or prolific Twitter users vanish from the platform after making controversial statements—is that the platform disapproves.

It might be, we suppose, that some content-moderation decisions—for instance, to prioritize or deprioritize individual posts—are so subtle that users wouldn't notice them but for the

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The State asserts that *Pruneyard* and *FAIR*—and, for that matter, the Supreme Court's editorial-judgment decisions—establish three "guiding principles" that should lead us to conclude that S.B. 7072 doesn't implicate the First Amendment. We disagree.

The first principle—that a regulation must interfere with the host's ability to speak in order to implicate the First Amendment—does find support in *FAIR*. *See* 547 U.S. at 64. Even so, the State's *argument*—that S.B. 7072 doesn't interfere with platforms' ability to speak because they can still affirmatively dissociate themselves from the content that they disseminate—encounters two difficulties. As an initial

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platforms' speech explaining their actions. But even if some subset of content-moderation activities wouldn't count as inherently expressive conduct under *FAIR* and *FLFNB* I, many are sufficiently transparent that users would likely notice them and, in context, infer from them "some sort of message"—even in the absence of explanatory speech. Specifically, it's likely clear to viewers that platforms take down individual posts, remove entire categories of content, and deplatform other users—and that such actions express messages. "Shadow-banning" would also likely be apparent and communicate a message to a reasonable user who knows that she follows a particular poster but doesn't see that poster's content, for instance, in her feed or search results. Thus, even if *some* content moderation isn't inherently expressive, much of it is. *See United States v. Stevens*, 559 U.S. 460, 473 (2010) (noting that a statute facially violates the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep" (quotation marks omitted)). As explained in text, S.B. 7072's content-moderation restrictions all regulate platforms' inherently expressive conduct and trigger heightened scrutiny. *See infra* Part II.C.

matter, in at least one key provision, the Act defines the term "censor" to include "posting an addendum," *i.e.*, a disclaimer—and thereby explicitly prohibits the very speech by which a platform might dissociate itself from users' messages. Fla. Stat. § 501.2041(1)(b). Moreover, and more fundamentally, if the exercise of editorial judgment—the decision about whether, to what extent, and in what manner to disseminate third-party content—is itself speech or inherently expressive conduct, which we have said it is, then the Act *does* interfere with platforms' ability to speak. *See Pacific Gas*, 475 U.S. at 10–12, 16 (plurality op.) (noting that if the government could compel speakers to "propound . . . messages with which they disagree," the First Amendment's protection "would be empty, for the government could require speakers to affirm in one breath that which they deny in the next").

The State's second principle—that in order to trigger First Amendment scrutiny a regulation must create a risk that viewers or listeners might confuse a user's and the platform's speech—finds little support in our precedent. Consumer confusion simply isn't a prerequisite to First Amendment protection. In *Miami Herald*, for instance, even though no reasonable observer would have mistaken a political candidate's statutorily mandated right-to-reply column for the newspaper reversing its earlier criticism, the Supreme Court deemed the paper's editorial judgment to be protected. *See* 418 U.S. at 244, 258. Nor was there a risk of consumer confusion in *Turner*: No reasonable person would have thought that the cable operator there endorsed every message conveyed by every speaker on every one of the channels it carried, and

yet the Court stated categorically that the operator's editorial discretion was protected. *See* 512 U.S. at 636–37. Moreover, it seems to us that the State's confusion argument boomerangs back around on itself: If a platform announces a community standard prohibiting, say, hate speech, but is then barred from removing or even disclaiming posts containing what it perceives to be hate speech, there's a real risk that a viewer might erroneously conclude that the platform doesn't consider those posts to constitute hate speech.

The State's final principle—that in order to receive First Amendment protection a platform must curate and present speech in such a way that a "common theme" emerges—is similarly flawed. *Hurley* held that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." 515 U.S. at 569–70; *see FLFNB I*, 901 F.3d at 1240 (citing *Hurley* for the proposition that a "particularized message" isn't required for conduct to qualify for First Amendment protection). Moreover, even if one could theoretically attribute a common theme to a parade, *Turner* makes clear that no such theme is required: It seems to us inconceivable that one could ascribe a common theme to the cable operator's choice there to carry hundreds of disparate channels, and yet the Court held that the First Amendment protected the operator's editorial discretion. 512 U.S. at 636.[16]

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[16] Of course, to the extent that one might say that a cable operator is pursuing, say, a "theme" of *non*-obscenity, the very same sort of thing could be said of social-media platforms. *See Facebook Community Standards*, *supra* (explaining that Facebook

In short, the State's reliance on *PruneYard* and *FAIR* and its attempts to distinguish the editorial-judgment line of cases are unavailing.

2

The State separately seeks to evade (or at least minimize) First Amendment scrutiny by labeling social-media platforms "common carriers."[17] The crux of the State's position, as expressed at oral argument, is that "[t]here are certain services that society determines people shouldn't be required to do without," and

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prohibits many categories of content as it seeks to foster the values of "authenticity," "safety," "privacy," and "dignity").

[17] We say "or at least minimize" because it's not entirely clear what work a common-carrier designation would perform in a First Amendment analysis. While the Supreme Court has suggested that common carriers "receive a lower level of First Amendment protection than other forms of communication," it has never explained the precise level of protection that they do receive. Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. Free Speech L. 463, 480–82 (2021); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) (noting only that "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties" (cleaned up)). Moreover, at common law, even traditional common carriers like innkeepers were allowed to exclude drunks, criminals, diseased persons, and others who were "obnoxious to [ ] others," and telegraph companies weren't required to accept "obscene, blasphemous, profane or indecent messages." *See* TechFreedom Amicus Br. at 29 (quoting 1 Bruce Wyman, *The Special Law Governing Public Service Corporations, and All Others Engaged in Public Employment* §§ 632– 33 (1911)). Because S.B. 7072 prevents platforms from removing content regardless of its impact on others, it appears to extend beyond the historical obligations of common carriers.

that this is "true of social media in the 21st century." Oral Arg. at 18:37 et seq. For reasons we explain, we disagree.

At the outset, we confess some uncertainty whether the State means to argue (a) that platforms are *already* common carriers, and so possess no (or only minimal) First Amendment rights, or (b) that the State can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights that they currently possess. Whatever the State's position, we are unpersuaded.

a

The first version of the argument fails because, in point of fact, social-media platforms are not—in the nature of things, so to speak—common carriers. That is so for at least three reasons.

First, social-media platforms have never acted like common carriers. "[I]n the communications context," common carriers are entities that "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing"—they don't "make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (cleaned up). While it's true that social-media platforms generally hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by

their community standards. In other words, Facebook is open to every individual if, but only if, she agrees not to transmit content that violates the company's rules. Social-media users, accordingly, are *not* freely able to transmit messages "of their own design and choosing" because platforms make—and have always made—"individualized" content- and viewpoint-based decisions about whether to publish particular messages or users.

Second, Supreme Court precedent strongly suggests that internet companies like social-media platforms aren't common carriers. While the Court has applied less stringent First Amendment scrutiny to television and radio broadcasters, the *Turner* Court cabined that approach to "broadcast" media because of its "unique physical limitations"—chiefly, the scarcity of broadcast frequencies. 512 U.S. at 637–39. Instead of "comparing cable operators to electricity providers, trucking companies, and railroads—all entities subject to traditional economic regulation"—the *Turner* Court "analogized the cable operators [in that case] to the publishers, pamphleteers, and bookstore owners traditionally protected by the First Amendment." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 428 (D.C. Cir. 2017) (Kavanaugh, J., dissental); *see Turner*, 512 U.S. at 639. And indeed, the Court explicitly distinguished online from broadcast media in *Reno v. American Civil Liberties Union*, emphasizing that the "vast democratic forums of the Internet" have never been "subject to the type of government supervision and regulation that has attended the broadcast industry." 521 U.S. 844, 868–69 (1997). These precedents demonstrate that social-media platforms should be treated more

like cable operators, which retain their First Amendment right to exercise editorial discretion, than traditional common carriers.

Finally, Congress has distinguished internet companies from common carriers. The Telecommunications Act of 1996 explicitly differentiates "interactive computer services"—like social-media platforms—from "common carriers or telecommunications services." *See, e.g.*, 47 U.S.C. § 223(e)(6) ("Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."). And the Act goes on to provide protections for internet companies that are inconsistent with the traditional common-carrier obligation of indiscriminate service. In particular, it explicitly protects internet companies' ability to restrict access to a plethora of material that they might consider "objectionable." *Id.* § 230(c)(2)(A). Federal law's recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights.

b

If social-media platforms are not common carriers either in fact or by law, the State is left to argue that it can force them to *become* common carriers, abrogating or diminishing the First Amendment rights that they currently possess and exercise. Neither law nor logic recognizes government authority to strip an

entity of its First Amendment rights merely by labeling it a common carrier. Quite the contrary, if social-media platforms currently possess the First Amendment right to exercise editorial judgment, as we hold it is substantially likely they do, then any law infringing that right—even one bearing the terminology of "common carri[age]"—should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Labeling leased access a common carrier scheme has no real First Amendment consequences."); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1321–22 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (explaining that because video programmers have a constitutional right to exercise editorial discretion, "the Government cannot compel [them] to operate like 'dumb pipes' or 'common carriers' that exercise no editorial control"); *U.S. Telecom Ass'n*, 855 F.3d at 434 (Kavanaugh, J., dissental) ("Can the Government really force Facebook and Google . . . to operate as common carriers?").

* * *

The State's best rejoinder is that because large social-media platforms are clothed with a "public trust" and have "substantial market power," they are (or should be treated like) common carriers. Br. of Appellants at 35–37; *see Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). These premises aren't uncontroversial, but

even if they're true, they wouldn't change our conclusion. The State doesn't argue that market power and public importance are alone sufficient reasons to recharacterize a private company as a common carrier; rather, it acknowledges that the "basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately." Br. of Appellants at 35 (quoting *U.S. Telecom. Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016)); *see Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). The problem, as we've explained, is that social-media platforms *don't* serve the public indiscriminately but, rather, exercise editorial judgment to curate the content that they display and disseminate.

The State seems to argue that even if platforms aren't currently common carriers, their market power and public importance might justify their "legislative designation . . . as common carriers." Br. of Appellants at 36; see *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring) (noting that the Court has suggested that common-carrier regulations "may be justified, even for industries not historically recognized as common carriers, when a business . . . rises from private to be a public concern" (quotation marks omitted)). That might be true for an insurance or telegraph company, whose only concern is whether its "property" becomes "the means of rendering the service which has become of public interest." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring) (quoting *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 408 (1914)). But the Supreme Court has squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just

because it succeeds in the marketplace and hits it big. *See Miami Herald*, 418 U.S. at 251, 258.

In short, because social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren't common carriers, and a state law can't force them to act as such unless it survives First Amendment scrutiny.

C

With one exception, we hold that the challenged provisions of S.B. 7072 trigger First Amendment scrutiny either (1) by restricting social-media platforms' ability to exercise editorial judgment or (2) by imposing disclosure requirements. Here's a brief rundown.

S.B. 7072's content-moderation restrictions all limit platforms' ability to exercise editorial judgment and thus trigger First Amendment scrutiny. The provisions that prohibit deplatforming candidates (§ 106.072(2)), deprioritizing and "shadow-banning" content by or about candidates (§ 501.2041(2)(h)), and censoring, deplatforming, or shadow-banning "journalistic enterprises" (§ 501.2041(2)(j)) all clearly restrict platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable.

The consistency requirement (§ 501.2041(2)(b)) and the 30- day restriction (§ 501.2041(2)(c)) also—if somewhat less obviously— restrict editorial judg-

ment. Together, these provisions force platforms to remove (or retain) all content that is similar to material that they have previously removed (or retained). Even if a platform wants to retain or remove content in an *inconsistent* manner—for instance, to steer discourse in a particular direction— it may not do so. And even if a platform wants to leave certain content up and continue distributing it to users, it can't do so if within the past 30 days it's removed other content that a court might find to be similar. These provisions thus burden platforms' right to make editorial judgments on a case-by-case basis or to change the types of content they'll disseminate—and, hence, the messages they express.

The user-opt-out requirement (§ 501.2041(2)(f), (g)) also triggers First Amendment scrutiny because it forces platforms, upon a user's request, not to exercise the editorial discretion that they otherwise would in curating content—prioritizing some posts and deprioritizing others—in the user's feed. Even if a platform would prefer, for its own reasons, to give greater prominence to some posts while limiting the reach of others, the opt-out provision would prohibit it from doing so, at least with respect to some users.

S.B. 7072's disclosure provisions implicate the First Amendment, but for a different reason. These provisions don't directly restrict editorial judgment or expressive conduct, but *indirectly* burden platforms' editorial judgment by compelling them to disclose certain information. Laws that compel commercial disclosures and thereby indirectly burden protected speech trigger relatively permissive First Amendment

scrutiny, which we will explain. *See Zauderer*, 471 U.S. at 651; *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) ("*NIFLA*").

Finally, the exception: We hold that S.B. 7072's user-data-access requirement (§ 501.2041(2)(i)) does *not* trigger First Amendment scrutiny. This provision—which requires social-media platforms to allow deplatformed users to access their own data stored on the platform's servers for at least 60 days—doesn't prevent or burden to any significant extent the exercise of editorial judgment or compel any disclosure.[18]

* * *

Taking stock: We conclude that social-media platforms' content-moderation activities—permitting, removing, prioritizing, and deprioritizing users and posts—constitute "speech" within the meaning of the First Amendment. All but one of S.B. 7072's operative provisions implicate platforms' First Amendment rights and are therefore subject to First Amendment scrutiny.

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[18] It is theoretically possible that this provision could impose such an inordinate burden on the platforms' First Amendment rights that some scrutiny would apply. But at this stage of the proceedings, the plaintiffs haven't shown a substantial likelihood of success on the merits of their claim that it implicates the First Amendment.

III

A

Having determined that it is substantially likely that S.B. 7072 triggers First Amendment scrutiny, we must now determine the level of scrutiny to apply—and to which provisions.

We begin with the basics. "[A] content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny." *FLFNB II*, 11 F.4th at 1291; *see also Turner*, 512 U.S. at 643–44, 662 (noting that although the challenged provisions "interfere[d] with cable operators' editorial discretion," they were content-neutral and so would be subject only to intermediate scrutiny). A law is content-based if it "suppress[es], disadvantage[s], or impose[s] differential burdens upon speech because of its content," *Turner*, 512 U.S. at 642—*i.e.*, if it "applies to particular speech because of the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A law can be content-based either because it draws "facial distinctions. . . defining regulated speech by particular subject matter" or because, though facially neutral, it "cannot be justified without reference to the content of the regulated speech." *Id.* at 163–64 (quotation marks omitted).

Viewpoint-based laws—"[w]hen the government targets not subject matter, but particular views

taken by speakers on a subject"— constitute "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). They "are prohibited," seemingly as a *per se* matter. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *see Turner*, 512 U.S. at 642 ("The government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed." (quotation marks omitted and alteration adopted)).

1

NetChoice asks us to affirm the district court's conclusion that S.B. 7072's "viewpoint-based *motivation*" subjects the entire Act—every provision—"to strict scrutiny, root and branch." Doc. 113 at 25 (emphasis added). It's certainly true—as already explained— that at least a handful of S.B. 7072's key proponents candidly acknowledged their desire to combat what they perceived to be the "leftist" bias of the "big tech oligarchs" against "conservative" ideas. *Id.* It's also true that the Act applies only to a subset of speakers consisting of the largest social-media platforms and that the law's enacted findings refer to the platforms' allegedly "unfair" censorship. See S.B. 7072 § (9), (10); Fla. Stat. § 501.2041(1)(g). But given the state of our (sometimes dissonant) precedents, we don't think that NetChoice is substantially likely to succeed on the merits of its claim that the entire Act is impermissibly viewpoint-based. Here's why.

We have held—"many times"—that "when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the

lawmakers who passed it acted with a constitutionally impermissible purpose." *In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015). In *Hubbard*, we cited (among other decisions) *United States v. O'Brien* for the proposition that courts shouldn't look to a law's legislative history to find an illegitimate motivation for an otherwise constitutional statute. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). The plaintiffs in *O'Brien* had challenged a law prohibiting the burning of draft cards on the ground that Congress's "purpose"—as evidenced in the statements of several legislators—was "to suppress freedom of speech." 391 U.S. at 382–83. The Supreme Court refused to void the statute "on the basis of what fewer than a handful of Congressmen said about it" given that Congress "had the undoubted power to enact" it if legislators had only made "'wiser' speech[es] about it." *Id.* at 384; *see also Arizona v. California* , 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to enact the [statute], this court may not inquire."). Even though the statute in *O'Brien* regulated expressive conduct and its legislative history suggested a viewpoint-based motivation, the *O'Brien* Court declined to invalidate the statute as a *per se* matter, or even apply strict scrutiny, but rather upheld the law under what we have come to call intermediate scrutiny. 391 U.S. at 382.

To be fair, there is some support for NetChoice's motivation-based argument for invalidating S.B. 7072 in toto, but not enough to overcome the clear statements in *Hubbard* and *O'Brien*. It's true that the Supreme Court said in *Turner* that "even a regulation neutral on its face may be content based if its *manifest*

purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645–46 (emphasis added). And *Turner* cited,with a hazy "cf." signal, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534–535 (1993), which held that in the *free-exercise* context, it was appropriate to look beyond "the text of the laws at issue" to identify discriminatory animus against a minority religion. But NetChoice hasn't cited—and we're not aware of— any Supreme Court or Eleventh Circuit decision that relied on legislative history or statements by proponents to characterize as viewpoint-based a law challenged on *free-speech* grounds.[19] The closest the Supreme Court seems to have come is in *Sorrell v. IMS Health, Inc.*, in which it looked to a statute's "formal legislative findings" to dispel "any doubt" that the challenged

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[19] To be sure, in *Ranch House, Inc. v. Amerson*, we observed that in determining whether a law prohibiting nude-dance establishments had the purpose of "suppress[ing] protected speech," a court could examine the statute's "legislative findings[,] . . . legislative history, and studies and information of which legislators were clearly aware." 238 F.3d 1273, 1280 (11th Cir. 2001). But *Ranch House* is largely inapposite. First, *Ranch House* seems, at most, to have ratified the possibility that a legislature's content-neutral purpose—combatting nude-dance establishments' "secondary effects"—could *save* a law that facially discriminated on the basis of content. Id. at 1279–80 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–48 (1986)). That's the opposite of what NetChoice asks us to do here—i.e., to *invalidate* a facially viewpoint-neutral law on the basis of its legislative history. Second, *Ranch House* recognized that the "[s]econdary effects doctrine is an exception to the general rule that a statute which on its face distinguishes among particular types of speech or expression by content is subject to the strictest scrutiny." *Id.* at 1282. We decline to extend *Ranch House's* limited endorsement of legislative-history reviews beyond the unique nude-dancing and secondary-effects contexts.

statute was content-based. 564 U.S. at 564–65. But the only evidence of viewpoint-based motivation in S.B. 7072's enacted findings are the references to "unfair[ness]." Those, we think, are far less damning than the findings in *Sorrell*, which expressly—and startlingly— stated that the regulated speakers conveyed messages that were "often in conflict with the goals of the state." 564 U.S. at 565 (quotation marks omitted).

Finally, the fact that S.B. 7072 targets only a subset of social-media platforms isn't enough to subject the entire law to strict scrutiny or *per se* invalidation. It's true that the Supreme Court's "precedents are deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others" because they "run the risk that the State has left unburdened those speakers whose messages are in accord with its own views." *NIFLA*, 138 S. Ct. at 2378 (quotation marks omitted); cf. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (noting that the power to "single[] out a few members of the press presents such a potential for abuse that no interest suggested by [the State] can justify the scheme"). But "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others": "[H]eightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[20] *Turner*, 512 U.S. at 660–61 (quoting *Minneapolis Star*, 460 U.S. at 585). S.B. 7072's application

[20] NetChoice suggests that speaker-based laws trigger strict scrutiny, but on our reading of precedent, speaker-based laws

to only the largest social-media platforms might be viewpoint-motivated, *or* it might be based on some other "special characteristic" of large platforms—for instance, their market power. See Appellant's App'x at 237–46. Given *Hubbard* and *O'Brien*—and in the absence of clear precedent enabling us to find a viewpoint-discriminatory purpose based on legislative history—we conclude that NetChoice hasn't shown a substantial likelihood of success on the merits of its argument that S.B. 7072 should be stricken, or subject to strict scrutiny, in its entirety.[21]

2

Having determined that we cannot use the Act's chief proponents' statements as a basis to invalidate S.B. 7072 "root and branch," we must proceed on

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don't constitute an analytical category distinct from content-based and viewpoint-based laws. Rather, speaker-based distinctions trigger strict scrutiny—or perhaps face *per se* invalidation—*when they indicate underlying content- or viewpoint-based discrimination. See Turner*, 512 U.S. at 658 ("[L]aws favoring some speakers over others demand strict scrutiny *when the legislature's speaker preference reflects a content preference*." (emphasis added)); Reed, 576 U.S. at 170 ("Characterizing a distinction as speaker-based is only the beginning—not the end—of our inquiry."). While the *Sorrell* Court noted that the challenged law imposed "a content- and speaker-based burden" that warranted "heightened scrutiny," it's not clear that the law's speaker-based distinctions would have mandated heightened scrutiny had the law not also been content- and viewpoint-based. 564 U.S. at 570–72.

[21] Given the somewhat unsettled state of precedent, we needn't—and don't—decide whether courts can ever refer to a statute's legislative and enactment history to find it viewpoint-based.

a more nuanced basis to determine what sort of scrutiny each provision—or category of provisions—triggers.

To start, we hold that it is substantially likely that what we have called the Act's content-moderation restrictions are subject to either strict or intermediate First Amendment scrutiny, depending on whether they are content-based or content-neutral. *See FLFNB II*, 11 F.4th at 1291–92. Some of these provisions are self-evidently content-based and thus subject to strict scrutiny. The journalistic enterprises provision, for instance, prohibits a platform from making content-moderation decisions concerning any "journalistic enterprise *based on the content of* " its posts, Fla. Stat. § 501.2041(2)(j) (emphasis added), and thus applies "because of the . . . message" that the platform's decision expresses, *Reed*, 576 U.S. at 163: Removing a journalistic enterprise's post, for instance, because it is duplicative or too big is permissible, but removing a post to communicate disapproval of its content isn't. Similarly, the restriction on deprioritizing posts "about . . . a candidate," *id.* § 501.2041(2)(h), regulates speech based on "the topic discussed," *Reed*, 576 U.S. at 163, and is therefore clearly content-based. At the other end of the spectrum, the candidate-deplatforming (§ 106.072(2)) and user-optout (§ 501.2041(2)(f), (g)) provisions are pretty obviously content neutral. Neither a prohibition on banishing political candidates nor a requirement that platforms allow users to decline content curation depends in any way on the substance of platforms' content moderation decisions.

Some of the provisions—for instance, § 501.2041(2)(b)'s requirement that platforms exercise their content-moderation authority "consistently"—may exhibit both content-based and content- neutral characteristics. Ultimately, though, we find that we needn't precisely categorize each and every one of S.B. 7072's content- moderation restrictions because it is substantially likely that they are all "regulation[s] of expressive conduct" that, at the very least, trigger intermediate scrutiny, *FLFNB II*, 11 F.4th at 1291–92—and, for reasons we'll explain in the next Part, none survive even that, cf. *Sorrell*, 564 U.S. at 571 (noting that because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied . . . there is no need to determine whether all speech hampered by [the law] is commercial").

A different standard applies to S.B. 7072's disclosure provisions—§ 106.072(4) and § 501.2041(2)(a), (c), (e), (4). These are content-neutral regulations requiring social-media platforms to disclose "purely factual and uncontroversial information" about their conduct toward their users and the "terms under which [their] services will be available," which are assessed under the standard announced in *Zauderer*. 471 U.S. at 651. While "restrictions on non-misleading commercial speech regarding lawful activity must withstand intermediate scrutiny," when "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech . . . the less exacting scrutiny described in *Zauderer* governs our review." *Milavetz, Gallop & Milavetz, P.A. v. United*

States, 559 U.S. 229, 249 (2010). Although this standard is typically applied in the context of advertising and to the government's interest in preventing consumer deception, we think it is broad enough to cover S.B. 7072's disclosure requirements—which, as the State contends, provide users with helpful information that prevents them from being misled about platforms' policies.

B

At last, it is time to apply the requisite First Amendment scrutiny. We hold that it is substantially likely that none of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny. We further hold that there is a substantial likelihood that the "thorough explanation" disclosure requirement (§ 501.2041(2)(d)) is unconstitutional. As for the remaining disclosure provisions, we hold that it is not substantially likely that they are unconstitutional.[22]

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[22] We agree with the State that only those provisions of the Act that are substantially likely to be unconstitutional should be enjoined. The Act contains a severability clause that says that the invalidity of any provision "shall not affect other provisions or applications of the act which can be given effect without" it. S.B. 7072 § 6. Under Florida law, "[t]he severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." *Emerson v. Hillsborough County*, 312 So. 3d 451, 460 (Fla. 2021). The plaintiff bears the burden to establish that the measure isn't severable. *Id.* Here, the severability clause reflects the Florida legislature's intent to give effect to every constitutionally permissible provision of the Act, and, with the exception of its argument

We'll start with S.B. 7072's content-moderation restrictions. While some of these provisions are likely subject to strict scrutiny, it is substantially likely that none survive even intermediate scrutiny. When a law is subject to intermediate scrutiny, the government must show that it "is narrowly drawn to further a substantial governmental interest . . . unrelated to the suppression of free speech." *FLFNB II*, 11 F.4th at 1291. Narrow tailoring in this context means that the regulation must be "no greater than is essential to the furtherance of [the government's] interest." *O'Brien*, 391 U.S. at 377.

We think it substantially likely that S.B. 7072's content-moderation restrictions do not further any substantial governmental interest— much less any compelling one. Indeed, the State's briefing doesn't even argue that these provisions can survive heightened scrutiny. (The State seems to have wagered pretty much everything on the argument that S.B. 7072's provisions don't trigger First Amendment scrutiny at all.) Nor can we discern any substantial or compelling interest that would justify the Act's significant restrictions on platforms' editorial judgment. We'll briefly explain and reject two possibilities that the State might offer.

The State might theoretically assert some interest in counteracting "unfair" private "censorship" that privileges some viewpoints over others on social-

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that the entire Act is viewpoint-based, NetChoice hasn't argued that any of the provisions are inseverable.

media platforms. *See S.B.* 7072 § 1(9). But a state "may not burden the speech of others in order to tilt public debate in a preferred direction," *Sorrell*, 564 U.S. at 578–79, or "advance some points of view," *Pacific Gas*, 475 U.S. at 20 (plurality op.). Put simply, there's no legitimate—let alone substantial— governmental interest in leveling the expressive playing field. Nor is there a substantial governmental interest in enabling users—who, remember, have no vested right to a social-media account— to say whatever they want on privately owned platforms that would prefer to remove their posts: By preventing platforms from conducting content moderation—which, we've explained, is itself expressive First-Amendment-protected activity—S.B. 7072 "restrict[s] the speech of some elements of our society in order to enhance the relative voice of others"—a concept "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976). At the end of the day, preventing "unfair[ness]" to certain users or points of view isn't a substantial governmental interest; rather, private actors have a First Amendment right to be "unfair"— which is to say, a right to have and express their own points of view. *Miami Herald*, 418 U.S. 258.

The State might also assert an interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner*, 512 U.S. at 662. Just as the *Turner* Court held that the must-carry provisions served the government's substantial interest in ensuring that American citizens were able to access their "local broadcasting outlets," *id.* at 663–64, the State could argue that S.B. 7072 ensures that political candidates and journalistic enterprises are

able to communicate with the public, see Fla. Stat. §§ 106.072(2); 501.2041(2)(f), (j). But it's hard to imagine how the State could have a "substantial" interest in forcing large platforms— and only large platforms— to carry these parties' speech: Unlike the situation in *Turner*, where cable operators had "bottleneck, or gatekeeper control over most programming delivered into subscribers' homes," 512 U.S. at 623, political candidates and large journalistic enterprises have numerous ways to communicate with the public besides any particular social-media platform that might prefer not to disseminate their speech—*e.g.*, other more-permissive platforms, their own websites, email, TV, radio, etc. *See Reno*, 521 U.S. at 870 (noting that unlike the broadcast spectrum, "the internet can hardly be considered a 'scarce' expressive commodity" and that "[t]hrough the use of Web pages, mail exploders, and newsgroups, [any] individual can become a pamphleteer"). Even if other channels aren't as *effective* as, say, Facebook, the State has no substantial (or even legitimate) interest in restricting *platforms'* speech—the messages that platforms express when they remove content they find objectionable—to "enhance the relative voice" of certain candidates and journalistic enterprises. *Buckley*, 424 U.S. at 48–49.

There is also a substantial likelihood that the consistency, 30- day, and user-opt-out provisions (§ 501.2041(2)(b), (c), (f), (g)) fail to advance substantial governmental interests. First, it is substantially unlikely that the State will be able to show an interest sufficient to justify requiring private actors to apply their content moderation policies—to speak—"consistently." *See* § 501.2041(2)(b). Is there any interest

that would justify a state forcing, for instance, a parade organizer to apply its criteria for participation in a manner that the state deems "consistent"? Could the state require the organizer to include a group that it would prefer to exclude on the ground that it allowed similar groups in the past, or vice versa? We think not. *See Hurley*, 515 U.S. at 573–74. Because social-media platforms exercise analogous editorial judgment, the same answer applies to them. Second, there is likely no governmental interest sufficient to justify prohibiting a platform from changing its content-moderation policies—*i.e.*, prohibiting a private speaker from changing the messages it expresses—more than once every 30 days. *See* § 501.2041(2)(c). Finally, there is likely no governmental interest sufficient to justify forcing platforms to show content to users in a "sequential or chronological" order, *see* § 501.2041(2)(f), (g)—a requirement that would prevent platforms from expressing messages through post-prioritization and shadow banning.

Moreover, and in any event, even if the State could establish that its content-moderation restrictions serve a substantial governmental interest, it hasn't even attempted to—and we don't think it could—show that the burden that those provisions impose is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. For instance, §§ 106.072(2) and 501.2041(2)(h) prohibit deplatforming, deprioritizing, or shadow- banning candidates regardless of how blatantly or regularly they violate a platform's community standards and regardless of what alternative avenues the candidate has for communicating with the public. These provisions

would apply, for instance, even if a candidate repeatedly posted obscenity, hate speech, and terrorist propaganda. The journalistic-enterprises provision requires platforms to allow any entity with enough content and a sufficient number of users to post *anything* it wants—other than true "obscen[ity]"— and even prohibits platforms from adding disclaimers or warnings. See Fla. Stat. § 501.2041(2)(j). As one amicus vividly described the problem, the provision is so broad that it would prohibit a child friendly platform like YouTube Kids from removing—or even adding an age gate to—soft-core pornography posted by PornHub, which qualifies as a "journalistic enterprise" because it posts more than 100 hours of video and has more than 100 million viewers per year. See Chamber of Progress Amicus Br. at 12.[23] That seems to us the opposite of narrow tailoring.

We conclude that NetChoice has shown a substantial likelihood of success on the merits of its claim that S.B. 7072's content moderation restrictions—in Fla. Stat. §§ 106.072(2), 501.2041(2)(b), (c), (f), (g), (h), (j)—violate the First Amendment.

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We assess S.B. 7072's disclosure requirements—in §§ 106.072(4), 501.2041(2)(a), (c), (d), (e))—

[23] Even worse, S.B. 7072 would seemingly prohibit Facebook or Twitter from removing a video of a mass shooter's killing spree if it happened to be reposted by an entity that qualifies for "journalistic enterprise" status.

under the *Zauderer* standard: A commercial disclosure requirement must be "reasonably related to the State's interest in preventing deception of consumers" and must not be "[u]njustified or unduly burdensome" such that it would "chill[] protected speech." *Milavetz*, 559 U.S. at 250 (citing *Zauderer*, 471 U.S. at 651).

With one notable exception, it is not substantially likely that the disclosure provisions are unconstitutional. The State's interest here is in ensuring that users—consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies.[24] This interest is likely legitimate. On the ensuing burden question, NetChoice hasn't established a substantial likelihood that the provisions that require platforms to publish their standards (§ 501.2041(2)(a)), inform users about changes to their rules (§ 501.2041(2)(c)), provide users with view counts for their posts, (§ 501.2041(2)(e)), and inform candidates about free advertising (§ 106.072(4)), are unduly burdensome or likely to chill

[24] This interest likely applies to all of the disclosure provisions with the possible exception of the candidate-free-advertising provision (§ 106.072(4)). Neither party has addressed that provision in any detail, but it might serve a legitimate purpose in ensuring that candidates who purchase advertising from platforms are fully informed about the "free advertising" that the platform has already provided so that they can make better ad-purchasing decisions. While there is some uncertainty in the interest this provision serves and the meaning of "free advertising," we conclude that at this stage of the proceedings, NetChoice hasn't shown that it is substantially likely to be unconstitutional.

platforms' speech. So, these provisions aren't substantially likely to be unconstitutional.[25]

But NetChoice *does* argue that § 501.2041(2)(d)—the requirement that platforms provide notice and a detailed justification for every content-moderation action—is "practically impossible to satisfy." Br. of Appellees at 49. We conclude that it is substantially likely that this provision is unconstitutional under *Zauderer* because it is unduly burdensome and likely to chill platforms' protected speech. The targeted platforms remove millions of posts per day; YouTube alone removed more than a billion comments in a single quarter of 2021. *See* Doc. 25-1 at 6. For every one of these actions, the law requires a platform to provide written notice delivered within seven days, including a "thorough rationale" for the decision and a "precise and thorough explanation of how [it] became aware" of the material. *See* § 501.2041(3). 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." *See* § 501.2041(6)(a). 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"—platforms' exercise

[25] Of course, NetChoice still might establish during the course of litigation that these provisions are unduly burdensome and therefore unconstitutional.

of editorial judgment—such that § 501.2041(2)(d) violates platforms' First Amendment rights. *Milavetz*, 559 U.S. at 250.

* * *

It is substantially likely that S.B. 7072's content-moderation restrictions (§§ 106.072(2), 501.2041(2)(b), (c), (f), (g), (h), (j)) and its requirement that platforms provide a thorough rationale for every content-moderation action (§ 501.2041(2)(d)) violate the First Amendment. The same is not true of the Act's other disclosure provisions (§§ 106.072(4), 501.2041(2)(a), (c), (e)) and its user-data access provision (§ 501.2041(2)(i)).[26]

IV

Finally, we turn to the remaining preliminary-injunction factors. Our conclusions about which provisions of S.B. 7072 are substantially likely to violate the First Amendment effectively determine the result of this appeal because likelihood of success on the

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[26] Nor are these provisions substantially likely to be preempted by 47 U.S.C. § 230. Neither NetChoice nor the district court asserted that § 230 would preempt the disclosure, candidate-advertising, or user-data-access provisions. It is not substantially likely that any of these provisions treat social-media platforms "as the publisher or speaker of any information provided by" their users, 47 U.S.C. § 230(c)(1), or hold platforms "liable on account of" an "action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," *id.* § 230(c)(2)(A).

merits "is generally the most important of the four factors." *Gonzalez*, 978 F.3d at 1271 n.12 (quotation marks omitted). With respect to the second factor, we have held that "an ongoing violation of the First Amendment"—as the platforms here would suffer in the absence of an injunction—"constitutes an irreparable injury." *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017); *see also Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020). The third and fourth factors—"damage to the opposing party" and the "public interest"—"can be consolidated" because "[t]he nonmovant is the government." *Otto*, 981 F.3d at 870. And "neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance." *Id.* Therefore, the preliminary-injunction factors weigh in favor of enjoining the likely unconstitutional provisions of the Act.

* * *

We hold that the district court did not abuse its discretion when it preliminarily enjoined those provisions of S.B. 7072 that are substantially likely to violate the First Amendment. But the district court did abuse its discretion when it enjoined provisions of S.B. 7072 that aren't likely unconstitutional. Accordingly, we **AFFIRM** the preliminary injunction in part, and **VACATE** and **REMAND** in part, as follows:

Provision	**Fla. Stat. §**	**Likely Constitutionality**	**Disposition**
Candidate Deplatforming	106.072(2)	Unconstitutional	**Affirm**

Posts by/about candidates	501.2041(2)(h)	Unconstitutional	**Affirm**
"Journalistic enterprises"	501.2041(2)(j)	Unconstitutional	**Affirm**
Consistency	501.2041(2)(b)	Unconstitutional	**Affirm**
30-day restriction	501.2041(2)(c)	Unconstitutional	**Affirm**
User opt-out	501.2041(2)(f)(g)	Unconstitutional	**Affirm**
Explanations (per decision)	501.2041(2)(d)	Unconstitutional	**Affirm**
Standards	501.2041(2)(a)	Constitutional	**Vacate**
Rule Changes	501.2041(2)(c)	Constitutional	**Vacate**
User View counts	501.2041(2)(e)	Constitutional	**Vacate**
Candidate "free advertis-ing"	106.072(4)	Constitutional	**Vacate**
User-data ac-cess	501.2041(2)(l)	Constitutional	**Vacate**

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NETCHOICE, LLC et al.,

Plaintiffs,

v. CASE NO. 4:21cv220-RH-MAF

ASHLEY BROOKE MOODY et al.,

Defendants.
_____/

PRELIMINARY INJUNCTION

The State of Florida has adopted legislation that imposes sweeping requirements on some but not all social-media providers. The legislation applies only to large providers, not otherwise-identical but smaller providers, and explicitly exempts providers under common ownership with any large Florida theme park. The legislation compels providers to host speech that violates their standards—speech they otherwise would not host—and forbids providers from speaking as they otherwise would. The Governor's signing statement and numerous remarks of legislators show rather clearly that the legislation is viewpoint-based. And parts contravene a federal statute. This order preliminarily enjoins enforcement of the parts of the legislation that are preempted or violate the First Amendment.

I. The Lawsuit

The plaintiffs are NetChoice, LLC and Computer & Communications Industry Association. Both are trade associations whose members include social-media providers subject to the legislation at issue. The plaintiffs assert the rights of their affected members and have standing to do so. *See, e.g., Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977).

The defendants are the Attorney General of Florida, the members of the Florida Elections Commission, and a Deputy Secretary of the Florida Department of Management Services, all in their official capacities. The plaintiffs named the Deputy Secretary because the Secretary's position was vacant. Each of the defendants has a role in enforcement of the provisions at issue and is a proper defendant under Ex parte Young, 209 U.S. 123 (1908). For convenience, this order sometimes refers to the defendants simply as "the State."

The complaint challenges Senate Bill 7072 as adopted by the 2021 Florida Legislature ("the Act"). The Act created three new Florida statutes: § 106.072, § 287.137, and § 501.2041. The Act also included findings and a severability clause. The Act is scheduled to take effect on July 1, 2021.

Count 1 of the complaint alleges the Act violates the First Amendment's free-speech clause by interfering with the providers' editorial judgment, compelling speech, and prohibiting speech. Count 2 alleges the Act is vague in violation of the Fourteenth Amendment. Count 3 alleges the Act violates the Fourteenth Amendment's equal protection clause by

impermissibly discriminating between providers that are or are not under common ownership with a large theme park and by discriminating between providers that do or do not meet the Act's size requirements. Count 4 alleges the Act violates the Constitution's dormant commerce clause. Count 5 alleges the Act is preempted by 47 U.S.C. § 230(e)(3), which, together with § 230(c)(2)(A), expressly prohibits imposition of liability on an interactive computer service—this includes a social-media provider—for action taken in good faith to restrict access to material the service finds objectionable.

The plaintiffs have moved for a preliminary injunction. The motion has been fully briefed and orally argued. Each side has submitted evidentiary material. The motion is ripe for a decision.

II. Preliminary-Injunction Standard

As a prerequisite to a preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest. *See, e.g., Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

This order addresses these prerequisites. The order addresses the merits because likelihood of success on the merits is one of the prerequisites. With further factual development, the analysis may change.

Statements in this order about the facts should be understood to relate only to the current record and the properly considered material now available. Statements about the merits should be understood only as statements about the likelihood of success as viewed at this time.

III. The Statutes

A. Terminology

Before setting out the substance of the challenged statutes, a word is in order about terminology. This order sometimes uses the term "social-media provider" to refer to what most people on the street would probably understand that term to mean—so YouTube, Facebook, Twitter, and dozens of smaller but similar providers. The distinguishing characteristic is perhaps this: the primary function of a social-media provider, or at least a primary function, is to receive content from users and in turn to make the content available to other users. This is hardly a precise definition, but none is needed; the term is used only for purposes of this order. The term "social-media provider," as used in this order, is not limited to providers who are covered by the challenged statutes; the term is used instead to apply to all such entities, including those smaller than the providers covered by the statutes and those under common ownership with a large theme park.

The challenged statutes, in contrast, use a slightly different term, "social media *platform*." See Fla. Stat. § 501.2041(1)(g) (emphasis added). There is no significance to this order's use of "provider" to describe all social-media entities instead of "platform"—

the word the statutes use to define the more limited set of entities covered by the statutes. The order just needs different terms to refer to the substantially different sets of entities.

When this order uses "social media platform"—the statutory term—with or without quotation marks, the reference ordinarily will be to an entity that both meets the statutory definition *and* is a social-media provider as described above. This order sometimes shortens the phrase to a single word: "platform." At least on its face, the statutory definition also applies to systems nobody would refer to as social media; the definition says nothing about sharing content with other users. The State says the definition should nonetheless be understood to be limited to providers of social media within the common understanding—the State says this comports with the statutory findings and the statutes' obvious purpose. The State may be correct. For present purposes it makes no difference.

B. Removing Candidates

A social-media provider sometimes bars a specific user from posting on the provider's site. This can happen, for example, when a user violates the provider's standards by engaging in fraud, spreading a foreign government's disinformation, inciting a riot or insurrection, providing false medical or public-health information, or attempting to entice minors for sexual encounters.

Newly enacted Florida Statutes § 106.072 prohibits a social media platform from barring from its site any candidate for office—that is, any person who has filed qualification papers and subscribed to the

candidate's oath. See Fla. Stat. § 106.011(3)(e). It is a low bar.

C. Posts "By or About" a Candidate

A social-media provider sometimes takes down a user's post, sometimes restricts access to a post, and sometimes adds content to a post, saying, for example, that a post has been determined not to be true or that accurate information on the subject can be found at a specified location. And a social-media provider sometimes rearranges content on its site, including, for example, by making more readily available to a user content the provider believes the user will most wish to see. Social-media providers also often elevate content—make it more readily available to chosen users—when paid by advertisers to do so. Social-media providers routinely use algorithms as part of these processes.

Florida Statutes § 501.2041(2)(h) prohibits a social media platform from using "post-prioritization or shadow banning algorithms" for content "posted by or about a user" who is known by the platform to be a candidate for office. The statute does not define "about" a candidate. "Post-prioritization" means "action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results." Fla. Stat. § 501.2041(1)(e). But the term does not apply to ads—to content the platform is paid to carry. *Id.* "Shadow ban" means action by a social media platform "to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." *Id.* § 501.2041(1)(f).

At least by its terms, § 501.2041(2)(h) apparently prohibits a social media platform from using an algorithm to put a candidate's post in the proper feeds—to put the post in the feed of a user who wishes to receive it or to exclude the candidate's post from the feed of a user who does not wish to receive it. Including a post in the feed of a user who wishes to receive it places the post ahead of and in a more prominent position that the many posts the user will not receive at all. Excluding a post from the feed of a user who does not wish to receive it will eliminate the user's exposure to the post.

In any event, the statute does not explain how, if the platform cannot use an algorithm "for content" by or about a candidate, the platform can know, before it has violated the statute by using an algorithm, whether a post is by or about a candidate.

The statute has a paid-content exception to the post-prioritization ban: post-prioritization of "certain content or material" from or about a candidate based on payments from the candidate or a third party is not a violation. The statute does not specify what "certain" refers to—if it just means all such paid content, the word "certain" is superfluous. But the whole paid-content exception may be superfluous anyway; the definition of post-prioritization has its own paid-content exception. *See id.* § 501.2041(1)(e).

D. Posts by a "Journalistic Enterprise"

Florida Statutes § 501.2041(2)(j) prohibits a social media platform from taking action to "censor, deplatform, or shadow ban" a "journalistic enterprise" based on the content of its publication or broadcast.

"Censor" is broadly defined to include not just deleting content but adding content:

> "Censor" includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.

Fla. Stat. § 501.2041(1)(b). "Deplatform" means to ban a user permanently or for longer than 14 days. *Id.* § 501.2041(1)(c). "Shadow ban" has the meaning set out above. *See id.* § 501.2041(1)(f).

The statute defines "journalistic enterprise" in a manner that covers many entities that are engaged in journalism but many that are not; any retailer who does business in Florida, has a website of substantial size, and fills 100,000 online orders per month apparently qualifies. A small newspaper, in contrast—one with fewer than 50,000 paid subscribers and fewer than 100,000 active monthly users—does not qualify, no matter how high its journalistic standards. The definition provides:

> "Journalistic enterprise" means an entity doing business in Florida that:
>
> 1. Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
> 2. Publishes 100 hours of audio or video available online with at least 100 million viewers annually;

3. Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
4. Operates under a broadcast license issued by the Federal Communications Commission.

Fla. Stat. § 501.2041(1)(d).

The restrictions on a platform's treatment of posts by journalistic enterprises have two exceptions: they do not apply to obscenity or paid content.

E. Opting Out of Post-Prioritization and Shadow Banning

Florida Statutes § 501.2041(2)(f) requires a social media platform to "[c]ategorize" algorithms used for post-prioritization and shadow banning and to allow a "user" to "opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content." On its face, this allows a user who posts content to insist it be shown to other users in chronological order—not in the order the recipient has otherwise specified or the order that, based on the recipient's profile and history, the social media platform believes would be most preferred by or useful to the recipient. It is not clear how a social media platform would display content posted by multiple users who all opt out—a wild west of content on which the platform would be prohibited from using an algorithm.

The State says, though, that "user" in § 501.2041(2)(f) means only a recipient of information, not a person who posts information. But "user" is explicitly defined in the statute to mean a person who

resides or is domiciled in Florida and "has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform." *Id.* § 501.2041(1)(h). Those who post content have accounts, no less than those who receive content. And "user" is consistently used in other provisions to include those who post content, not just recipients. *See, e.g., id.* § 501.2041(2)(d) (prohibiting a social media platform from censoring or shadow banning "a user's content" or deplatforming "a user" without meeting specific conditions); *id.* § 501.2041(2)(e) (allowing "a user" to request the number of participants "who were provided or shown *the user's content or posts*") (emphasis added); id. § 501.2041(2)(h) (restricting treatment of content "posted by . . . *a user*") (emphasis added); *see also id.* § 501.2041(2)(b), (c), (g) & (i).

F. Consistent Application of Standards

Florida Statutes § 501.2041(2)(a) requires a social media platform to "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." And § 501.2041(2)(b) requires a social media platform to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." The State says "standards," in § 501.2041(2)(b), means the platform's own standards, as published under § 501.2041(2)(a). That is probably correct.

The statute does not define "consistent manner." And the statute does not address what a social media platform should do when the statute itself pro-

hibits consistent application of the platform's standards—for example, when a candidate engages in conduct that would appropriately lead to deplatforming any other person, or when content "by or about" a candidate, if by or about anyone else, would be post-prioritized, or when a "journalistic enterprise" posts content that would otherwise be censored.

G. Changing the Standards

Florida Statutes § 501.2041(2)(c) prohibits a social media platform from changing its "user rules, terms, and agreements"—this apparently includes the standards published under § 501.2041(2)(a)—more often than once every 30 days. The provision requires the social media platform to inform each user about any changes before they take effect.

H. Information

Florida Statutes § 501.2041(2) includes additional provisions requiring social media platforms to provide information to users.

Under § 501.2042(2)(d), a platform must give notice to a user who is deplatformed or who posts content that is censored or shadow banned. Under § 501.2041(2)(i), the platform must allow a deplatformed user access to the user's content for 60 days after the notice. The notice for censored content must be especially detailed: it must include a "thorough rationale explaining the reason that the social media platform censored the user," § 501.2041(3)(c), and a "precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's

content or material as objectionable." *Id.* § 501.2041(3)(d). The notice need not be given, however, for censored content that is obscene. *Id.* § 501.2041(4).

Under § 501.2041(2)(e), a platform must, on request, tell a user how many other participants were shown the user's posts or content.

Under § 501.2041(2)(g), a platform must provide users annual notice of algorithms used for post-prioritization and shadow banning and of their right to opt out of the use of those algorithms.

I. Antitrust

Florida Statutes § 287.137 allows the State to debar from public contracting a social media platform that has committed, or sometimes just been accused of, an antitrust violation. The section raises issues under both state and federal law, but it poses no threat of immediate, irreparable harm to social media platforms. The statute is not further addressed in, or enjoined by, this order.

IV. Likelihood of Success on the Merits

A. 47 U.S.C. § 230

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at
*3–4 (N.Y. Sup. Ct. May 24, 1995), an anonymous user posted allegedly defamatory content on an electronic bulletin board—an earlier version of what today might be called social media. The court said that if the provider of such a bulletin board did not undertake to review posted content—much as a librarian does not undertake to review all the books in a library—the

provider would not be deemed the publisher of a defamatory post, absent sufficient actual knowledge of the defamatory nature of the content at issue. On the facts of that case, though, the provider undertook to screen the posted content—to maintain a "family oriented" site. The court held this subjected the provider to liability as a publisher of the content.

At least partly in response to that decision, which was deemed a threat to development of the internet, Congress enacted 47 U.S.C. § 230. Congress sought "to encourage service providers to self-regulate the dissemination of offensive material over their services," *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), and to allow "computer service providers to establish standards of decency without risking liability for doing so," *Domen v. Vimeo, Inc.*, 991 F.3d 66, 73 (2d Cir. 2021).

Under § 230, a provider of interactive computer services—this includes, as things have evolved, a social-media provider—cannot be "held liable" for any action "taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2). The statute says it does not prevent a state from enforcing any *consistent* state law—the federal statute thus does not preempt the field—but the statute does expressly preempt *inconsistent* state laws: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

Florida Statutes § 106.072 prohibits a social media platform from deplatforming a candidate for office and imposes substantial fines: $250,000 per day

for a statewide office and $25,000 per day for any other office. But deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2). If this is done in good faith—as can happen—the Florida provision imposing daily fines is preempted by § 230(e)(3). Good faith, for this purpose, is determined by federal law, not state law. Removing a candidate from a platform based on otherwise-legitimate, generally applicable standards—those applicable to individuals who are not candidates—easily meets the good-faith requirement. Indeed, even a mistaken application of standards may occur in good faith.

The federal statute also preempts the parts of Florida Statutes § 501.2041 that purport to impose liability for other decisions to remove or restrict access to content. See Fla. Stat. § 501.2041(6) (creating a private right of action for damages for violations of § 501.2041(2)(b) and (2)(d)1; *id.* § 501.2041(2)(b) (requiring a social media platform to apply censorship, deplatforming, and shadow banning standards in a consistent manner); id. § 501.2041(2)(d)1 (prohibiting a social media platform from deplatforming a user or censoring or shadow banning a user's content without notifying the user); § 501.2041(2) (making any violation of that subsection an unfair or deceptive act or practice within the meaning of § 501.204—and thus providing a private right of action for damages under § 501.211).

Claims based on alleged inconsistency of a platform's removal of some posts but not others are preempted. *See Domen*, 991 F.3d at 73.

In sum, the plaintiffs are likely to prevail on their challenge to the preempted provisions—to those applicable to a social media platform's restriction of access to posted material. This does not, however, invalidate other provisions; for those, the plaintiffs' challenge must rise or fall with their constitutional claims.

B. First Amendment

1. Application to Social-Media Providers

Although a primary function of social-media providers is to receive content from users and in turn to make the content available to other users, the providers routinely manage the content, allowing most, banning some, arranging content in ways intended to make it more useful or desirable for users, sometimes adding the providers' own content. The plaintiffs call this curating or moderating the content posted by users. In the absence curation, a social-media site would soon become unacceptable—and indeed useless—to most users.

The plaintiffs say—correctly—that they use editorial judgment in making these decisions, much as more traditional media providers use editorial judgment when choosing what to put in or leave out of a publication or broadcast. The legislative record is chock full of statements by state officials supporting the view that the providers do indeed use editorial judgment. A constant theme of legislators, as well as the Governor and Lieutenant Governor, was that the providers' decisions on what to leave in or take out and how to present the surviving material are ideologically biased and need to be reined in.

Where social media fit in traditional First Amendment jurisprudence is not settled. But three things are clear.

First, the State has asserted it is on the side of the First Amendment; the plaintiffs are not. It is perhaps a nice sound bite. But the assertion is wholly at odds with accepted constitutional principles. The First Amendment says "Congress" shall make no law abridging the freedom of speech or of the press. The Fourteenth Amendment extended this prohibition to state and local governments. The First Amendment does not restrict the rights of private entities not performing traditional, exclusive public functions. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). So whatever else may be said of the providers' actions, they do not violate the First Amendment.

Second, the First Amendment applies to speech over the internet, just as it applies to more traditional forms of communication. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that prior cases, including those allowing greater regulation of broadcast media, "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to the internet).

Third, state authority to regulate speech has not increased even if, as Florida argued nearly 50 years ago and is again arguing today, one or a few powerful entities have gained a monopoly in the marketplace of ideas, reducing the means available to candidates or other individuals to communicate on matters of public interest. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court rejected

just such an argument, striking down a Florida statute requiring a newspaper to print a candidate's reply to the newspaper's unfavorable assertions. A similar argument about undue concentration of power was commonplace as the social-media restrictions now at issue advanced through the Florida Legislature. But here, as in *Tornillo*, the argument is wrong on the law; the concentration of market power among large social-media providers does not change the governing First Amendment principles. And the argument is also wrong on the facts. Whatever might be said of the largest providers' monopolistic conduct, the internet provides a greater opportunity for individuals to publish their views—and for candidates to communicate directly with voters—than existed before the internet arrived. To its credit, the State does not assert that the dominance of large providers renders the First Amendment inapplicable.

That brings us to issues about First Amendment treatment of social-media providers that are not so clearly settled. The plaintiffs say, in effect, that they should be treated like any other speaker. The State says, in contrast, that social-media providers are more like common carriers, transporting information from one person to another much as a train transports people or products from one city to another. The truth is in the middle.

More generally, the plaintiffs draw support from three Supreme Court decisions in which a state mandate for a private entity to allow unwanted speech was held unconstitutional. On the State's side are two Supreme Court decisions in which a state or federal mandate for a private entity to allow unwanted speech was held constitutional. Each side claims the cases on

its side are dispositive, but this case again falls in the middle. On balance, the decisions favor the plaintiffs.

The plaintiffs push hardest of *Tornillo*, which, as set out above, held unconstitutional the Florida statute requiring a newspaper to allow a candidate to reply to the newspaper's unfavorable statements. But newspapers, unlike social-media providers, create or select all their content, including op-eds and letters to the editor. Nothing makes it into the paper without substantive, discretionary review, including for content and viewpoint; a newspaper is not a medium invisible to the provider. Moreover, the viewpoint that would be expressed in a reply would be at odds with the newspaper's own viewpoint. Social media providers, in contrast, routinely use algorithms to screen all content for unacceptable material but usually not for viewpoint, and the overwhelming majority of the material never gets reviewed except by algorithms. Something well north of 99% of the content that makes it onto a social media site never gets reviewed further. The content on a site is, to that extent, invisible to the provider.

Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U. S. 557 (1995), a state court ruled that the state's public-accommodation law required an association conducting a private parade to allow participation by an organization advocating gay rights. The parade association asserted the gay-rights group's participation would contravene what the association was attempting to communicate. The Supreme Court held the association had a First Amendment right to exclude the gay-rights group. Again, though, the parade involved a

limited number of participants, all undoubtedly approved in the association's discretionary judgment, including for viewpoint. This was not an invisible-to-the-provider event.

The third case on the plaintiffs' side is *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986). There a public utility included in its billing envelopes its own viewpoint-laden newsletters. The state directed the utility to include in its billing envelopes four times per year a private watchdog organization's newsletters setting out a viewpoint with which the utility disagreed. The Supreme Court held this unconstitutional. The utility undoubtedly knew precisely what went into its billing envelopes and newsletters; as in *Tornillo* and *Hurley*, this was not an invisible-to-the-provider forum.

These three cases establish that a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner—in each of these instances, content with which the party disagreed. But social-media providers do not use editorial judgment in quite the same way. The content on their sites is, to a large extent, invisible to the provider.

Even so, the activities of social media platforms that are the focus of the statutes now at issue are not the routine posting of material without incident or the routine exclusion without incident of plainly unacceptable content. These statutes are concerned instead primarily with the ideologically sensitive cases. Those are the very cases on which the platforms are most likely to exercise editorial judgment. Indeed, the

targets of the statutes at issue are the editorial judgments themselves. The State's announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*, *Hurley*, and *PG&E*.

On the other side, the State pushes hardest on *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). There the Court upheld a federal statute conditioning law schools' receipt of federal funds on allowing military recruiters the same access as other recruiters to the school's facilities and students. The Court held this was, for the most part, conduct, not speech. Indeed, the schools objected not primarily because they disagreed with anything they expected the recruiters to do or say on campus, but because they disagreed with the government's policy on gays in the military. The statute did not require the schools to say anything at all, nor did the statute prohibit the schools from saying whatever they wished whenever and however they wished. It was unlikely anyone would conclude, from the military recruiters' presence, that the schools supported the military's policy.

Similarly, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a shopping center refused to allow individuals to solicit petition signatures from members of the public at the shopping center. The California Supreme Court held the individuals had the right, under state law, to engage in the proposed activity. The ruling did not compel the shopping center to say anything at all, and the ruling did not prohibit the center from saying anything it wished, when and how it wished. The United States Supreme Court

said it was unlikely anyone would attribute the solicitation activities to the shopping center and, with no state action compelling the center to speak or restricting it from doing so, there was no violation of the First Amendment.

FAIR and *PruneYard* establish that compelling a person to allow a visitor access to the person's property, for the purpose of speaking, is not a First Amendment violation, so long as the person is not compelled to speak, the person is not restricted from speaking, and the message of the visitor is not likely to be attributed to the person. The Florida statutes now at issue, unlike the state actions in *FAIR* and *PruneYard*, explicitly forbid social media platforms from appending their own statements to posts by some users. And the statutes compel the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites. This is a far greater burden on the platforms' own speech than was involved in *FAIR* or *PruneYard*.

In sum, it cannot be said that a social media platform, to whom most content is invisible to a substantial extent, is indistinguishable for First Amendment purposes from a newspaper or other traditional medium. But neither can it be said that a platform engages only in conduct, not speech. The statutes at issue are subject to First Amendment scrutiny.

2. Strict Scrutiny

Viewpoint- and content-based restrictions on speech are subject to strict scrutiny. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015). A law restricting speech is content-based if it "applies to particular speech because of the topic discussed or the

idea or message expressed." *Id.* at 163 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563-64 (2011), *Carey v. Brown*, 447 U.S. 455, 462 (1980), and *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Laws that are facially content-neutral, but that cannot be justified without reference to the content of the regulated speech, or that were adopted because of disagreement with the speaker's message, also must satisfy strict scrutiny. *See Reed*, 576 U.S. at 164.

These principles plainly require strict scrutiny here. The Florida statutes at issue are about as content-based as it gets. Thus, for example, § 106.072 applies to deplatforming a candidate, not someone else; this is a content-based restriction. Similarly, § 501.2041(2)(h) imposes restrictions applicable only to material posted "by or about a candidate." This again is content-based. And § 501.2041(2)(j) prohibits a social media platform from taking action based on the "content" of a journalistic enterprise's post; prohibiting a platform from making a decision based on content is itself a content-based restriction. That the statutes are content-based in these and other respects triggers strict scrutiny.

The plaintiffs assert, too, with substantial factual support, that the actual motivation for this legislation was hostility to the social media platforms' perceived liberal viewpoint. Thus, for example, the Governor's signing statement quoted the bill's sponsor in the House of Representatives: "Day in and day out, our freedom of speech as conservatives is under attack by the 'big tech' oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated." Similarly, in another

passage quoted by the Governor, the Lieutenant Governor said, "What we've been seeing across the U.S. is an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations. . . . Thankfully in Florida we have a Governor that fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative." This viewpoint-based motivation, without more, subjects the legislation to strict scrutiny, root and branch. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("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.") (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

Moreover, these statements are consistent with the statutory definition of "social media platform," which extends only to, and thus makes the legislation applicable only to, large entities—those with $100 million in revenues or 100 million monthly participants. As the Supreme Court has recognized, discrimination between speakers is often a tell for content discrimination. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). That is the case here. The state has suggested no other basis for imposing these restrictions only on the largest providers. And even without evidence of an improper motive, the application of these requirements to only a small subset of social-media entities would be sufficient, standing alone, to subject these statutes to strict scrutiny. *See, e.g., Minneapolis Star & Tribune*

Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

Similar analysis applies to the treatment of "journalistic enterprises" in § 501.2041(2)(j). The statute affords their posts favored treatment—but to qualify, an entity must meet the minimum size requirement of § 501.2041(1)(d).

Finally, the same is true of the exclusion for social-media providers under common ownership with a large Florida theme park. The State asserted in its brief that the provision could survive intermediate scrutiny, but the proper level of scrutiny is strict, and in any event, when asked at oral argument, the State could suggest no theory under which the exclusion could survive even intermediate scrutiny. The State says this means only that the exclusion fails, but that is at least questionable. Despite the obvious constitutional issue posed by the exclusion, the Legislature adopted it, apparently unwilling to subject favored Florida businesses to the statutes' onerous regulatory burdens. It is a stretch to say the severability clause allows a court to impose these burdens on the statutorily excluded entities when the Legislature has not passed, and the Governor has not signed, a statute subjecting these entities to these requirements.

To survive strict scrutiny, an infringement on speech must further a compelling state interest and must be narrowly tailored to achieve that interest. *See, e.g., Reed*, 576 U.S. at 171. These statutes come nowhere close. Indeed, the State has advanced no argument suggesting the statutes can survive strict scrutiny. They plainly cannot. First, leveling the playing field—promoting speech on one side of an issue or

restricting speech on the other—is not a legitimate state interest. *See, e.g., Arizona Free Enter. Club v. Bennett*, 564 U.S. 721, 749-50 (2011). Whatever might be said of any other allegedly compelling state interest, these statutes are not narrowly tailored. Like prior First Amendment restrictions, this is an instance of burning the house to roast a pig. *See, e.g., Reno v. ACLU*, 521 U.S. at 882; *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

The plaintiffs are likely to prevail on the merits of their claim that these statutes violate the First Amendment. There is nothing that could be severed and survive.

3. Intermediate Scrutiny

The result would be the same under intermediate scrutiny—the level of scrutiny that applies to some content-neutral regulations of speech. To survive intermediate scrutiny, a restriction on speech must further an important or substantial governmental interest unrelated to the suppression of free expression, and the restriction must be no greater than essential to further that interest. The narrow tailoring requirement is satisfied so long as the governmental interest would be achieved less effectively absent the restriction. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

The provisions at issue here do not meet the narrow-tailoring requirement. Indeed, some of the disclosure provisions seem designed not to achieve any governmental interest but to impose the maximum available burden on the social media platforms.

Intermediate scrutiny does not apply because these statutes are not content- or viewpoint-neutral.

And the statutes would not survive intermediate scrutiny even if it applied.

C. Vagueness

Florida Statutes § 501.2041 is riddled with imprecision and ambiguity. But this, without more, does not render the statute unconstitutional. As the State correctly notes, uncertainty about a statute's application to marginal cases—or even to not-so-marginal cases—can be resolved through judicial construction. But violations of this statute subject a social media platform to statutory damages that seem more punitive than compensatory: up to $100,000 per claim.

Two provisions are especially vague. First, § 501.2041(2)(b) requires a social media platform to apply its standards in a consistent manner, but as set out *supra* at 12, this requirement is itself inconsistent with other provisions. Second, § 501.2041(2)(h) imposes a requirement that, as set out *supra* at 7-8, is incomprehensible. Vagueness presents heightened concern in a statute that, like this one, trenches on First Amendment interests. *See, e.g., Wollschlaeger v. Gov., Fla.*, 848 F.3d 1293, 1320 (11th Cir. 2017).

This order need not and does not decide whether vagueness would provide an independent ground for a preliminary injunction.

V. Other Prerequisites

The plaintiffs easily meet the other prerequisites to a preliminary injunction. If a preliminary injunction is not issued, the plaintiffs' members will sometimes be compelled to speak and will sometimes be forbidden from speaking, all in violation of their editorial

judgment and the First Amendment. This is irreparable injury. The threatened injury outweighs whatever damage the injunction may cause the State. And the injunction will serve, not be adverse to, the public interest. When a plaintiff is likely to prevail on the merits of a First Amendment claim, these other prerequisites to a preliminary injunction are usually met. *See, e.g., Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020).

VI. Conclusion

The legislation now at issue was an effort to rein in social-media providers deemed too large and too liberal. Balancing the exchange of ideas among private speakers is not a legitimate governmental interest. And even aside from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny. It is also subject to strict scrutiny because it discriminates on its face among otherwise-identical speakers: between social-media providers that do or do not meet the legislation's size requirements and are or are not under common ownership with a theme park. The legislation does not survive strict scrutiny. Parts also are expressly preempted by federal law.

For these reasons,

IT IS ORDERED:

1. The plaintiffs' motion for a preliminary injunction, ECF No. 22, is granted.

2. The defendants Ashley Brooke Moody, Joni Alexis Poitier, Jason Todd Allen, John Martin Hayes, Kymberlee Curry Smith, and Patrick Gillespie must take no steps to enforce Florida Statutes §§ 106.072 or

501.2041 until otherwise ordered. The preliminary injunction set out in this paragraph will take effect upon the posting of security in the amount of $1,000, or an undertaking to pay up to $1,000, for costs and damages sustained by a party found to have been wrongfully enjoined. The preliminary injunction binds the defendants and their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

SO ORDERED on June 30, 2021.
s/Robert L. Hinkle
United States District Judge

Appendix C

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix D

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Effective: April 22, 2022

West's F.S.A. § 501.2041

501.2041. Unlawful acts and practices by social media platforms

Currentness

(1) As used in this section, the term:

(a) "Algorithm" means a mathematical set of rules that specifies how a group of data behaves and that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material.

(b) "Censor" includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.

(c) "Deplatform" means the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days.

(d) "Journalistic enterprise" means an entity doing business in Florida that:

1. Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
2. Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
3. Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
4. Operates under a broadcast license issued by the Federal Communications Commission.

(e) "Post-prioritization" means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results. The term does not include post-prioritization of content and material of a third party, including other users, based on payments by that third party, to the social media platform.

(f) "Shadow ban" means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform. This term includes acts of shadow banning by a social media platform which are not readily apparent to a user.

(g) "Social media platform" means any information service, system, Internet search engine, or access software provider that:

1. Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
2. Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
3. Does business in the state; and
4. Satisfies at least one of the following thresholds:
    a. Has annual gross revenues in excess of $100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
    b. Has at least 100 million monthly individual platform participants globally.

(h) "User" means a person who resides or is domiciled in this state and who has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform.

(2) A social media platform that fails to comply with any of the provisions of this subsection commits an unfair or deceptive act or practice as specified in s. 501.204.

(a) A social media platform must publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban.

(b) A social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform.

(c) A social media platform must inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days.

(d) A social media platform may not censor or shadow ban a user's content or material or deplatform a user from the social media platform:

1. Without notifying the user who posted or attempted to post the content or material; or
2. In a way that violates this part.

(e) A social media platform must:

1. Provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts.
2. Provide, upon request, a user with the number of other individual platform participants who were provided or shown content or posts.

(f) A social media platform must:

1. Categorize algorithms used for post-prioritization and shadow banning.
2. Allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content.

(g) A social media platform must provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annually the opt-out opportunity in subparagraph (f)2.

(h) A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate as defined in s. 106.011(3)(e), beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate. Post-prioritization of certain content or material from or about a candidate for office based on payments to the social media platform by such candidate for office or a third party is not a violation of this paragraph. A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections.

(i) A social media platform must allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after the user receives the notice required under subparagraph (d)1.

(j) A social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic

enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation of this paragraph. This paragraph does not apply if the content or material is obscene as defined in s. 847.001.

(3) For purposes of subparagraph (2)(d)1., a notification must:

(a) Be in writing.

(b) Be delivered via electronic mail or direct electronic notification to the user within 7 days after the censoring action.

(c) Include a thorough rationale explaining the reason that the social media platform censored the user.

(d) Include a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable.

(4) Notwithstanding any other provisions of this section, a social media platform is not required to notify a user if the censored content or material is obscene as defined in s. 847.001.

(5) If the department, by its own inquiry or as a result of a complaint, suspects that a violation of this section is imminent, occurring, or has occurred, the department may investigate the suspected violation in accordance with this part. Based on its investigation,

the department may bring a civil or administrative action under this part. For the purpose of bringing an action pursuant to this section, ss. 501.211 and 501.212 do not apply.

(6) A user may only bring a private cause of action for violations of paragraph (2)(b) or subparagraph (2)(d)1. In a private cause of action brought under paragraph (2)(b) or subparagraph (2)(d)1., the court may award the following remedies to the user:

(a) Up to $100,000 in statutory damages per proven claim.

(b) Actual damages.

(c) If aggravating factors are present, punitive damages.

(d) Other forms of equitable relief, including injunctive relief.

(e) If the user was deplatformed in violation of paragraph (2)(b), costs and reasonable attorney fees.

(7) For purposes of bringing an action in accordance with subsections (5) and (6), each failure to comply with the individual provisions of subsection (2) shall be treated as a separate violation, act, or practice. For purposes of bringing an action in accordance with subsections (5) and (6), a social media platform that censors, shadow bans, deplatforms, or applies post-prioritization algorithms to candidates and users in the state is conclusively presumed to be both engaged in

substantial and not isolated activities within the state and operating, conducting, engaging in, or carrying on a business, and doing business in this state, and is therefore subject to the jurisdiction of the courts of the state.

(8) In an investigation by the department into alleged violations of this section, the department's investigative powers include, but are not limited to, the ability to subpoena any algorithm used by a social media platform related to any alleged violation.

(9) This section may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

(10) (a) All information received by the department pursuant to an investigation by the department or a law enforcement agency of a violation of this section is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the investigation is completed or ceases to be active. This exemption shall be construed in conformity with s. 119.071(2)(c).

(b) During an active investigation, information made confidential and exempt pursuant to paragraph (a) may be disclosed by the department:

1. In the performance of its official duties and responsibilities; or
2. To another governmental entity in performance of its official duties and responsibilities.

(c) Once an investigation is completed or ceases to be active, the following information received by the department shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. All information to which another public records exemption applies.
2. Personal identifying information.
3. A computer forensic report.
4. Information that would otherwise reveal weaknesses in a business' data security.
5. Proprietary business information.

(d) For purposes of this subsection, the term "proprietary business information" means information that:

1. Is owned or controlled by the business;
2. Is intended to be private and is treated by the business as private because disclosure would harm the business or its business operations;
3. Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public;
4. Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department; and
5. Includes:
   a. Trade secrets as defined in s. 688.002.

b. Competitive interests, the disclosure of which would impair the competitive advantage of the business that is the subject of the information.

(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Appendix E

Effective: April 22, 2022
West's F.S.A. § 106.072
106.072. Social media deplatforming of political candidates
Currentness

(1) As used in this section, the term:

(a) "Candidate" has the same meaning as in s. 106.011(3)(e).
(b) "Deplatform" has the same meaning as in s. 501.2041.
(c) "Social media platform" has the same meaning as in s. 501.2041.
(d) "User" has the same meaning as in s. 501.2041.

(2) A social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate. A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections.

(3) Upon a finding of a violation of subsection (2) by the Florida Elections Commission, in addition to the remedies provided in ss. 106.265 and 106.27, the social media platform may be fined $250,000 per day for

a candidate for statewide office and $25,000 per day for a candidate for other offices.

(4) A social media platform that willfully provides free advertising for a candidate must inform the candidate of such in-kind contribution. Posts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' posts, content, material, and comments are not considered free advertising.

(5) This section may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

Appendix F

https://www.wsj.com/articles/facebook-has-no-sense-of-humor-11603315866

Facebook Has No Sense of Humor
Its algorithms mistake a Monty Python joke for a threat of violence.

By Kyle Mann
Oct. 21, 2020 5:31 pm ET

G.K. Chesterton believed reality would one day kill satire. He wrote in 1911: "Satire has weakened in our epoch for several reasons, but chiefly, I think, because the world has become too absurd to be satirised."

That's even truer in 2020. No satirical article is so absurd that people won't believe it to be true. Snopes has fact-checked articles as bizarre as the Onion's "Shelling From Royal Caribbean's M.S. 'Allure' Sinks Carnival Cruise Vessel That Crossed Into Disputed Waters" and the Babylon Bee's "Ocasio-Cortez Appears on 'The Price Is Right,' Guesses Everything Is Free."

But there's a new threat to satire that Chesterton couldn't have foreseen: social media. As Facebook and Twitter desperately try to prevent a repeat of 2016, in which some believe Russian propaganda spread unchecked on their platforms, the social-media giants are cracking down hard on sites that report on politics. That includes humor sites, as we at the Babylon Bee have discovered.

Last week we posted the satirical headline: "Senator Hirono Demands ACB Be Weighed Against a Duck to See If She Is a Witch." It's a reference to "Monty Python and the Holy Grail"—not a particularly believable joke, nor an original one (we did something similar during the Mueller investigations). But because we included the Pythonesque line "We must burn her," Facebook accused us of "inciting violence" and deleted our post. The platform demonetized our page and gave us an ominous warning of future repercussions should we commit further violations. We attempted to appeal the violation. Facebook declined our appeal.

In what world does a joke lovingly appropriated from Monty Python constitute incitement to violence? These kinds of mistakes happen because Facebook relies more and more on algorithms to catch potentially offensive content. What's strange is that the social media giant stands by its humorless AI filter's judgment.

Comedy suffers under "community standards," as Facebook calls its algorithm-driven rules that can't tell the difference between comedy and a threat of violence. "There is simply no money in making comedy online anymore," writer Matt Klinman tweeted in 2018. "Facebook has completely destroyed independent digital comedy."

At the Babylon Bee, my primary question when considering a headline should be, "Is it funny?" Instead, I often ask myself things like: "Will Facebook kill this joke for mentioning the election?" "Should we say the word 'pandemic' in the headline here, or will that run

afoul of the algorithm?" "Facebook kills clickbait. Does this headline sound too clickbaity?" Instead of writing jokes for the audience, we're writing jokes for a robot with ever-changing standards that can only be identified through painful trial and error as headline after headline gets shot down.

Chesterton might as well have been writing about Facebook's robotic response to satire when he observed that "it is impossible to caricature that which caricatures itself." Indeed, we're having trouble coming up with a satirical headline more absurd than "Satire Site Demonetized for Telling Joke About Weighing Judge Against a Duck to See if She Is a Witch."

Mr. Mann is editor in chief of the Babylon Bee.

Appeared in the October 22, 2020, print edition as 'Facebook Has No Sense Of Humor.'

https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden

Facebook And Twitter Limit Sharing 'New York Post' Story About Joe Biden

By Shannon Bond
October 14, 2020 6:49 PM ET

Facebook and Twitter took action on Wednesday to limit the distribution of New York Post reporting with unconfirmed claims about Democratic presidential nominee Joe Biden, leading President Trump's campaign and allies to charge the companies with censorship.

Both social media companies said the moves were aimed at slowing the spread of potentially false information. But they gave few details about how they reached their decisions, sparking criticism about the lack of clarity and consistency with which they apply their rules.

The New York Post published a series of stories on Wednesday citing emails, purportedly sent by Biden's son Hunter, that the news outlet says it got from Trump's private attorney, Rudy Giuliani, and former Trump adviser Steve Bannon.

Facebook was limiting distribution of the Post's main story while its outside factcheckers reviewed the claims, spokesman Andy Stone said. That means the platform's algorithms won't place posts linking to the

story as highly in people's news feeds, reducing the number of users who see it. However, the story has still been liked, shared or commented on almost 600,000 times on Facebook, according to data from CrowdTangle, a research tool owned by the social network.

Stone said Facebook sometimes takes this step if it sees "signals" that something gaining traction is false, to give fact-checkers time to evaluate the story before it spreads widely. He did not give more detail on what signals Facebook uses or how often it takes this approach.

Twitter went further. It is blocking users from posting pictures of the emails or links to two of the New York Post's stories referring to them, spokesman Trenton Kennedy said, citing its rules against sharing "content obtained through hacking that contains private information."

Users who try to share the links on Twitter are shown a notice saying, "We can't complete this request because this link has been identified by Twitter or our partners as being potentially harmful."

If a user clicks on links already posted on Twitter, the user is taken to a warning screen saying, "this link may be unsafe," which they have to click past to read the story. Twitter also required the New York Post to delete its tweet about the story.

Twitter said it decided to block the links because it couldn't be sure about the origins of the emails. It said

its policy "prohibits the use of our service to distribute content obtained without authorization" and that it doesn't want to encourage hacking by allowing people to share "possibly illegally obtained materials."

But the company declined to comment on how it had reached that decision or what evidence it had weighed about the emails in the Post's stories.

The company later gave an additional explanation for why it was blocking the stories.

Its safety team said in a tweet that the images of emails in the articles "include personal and private information — like email addresses and phone numbers — which violate our rules" against unauthorized sharing of such details.

CEO Jack Dorsey acknowledged that the company's communication about why it was blocking the articles "was not great." He tweeted that it was "unacceptable" to prevent people from sharing "with zero context as to why we're blocking."

Asked for comment about the social networks' actions, New York Post spokeswoman Iva Benson referred NPR to an article by the paper's editorial board.

"Our story explains where the info came from, and a Senate committee now confirms it also received the files from the same source," the editorial said. "Yet Facebook and Twitter are deliberately trying to keep its users from reading and deciding for themselves what it means."

Twitter and Facebook have been acting more aggressively in recent weeks to curb the spread of false claims and manipulation related to the election as part of efforts to avoid a repeat of 2016 when Russian-linked actors used social media to target American voters.

Facebook has been warning about the possibility of "hack and leak" operations, where stolen documents or other sensitive materials are strategically leaked — as happened in 2016 with hacked emails from the Democratic National Committee and Hillary Clinton's campaign.

But the companies' moves on Wednesday drew criticism from some experts, who said Facebook and Twitter needed to explain more clearly their policies and how often they apply them.

"This story is a microcosm of something that I think we can expect to happen a lot over the next few weeks and, I think, demonstrates why platforms having clear policies that they are prepared to stick to is really important," said Evelyn Douek, a Harvard Law School lecturer who studies the regulation of online speech.

"It's really unclear if they have stepped in exceptionally in this case and, if they have, why they've done so," she said. "That inevitably leads to exactly the kind of outcry that we've seen, which is that they're doing it for political reasons and because they're biased."

Republicans seized on the episode as proof of their long-running assertions that the social networks censor conservative voices. There is no statistical evidence to support those claims.

Trump tweeted that it was "[s]o terrible that Facebook and Twitter took down the story," although Facebook did not remove it from its platform. "REPEAL SECTION 230!!!" he wrote, referring to a long-standing legal shield that protects online platforms from being sued over what people post on them and says they can't be punished for reasonable moderation of those posts. Trump has repeatedly called for Section 230 to be revoked.

Sen. Josh Hawley, R-Mo., sent letters to the CEOs of both Facebook and Twitter on Wednesday pressing them on the decisions to reduce distribution and block the story.

Hawley also sent a letter to the Federal Election Commission saying the companies' actions possibly constituted "egregious campaign-finance violations benefitting the Biden campaign."

The Senate Republican Conference, which is led by Sen. John Barrasso, R-Wyo., tweeted, "see you soon, @jack," with an image of the Post's story. Dorsey, the Twitter CEO, is scheduled to testify, along with Facebook CEO Mark Zuckerberg and Google CEO Sundar Pichai, before the Senate Commerce Committee on Oct. 28 — six days before the election. The topic: Section 230.

Editor's note: Facebook is among NPR's financial supporters.

NPR's David Folkenflik contributed to this report.

https://nypost.com/2021/04/16/social-media-again-silences-the-post-for-reporting-the-news/

Social media again silences The Post for reporting the news

By Post Editorial Board
April 16, 2021 9:54am

Once more unto the breach.

On Thursday, Facebook decided its users should not be able to share a New York Post article about the property-buying habits of one of the founders of Black Lives Matter.

This is the third time we've tangled with social media giants in the past year. In the early days of the COVID-19 pandemic, we published a column that suggested the virus could have leaked from a Chinese virology lab. Facebook's "fact checkers" decided this was an opinion you weren't allowed to have and blocked the article. Today, it's a commonly discussed theory, with officials from former CDC Director Dr. Robert Redfield to CNN's Sanjay Gupta saying it can't be discounted. Even the head of the World Health Organization (WHO) has said it can't be ruled out.

In October, we published a series of articles about a laptop Hunter Biden left at a Delaware repair shop. Twitter suspended our account. You probably know how that ended. Twitter CEO Jack Dorsey admitted to lawmakers months later it was a "total mistake."

We were right both times. We're right this time, too.

The $3.2 million real estate spending spree of BLM co-founder Patrisse Khan-Cullors is newsworthy for two reasons. One, she's an avowed Marxist, and as a public figure, it's legitimate to question whether she's practicing what she preaches. Secondly, as the article details, the finances of Black Lives Matter are opaque, a mixture of for-profits and tax-free nonprofits, and they don't reveal how much its executives are paid. Are the people donating to BLM helping to pay for these properties?

We reached out to Khan-Cullors for comment before publication; she didn't respond. After it was posted, her organization put out a statement saying yes, she used to take a salary from BLM but doesn't anymore, and the money she used to buy property came from her private income for book and development deals. Take the organization's word for it. We added the response in full to our online article post-publication.

Then she accused us of being "abusive" and putting her at risk.

Our article features some pictures of the properties she bought, but includes no addresses, in fact doesn't even say the city in some cases. Our reporter compiled the information from public records.

Khan-Cullors' lawyers apparently got a more sympathetic ear at Facebook, however, and five days after the article was published, it suddenly decided that it

clashed with its "community standards." "This content was removed for violating our privacy and personal information policy," Facebook writes.

This decision is so arbitrary as to be laughable. Does Facebook know how many newspapers, magazines and Web sites highlight the real estate purchases of the rich and famous? The next time People magazine covers Kim Kardashian's latest mansion purchase, will it violate any community standards? How about running a picture of the resort Ted Cruz is staying at?

No, this rule has not been and will not be applied in any fair manner.

It again highlights just how much power these social media companies have over our lives and our nation. They monopolized the market and became the main aggregators of news.

In public, they claim to be "neutral" and that they aren't making editorial decisions in a cynical bid to stave off regulation or legal accountability that threatens their profits. But they do act as publishers — just very bad ones. While failing abysmally for years to stop the torrent of truly harmful pedophilic, violent, personally abusive, terroristic, wildly inaccurate and hateful content that spews onto their platforms daily, they'll step in to censor and cover for Joe Biden. They'll cover for China. And now they'll cover for Black Lives Matter.

It's too dangerous to let Americans read politically inconvenient but accurate reports and varied opinions

and come to a conclusion themselves. Best to tell us what to think. Well, we'll keep publishing — and let you decide for yourselves.

https://www.wsj.com/articles/facebooks-lab-leak-about-face-11622154198

Facebook's Lab-Leak About-Face
The company acts in tandem with government on speech control.

By The Editorial Board
May 27, 2021 6:23 pm ET

Question: When does "misinformation" stop being misinformation on social media?
Answer: When Democratic government authorities give permission.

Witness Facebook's decision to stop censoring some claims about the origin of Covid-19 the same day President Biden said his Administration will investigate whether a Chinese lab may have been involved.

It's been clear for more than a year that the Wuhan Institute of Virology, which collects and tests coronaviruses, deserved scrutiny over the emergence of the pandemic in Wuhan. Yet Facebook announced in February that it would expand its content moderation on Covid-19 to include "false" and "debunked" claims such as that "COVID-19 is manmade or manufactured." Facebook deployed fact-check warnings against an influential Medium post this month on the origins of the virus by science journalist Nicholas Wade.

As long as Democratic opinion sneered at the lab-leak theory, Facebook dutifully controlled it. But ideological bubbles have a way of bursting, and the circumstantial evidence—most of which has been available for months—finally permeated the insular world of progressive public health. This prompted officials like Anthony Fauci to say more investigation is needed, while the White House issued new intelligence directives reflecting lower certainty of a natural emergence.

Facebook acted in lockstep with the government: "In light of ongoing investigations into the origin of COVID-19 and in consultation with public health experts, we will no longer remove the claim that COVID-19 is man-made or manufactured from our apps," it said Wednesday.

The shift is better late than never, but note the apparent implication: While a political or scientific claim is disfavored by government authorities, Facebook will limit its reach. When government reduces its hostility toward an idea, so will Facebook.

YouTube's Covid-19 policy similarly forbids contradicting "health authorities." The Centers for Disease Control and Prevention is run by a political appointee and its evolving guidance is clearly influenced by political considerations. YouTube, owned by Google, used this policy to remove a roundtable on virus response with scientists and Florida Gov. Ron DeSantis.

Perhaps the social-media giants think their censorship carries more legitimacy if they can appeal to government. In fact such coordination makes censorship even more suspect. Free speech protects the right to challenge government. But instead of acting as private actors with their own speech rights, the companies are mandating conformity with existing government views.

In 2019 a wiser Mark Zuckerberg, the Facebook CEO, said "I don't think it's right for a private company to censor politicians or the news in a democracy." If he'd stuck to that spirit instead of bending to pressure, he'd have avoided this embarrassment, and the more like it that are sure to come.

https://nypost.com/2021/03/25/dorsey-says-blocking-posts-hunter-biden-story-was-total-mistake/

Jack Dorsey says blocking Post's Hunter Biden story was 'total mistake' — but won't say who made it

By Noah Manskar
March 25, 2021 4:04pm

Twitter doesn't have a "censoring department" that blocked The Post from tweeting last fall, CEO Jack Dorsey said Thursday — but he wouldn't reveal who was responsible for the blunder.

At a congressional hearing on misinformation and social media, Dorsey said Twitter made a "total mistake" by barring users from sharing The Post's bombshell October report about Hunter Biden's emails.

Twitter also locked The Post out of its account for more than two weeks over baseless charges that the exposé used hacked information — a decision Dorsey chalked up to a "process error."

"It was literally just a process error. This was not against them in any particular way," Dorsey told the House Energy and Commerce Committee.

"If we remove a violation we require people to correct it," he added. "We changed that based on their to wanting to delete that tweet, which I completely agree with. I see it. But it is something we learn."

But Dorsey dodged a question from Rep. Steve Scalise about who decided to freeze the 200-year-old newspaper's account.

Twitter demanded The Post delete six tweets that linked to stories based on files from the abandoned laptop of President Biden's son. Twitter backed down after the paper refused to remove the posts — a development The Post celebrated on its Oct. 31 front page with the headline "FREE BIRD!"

"Their entire account to be blocked for two weeks by a mistake seems like a really big mistake," Scalise, a Louisiana Republican, told Dorsey. "Was anyone held accountable in your censoring department for that mistake?"

"Well, we don't have a censoring department," the bearded and newly bald-headed tech exec replied.

When Scalise interjected to ask who made the decision "to block their account for two weeks," Dorsey claimed, "We didn't block their account for two weeks."

"We required them to delete the tweet and then they could tweet it again," he said. "They didn't take that action, so we corrected it for them."

Scalise compared Twitter's response to The Post's stories with a Jan. 9 Washington Post article that claimed then-President Donald Trump urged Georgia's lead elections investigator to "find the fraud" in the state's presidential vote and that she'd be a "national hero" if she did.

The paper issued a lengthy correction to the story this month revealing that Trump never used those words, though he did say the official would find "dishonesty" and that she had "the most important job in the country right now."

"There are tweets today … that still mischaracterize it even in a way where the Washington Post admitted it's wrong, yet those mischaracterizations can still be retweeted," Scalise told Dorsey. "Will you address that and start taking those down to reflect what even the Washington Post themselves has admitted is false information?"

Dorsey would not answer affirmatively either way: "Our misleading information policies are focused on manipulated media, public health and civic integrity," he said. "That's it."

https://nypost.com/2020/10/14/facebook-twitter-block-the-post-from-posting/

Twitter, Facebook censor Post over Hunter Biden exposé

By Noah Manskar
October 14, 2020 4:14pm

Both Twitter and Facebook took extraordinary censorship measures against The Post on Wednesday over its exposés about Hunter Biden's emails — with Twitter baselessly charging that "hacked materials" were used.

The suppression effort came despite presidential candidate Joe Biden's campaign merely denying that he had anything on his "official schedules" about meeting a Ukrainian energy executive in 2015 — along with zero claims that his son's computer had been hacked.

The Post's primary Twitter account was locked as of 2:20 p.m. Wednesday because its articles about the messages obtained from Biden's laptop broke the social network's rules against "distribution of hacked material," according to an email The Post received from Twitter.

Twitter also blocked users from sharing the link to The Post article indicating that Hunter Biden introduced Joe Biden to the Ukrainian businessman, calling the link "potentially harmful."

"In line with our Hacked Materials Policy, as well as our approach to blocking URLs, we are taking action to block any links to or images of the material in question on Twitter," a Twitter spokesperson told The Post in a statement.

The company said it took the step because of the lack of authoritative reporting on where the materials included in The Post's story originated.

In a lengthier statement Wednesday night, the social media company said articles in The Post exposé, "include personal and private information — like email addresses and phone numbers — which violate our rules."

They reiterated the baseless claim that the story relied on hacked material, but added that "commentary on or discussion about hacked materials, such as articles that cover them but do not include or link to the materials themselves, aren't a violation of this policy."

"Our policy only covers links to or images of hacked material themselves," the statement says.

Users who clicked the link on Twitter were shown an alert warning them that the webpage may be "unsafe" and could contain content that would break Twitter's rules if it were shared directly on the platform.

The extraordinary move came after Facebook said it would limit the spread of The Post's story on its own platform. The social network added that the story

would be eligible for review by independent fact-checkers.

US Sen. Josh Hawley (R-Mo.) fired off a letter to Facebook CEO Mark Zuckerberg on Wednesday demanding answers about why the platform "censored" The Post's reporting.

"The seemingly selective nature of this public intervention suggests partiality on the part of Facebook," Hawley wrote. "And your efforts to suppress the distribution of content revealing potentially unethical activity by a candidate for president raises a number of additional questions, to which I expect responses immediately."

Hawley later sent a similar letter to Twitter CEO Jack Dorsey, blasting the company for what he said was "an unusual intervention that is not universally applied to all content."

The senator demanded to know how Twitter had determined that The Post's story was violating its policy on hacked materials and why the company had taken the "unprecedented action" to lock the news org's account.

"I ask that you immediately answer these questions and provide the necessary justifications so that your users can feel confident that you are not seeking to influence the outcome of the presidential election with your content removal decisions," Hawley wrote.

https://www.hudson.org/research/16450-twitter-facebook-and-amazon-censorship-of-conservatives-harms-social-media-giants

Twitter, Facebook and Amazon Censorship of Conservatives Harms Social Media Giants

By Arthur Herman
October 21, 2020

Big Tech firms Facebook, Twitter and Amazon have managed to provide plenty of ammunition in the past week for those who accuse them of using their colossal market dominance to unfairly tilt the political and cultural conversation.

We can start with the most egregious example: The decision by Twitter and Facebook to suspend the accounts of anyone who tried to retweet or post a New York Post story about the relationship between corrupt Ukrainian energy firm Burisma and Democratic presidential nominee Joe Biden and his son Hunter.

The list of accounts suspended included those belonging to the New York Post itself; White House press secretary Kayleigh McEnany; and the Team Trump reelection campaign.

Twitter executives explained that the social media company was suspending the accounts because the information in The New York Post story about Hunter Biden's emails was based on "hacked material." But that was a rationale that neither fit the facts nor precedent.

The emails that were the basis of the newspaper story were not hacked or stolen. The Post reported that the emails came from a repairman working on a laptop he says he assumed had been abandoned by its owner.

And Twitter's actions were not consistent with its past conduct. The social media giant did not interfere with the dissemination of other news stories from other news organizations that were based on hacked or leaked emails.

Facebook decided to do something similar to the action by Twitter in dealing with people trying to circulate The New York Post story.

The New York Post is not Alex Jones. It has the fourth-largest print circulation of any newspaper in the country. Suspending its account looked very much like a sneak attack on the First Amendment, as does suspending the account of Politico reporter Jake Sherman. And suspending the Trump campaign's account seemed to many observers like blatant interference in the election process.

As outrage swept over the Internet, Twitter promised to rescind its policy, but still hasn't released the Post's account.

It's rare for two social media giants to make such a blatant and coordinated move against their own self-interest. Their actions directly undermine the rationale for Facebook's and Twitter's exemption under Section 230 of the Communications Decency Act,

which shields them from any liability for content that appears on their sites.

The exemption is built on the assumption — fiercely defended by Facebook and Twitter — that the sites serve as neutral platforms and are not editors of content like the publishers of books, magazines and newspapers. Such publications are not exempt from liability for what they publish.

Now many people refuse to believe the claim of the social media companies that is the basis for their exemption.

As a result, we should expect efforts in Congress to redraw the Section 230 rules to allow parties to sue the social media giants when posts the sites publish are libelous or personally damaging. Starting this week, Twitter and Facebook will need to put a lot more lawyers on their payrolls.

The second blunder was Amazon's decision not to release the documentary "What Killed Michael Brown," written and narrated by the noted African American scholar Shelby Steele.

The documentary consists largely of interviews with African Americans. It casts a very different light on fatal police shooting of Brown, who was Black, in Ferguson, Mo., in 2014. The shooting triggered nationwide riots and the Black Lives Matter movement.

Steele examined the misconceptions and outright untruths surrounding the shooting of Brown.

Amazon clearly decided that a look at American race relations that defied the usual Groupthink was too hot to handle, and so refused to release the documentary on its streaming service.

With breathtaking hubris, Amazon informed Steele and his filmmaker son that "this decision may not be appealed." It's not hard to read into Amazon's action a desire to suppress an unwelcome message — and the brandishing of a political bias that be very costly to Amazon in the future.

Sen. Elizabeth Warren, D-Mass., has been the main congressional point person pushing for a breakup of Big Tech — including Facebook, Twitter and Amazon.

If Democratic presidential nominee Joe Biden is elected president, Warren will no doubt try to legislate her wish. If leaders of the social media giants think Republicans or free-market conservatives will charge to their rescue, they might want to think again.

There is a powerful double-shame hovering over the events of last week.

The first is that the case for exempting the social media platforms from Section 230 is strong Under ideal circumstances the exemption serves to further the free exchange of expression and discourse as public goods in a free and open society. But by acting as they did, these companies have put their defenders — including me — on the defensive.

The second cause for shame is that these companies — and all of Big Tech — command hug resources of capital, data, innovative energy, and individual talent that could be supporting open and honest public debate of important issues, not undermining or suppressing debate.

Last week was a big week for Big Tech, no doubt. It was also a bad week for America.

Respectfully submitted.

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