No. 22-277

In the
Supreme Court of the United States

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Petitioners,

v.

NETCHOICE, LLC, and the COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Florida Senate Bill 7072's content-moderation restrictions comply with the First Amendment.

2. Whether Florida Senate Bill 7072's individualized-explanation requirements comply with the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners, defendants-appellants below, are 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 official capacity as Commissioner of the Florida Elections Commission; Kymberlee Curry Smith, in her official capacity as Commissioner of the Florida Elections Commission; Deputy Secretary of Business Operations of the Florida Department of Management Services, in their official capacity.

Respondents, plaintiffs-appellees below, are NetChoice, LLC, and the Computer & Communications Industry Association.

CORPORATE DISCLOSURE STATEMENT

NetChoice, LLC has no parent corporation, and no publicly held corporation owns ten percent or more of its stock. The Computer & Communications Industry Association has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

Given the cacophony of voices on the Internet engaged in everything from incitement and obscenity to political discourse and friendly banter, websites like Facebook and YouTube have no realistic choice but to exercise editorial discretion over the expression they disseminate. Their users and advertisers demand nothing less. Websites, no less than traditional media, sometimes face criticism for how they exercise that editorial discretion. That is to be expected in a nation committed to the First Amendment, which encourages more speech as the remedy for controversial speech and editorial judgments. But in 2021, Florida took a different tack. It enacted Senate Bill 7072, a law that seeks to punish select private parties for exercising editorial discretion in ways the state disfavors.

Florida made no secret of the law's motivation and aim: The state enacted S.B.7072 to combat what it perceived to be a concerted effort by "big tech oligarchs in Silicon Valley" to silence "conservative" speech on their websites. Pet.App.3a. To ensure that the state's preferred messages reach a broad audience, S.B.7072 singles out a handful of large websites and requires them to disseminate a wide range of third-party speech that they do not want to disseminate. The law applies to Facebook and YouTube, but it spares websites with a different perceived ideological bent like Parler and Gab. And it requires covered websites to disseminate virtually all speech by the state's preferred speakers, no matter how blatantly or repeatedly the speaker violates the website's terms of use.

S.B.7072 is entirely incompatible with the First Amendment. While the state is free to criticize websites for their decisions about what content to display, disseminate, remove, or restrict, the First Amendment prohibits the state from countermanding those editorial decisions and substituting its own judgment. Just as Florida may not tell the New York Times what opinion pieces to publish or Fox News what interviews to air, it may not tell Facebook and YouTube what content to disseminate. When it comes to disseminating speech, decisions about what messages to include and exclude are for private parties—not the government—to make.

The Eleventh Circuit correctly concluded that S.B.7072 violates the First Amendment. Indeed, S.B.7072 is a compendium of First Amendment transgressions. It impermissibly compels speech. It draws obvious content distinctions, compelling covered websites to disseminate some types of speech but not others. And on top of that, Florida has unabashedly singled out certain companies for these onerous restrictions based on unconcealed hostility to how they exercise their editorial discretion, thus adding speaker and viewpoint discrimination to law's list of infirmities. The law thus triggers strict scrutiny several times over, which the state has never even tried to satisfy. Nor could it, as the First Amendment simply does not tolerate government efforts to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 34 F.4th 1196 and reproduced at Pet.App.1a-67a. The district court's order granting a preliminary injunction is reported at 546 F.Supp.3d 1082 and reproduced at Pet.App.68a-95a.

JURISDICTION

The Eleventh Circuit issued its opinion on May 23, 2022. Florida timely petitioned for certiorari on September 21, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at Pet.App.96a-108a.

STATEMENT OF THE CASE

A. Legal and Factual Background

1. NetChoice and the Computer & Communications Industry Association (CCIA) are Internet trade associations whose members operate a variety of popular websites on which users can share and interact with content, including Etsy, Facebook, Instagram, Pinterest, X (formerly known as Twitter), and YouTube.[1] The content users seek to share on these websites is diverse and substantial: It is generated by billions of users located throughout the world, it is uploaded in a variety of formats and languages, and it spans the entire range of human

[1] While most members operate apps and other services in addition to websites, this brief collectively refers to all of their services as "websites."

thought—from the creative, humorous, and political to the offensive, dangerous, and illegal.

Given the sheer volume and breadth of material users seek to share on their websites, NetChoice and CCIA members have invested extensive resources into developing policies and standards for editing, curating, arranging, displaying, and disseminating content in ways that reflect their unique values and the distinctive communities they hope to foster. Facebook, for example, "wants people to be able to talk openly about the issues that matter to them." Facebook, https://tinyurl.com/34fm6vna (last visited Nov. 28, 2023). But it also recognizes that "the internet creates new and increased opportunities for abuse." *Id.* It therefore restricts several categories of content that it finds objectionable, such as hate speech, bullying, and harassment. *Id.*; *see also* JA129-35; Brief for Meta Platforms as *Amicus Curiae* 6-16, *Gonzalez v. Google*, No. 21-1333 (filed Jan. 19, 2023). YouTube's policies likewise "aim to make YouTube a safer community while still giving creators the freedom to share a broad range of experiences and perspectives." YouTube, https://tinyurl.com/55mzk979 (last visited Nov. 28, 2023); *see also* JA111-19. It thus prohibits pornography, violent and graphic content, and more. *Id.*

X, for its part, seeks to "empower people to understand different sides of an issue and encourage dissenting opinions and viewpoints to be discussed openly." X, https://tinyurl.com/bdfyxdty (last visited Nov. 28, 2023). So rather than take a heavy hand to content it finds objectionable, X prefers to "promote[] counterspeech: speech that presents facts to correct

misstatements or misperceptions, points out hypocrisy or contradictions, warns of offline or online consequences, denounces hateful or dangerous speech, or helps change minds and disarm." *Id.* Other members target a more limited audience and exercise editorial discretion accordingly. For example, Etsy, in its effort to "keep human connection at the heart of commerce," requires any item "listed as handmade" to be "made and/or designed by … the seller." Etsy, https://tinyurl.com/28zydkvz (last visited Nov. 28, 2023); JA149-53. And virtually all members have advertising clients that are critical to their business models—clients who prefer not to have their paid advertisements displayed alongside material they find objectionable.

Collectively, NetChoice and CCIA members make billions of editorial decisions each day. Those decisions include choices to block or remove content or users, display content with additional context, and a wide range of other nuanced judgments about how to arrange, rank, or prioritize content on their websites. A user who visits Facebook or X, for example, sees "a curated and edited compilation of content from the people and organizations that she follows." Pet.App.6a. If a user "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." Pet.App.6a. The website will have "removed posts that violate its terms of service or community standards." Pet.App.6a. And 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." Pet.App.6a.

2. Given the expressive nature of those editorial decisions, it is inevitable that some will disagree with and criticize them. Others will agree with and praise them. Some will say too much speech is disseminated; others will say too little. That is all to be expected in a nation that values the First Amendment and its commitment to more speech as the remedy for speech with which people disagree. But in May 2021, Florida lawmakers embraced a different—and dangerous—approach: They enacted S.B.7072, which aims to punish select websites for exercising their editorial discretion in ways the state disfavors.

Florida was not coy about the law's motivation and aim. Upon signing the bill, the Governor announced in his official public statement that the state was enacting the law 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." Pet.App.7a. That same official statement quotes the Lieutenant Governor as saying: "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." Pet.App.90a. One of the law's sponsors in the Florida legislature added: "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." Pet.App.89a.

The text of S.B.7072 confirms that Florida passed the law to target certain entities "because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The formal legislative findings declare that "[s]ocial media platforms" have "*unfairly* censored, shadow banned, deplatformed, and applied post-prioritization algorithms," and that the state has a "substantial interest in protecting its residents from inconsistent and *unfair* actions" by those "social media platforms." S.B.7072 §§1(9)-(10) (emphases added). Confirming that the state's concerns did not extend to all websites commonly thought of as "social media platforms"—but only the largest ones with a perceived "unfair" "leftist" bent—the law limits the definition of "[s]ocial media platform" to websites with at least 100 million monthly users or $100 million in gross annual revenue, thus singling out the largest websites for disfavored treatment. Fla. Stat. §501.2041(1)(g)(4). That definition captures websites like Facebook, Instagram, and YouTube but excludes websites like Rumble, Gab, (then-operational) Parler, and (now-operational) Truth Social—i.e., websites perceived as exercising their editorial discretion in a manner that the state prefers.

Late in the drafting process, the state realized that its definition of "social media platform" captured companies with a large Florida presence—namely, Disney and Universal Studios. To protect those then-favored companies, the legislature gerrymandered a

carve-out for any entity that "owns and operates a theme park or entertainment complex." Fla. Stat. §501.2041(1)(g) (2021). The state later discovered, however, that the viewpoints it wished to punish are not limited to Silicon Valley, but reach Hollywood too. After Disney executives criticized a different Florida law related to classroom instruction on gender and sexuality, Florida repealed the theme park carve-out and eliminated similarly targeted tax benefits. *See* Fla. S.B. 6-C (2022). Before signing that bill, the Governor stated: "You're a corporation based in Burbank, California, and you're going to marshal your economic might to attack the parents of my state? We view that as a provocation and we're going to fight back." A. Campo-Flores, *Florida Gov. DeSantis Signs Bill Stripping Disney of Special Tax Status*, Wall St. J. (Apr. 22, 2022), https://tinyurl.com/5uc7wk79.

S.B.7072 imposes a slew of requirements that commandeer how covered websites exercise editorial discretion over the content on their websites. Some single out particular types of speakers and content for special favored treatment; others constrain a website's ability to exclude any content at all. All work toward the same end: restricting covered websites' ability to decide what speech to disseminate and how.

- ***Deplatforming political candidates.*** S.B.7072 prohibits a "social media platform" from "willfully deplatform[ing] a candidate for office." Fla. Stat. §106.072(2). The law defines "[c]andidate" to include anyone who "files qualification papers and subscribes to a candidate's oath." *Id.* §106.011(e). The word "[d]eplatform" 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).

- ***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 content in a "more or less prominent position" in a user's feed or search results. *Id.* §501.2041(1)(e). "Shadow ban[ning]" 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 the social media platform," and "includes acts of shadow banning by a social media platform which are not readily apparent to a user." *Id.* §501.2041(1)(f).
- ***Journalistic enterprises.*** 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." *Id.* §501.2041(2)(j). The term "[c]ensor" is defined broadly to cover actions taken not only to "delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post," or "remove" content, but also to "post an addendum to any content or material posted by a user." *Id.* §501.2041(1)(b). The law thus bans websites from disseminating speech that they *themselves* author about content on their services. The term

"[j]ournalistic enterprise" is defined broadly to include any entity doing business in Florida that (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 provision includes an exception for "obscene" content. *Id.* §501.2041(2)(j).

- ***Consistency.*** S.B.7072 requires a "social media platform" to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." *Id.* §501.2041(2)(b). The law does not define the phrase "consistent manner."
- ***30-day restriction.*** A "social media platform" may not change "user rules, terms, and agreements … more than once every 30 days." *Id.* §501.2041(2)(c).
- ***Detailed explanations.*** When a "social media platform" "deplatform[s]," "censor[s]," or "shadow ban[s]" any user, it must provide the user with a detailed notice. *Id.* §501.2041(2)(d). The notice must be in writing, be delivered within seven days, and include both a "thorough rationale explaining the reason" for its decision and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered that decision, "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). The provision includes an exception for "obscene" content. *Id.* §501.2041(4).

- ***User opt-out.*** A "social media platform" must allow users to opt out of its "post-prioritization" and "shadow-banning" algorithms. For users who opt out, material must instead be displayed in "sequential or chronological" order. *Id.* §501.2041(2)(f). Users must be offered the opportunity to opt out annually. *Id.* §501.2041(2)(g).

S.B.7072 imposes steep penalties. On top of exposing violators to civil and administrative actions by the state attorney general, *id.* §501.2041(5), the law creates a private cause of action that allows individual users to sue to enforce the "consistency" and "notice" mandates and authorizes awards of up to $100,000 in statutory damages for each claim, as well as actual damages, equitable relief, punitive damages, and in some cases attorneys' fees. *Id.* §501.2041(6). The law also authorizes the state elections commission to impose significant fines for violating the candidate "deplatforming" provision ($250,000 per day for candidates for state office, $25,000 per day for candidates for other office). *Id.* §106.072(3). And it appears to contemplate potential criminal penalties as well. *Id.* §106.27(1).

B. Proceedings Below

1. Soon after Florida passed S.B.7072, NetChoice and CCIA challenged the law in federal court. The district court entered a preliminary injunction barring

Florida from enforcing S.B.7072's principal provisions, holding that (among other things) S.B.7072 likely violates the First Amendment.[2]

The court first concluded that the law implicates the First Amendment, as it "targets … editorial judgments themselves." Pet.App.82a. The court next concluded that S.B.7072 discriminates based on content, speaker, and viewpoint. Indeed, the court found several provisions, such as the restrictions on speech "about" a political candidate, "about as content-based as it gets." Pet.App.89a. The court also found "substantial factual support"—including the gerrymandered definition of "social media platform," the legislative findings complaining of "unfair" editorial judgments, and statements by the law's proponents—for the conclusion that "the actual motivation for this legislation was hostility to the social media platforms' perceived liberal viewpoint." Pet.App.89a. That viewpoint discrimination, the court explained, "subjects the legislation to strict scrutiny, root and branch." Pet.App.90a. Finally, the court concluded that S.B.7072 comes "nowhere close" to surviving strict scrutiny. Pet.App.91a-92a. It accordingly enjoined the law's core provisions in their entirety. Pet.App.94a-95a.

2. The Eleventh Circuit affirmed in substantial part, holding that S.B.7072's candidate, journalistic-enterprise, consistency, 30-day restriction, user opt-

[2] The district court enjoined all the law's operative provisions except for certain antitrust provisions triggered by contingent events, as to which it found no threat of imminent, irreparable injury. Pet.App.79a.

out, and detailed-explanation provisions likely violate the First Amendment.[3]

The court first rejected Florida's contention that S.B.7072 is not subject to First Amendment scrutiny at all, explaining "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." Pet.App.23a. As it observed, "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." Pet.App.29a.

The court also rejected Florida's argument that "social media platforms" are common carriers. Unlike telephone companies and railroads, the court explained, "social media platforms" do not open their websites to the public on an indiscriminate and neutral basis—the hallmark of common-carrier status. Pet.App.41a-43a. They make "'individualized' content- and viewpoint-based decisions" about which content to disseminate and how. Pet.App.41a-43a.

Turning to the proper level of scrutiny, the court acknowledged that this Court is "deeply skeptical of laws that distinguish among different speakers." Pet.App.53a. It further acknowledged that S.B.7072

[3] The court vacated the injunction as to the provisions requiring websites to disclose standards, rule changes, view counts, free advertising, and user data. Those provisions are not before the Court.

"applies only to a subset of speakers consisting of the largest social-media platforms," and that its proponents wanted "to combat what they perceived to be the 'leftist' bias of the 'big tech oligarchs' against 'conservative' ideas." Pet.App.50a. The court nevertheless declined to subject the law to strict scrutiny as viewpoint discriminatory, largely because it read this Court's precedent as foreclosing it from looking to "legislative history to find an illegitimate motivation" in the speech context. Pet.App.51a.

The court ultimately concluded, however, that the appropriate level of scrutiny did not matter for most of the law's provisions. The court held that the candidate, journalistic-enterprise, consistency, 30-day, and user opt-out provisions "do not further any substantial government interest—much less any compelling one." Pet.App.58a. The state has no legitimate interest in "leveling the expressive playing field," as the concept that the government can "restrict the speech of some elements of our society in order to enhance the relative voice of others" is "wholly foreign to the First Amendment." Pet.App.59a (alteration omitted). And even if Florida had a substantial interest in interfering with the editorial judgment of private companies, its chosen means are "the opposite of narrow tailoring." Pet.App.62a.

The court also concluded that the detailed-explanation requirement likely violates the First Amendment, as it fails to satisfy even the more relaxed standard of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), under which laws that require disclosure of "purely factual and uncontroversial information about

the terms under which … services will be available" are permissible unless they are "unjustified or unduly burdensome." *Id.* at 651. "The targeted platforms," the court explained, "remove millions of posts per day; YouTube alone removed more than a billion comments in a single quarter of 2021." Pet.App.64a. And because the Act provides for up to $100,000 in statutory damages *per claim*, and "pegs liability to vague terms like 'thorough' and 'precise,'" 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." Pet.App.64a. That "massive potential liability" is "unduly burdensome" and would "chill protected speech." Pet.App.64a. The court therefore upheld the injunction in the main and then stayed its mandate, keeping the full injunction in force.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that S.B.7072 violates the First Amendment. This Court has repeatedly held that the dissemination of speech is itself speech within the meaning of the First Amendment, and that disseminating speech created by others is no less protected than creating speech in the first instance. When a private party disseminates speech, the First Amendment fully protects its right to choose what messages to include or exclude and which speech to give pride of place. Indeed, since "*all* speech inherently involves choices of what to say and what to leave unsaid," it is bedrock law that "one who chooses to speak may also decide 'what not to say.'" *Hurley v.*

Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995).

Those core First Amendment principles prohibit the government from interfering with the right of private parties to exercise editorial control over what speech they choose to disseminate. Just as the government may not tell the Miami Herald which editorials to publish or MSNBC which interviews to broadcast, the government may not tell Facebook or YouTube which third-party speech to disseminate or how to disseminate it. Yet S.B.7072 does just that. The law's core provisions compel privately owned and operated websites to disseminate speech that they do not wish to disseminate and to do so in ways that they otherwise would not. Indeed, countermanding the editorial judgments of "Big Tech" about what speech to allow on their websites is the law's *raison d'être*.

That alone suffices to trigger strict scrutiny, as laws that compel speakers to alter the content of their speech, whether by changing their own messages or by pairing them with other messages, have long been viewed as content based and subject to strict scrutiny. But that is far from the only problem with S.B.7072. The law is shot through with other content-based distinctions, demanding special treatment for "journalistic enterprises" and speech "by or about" political candidates. In addition, S.B.7072 singles out only a select group of websites for this special, disfavored treatment. The law is carefully designed to cover websites with a perceived "leftist" bias, while exempting other websites with a different perceived ideological bent. Laws that single out some—but not all—of those who disseminate speech trigger strict

scrutiny. And S.B.7072's First Amendment faults include the gravest free speech violation of all, as the law targets certain speakers because of their disfavored viewpoints. The law thus triggers strict scrutiny several times over.

S.B.7072 cannot survive any level of heightened scrutiny, let alone strict scrutiny. Whatever interest Florida may have in ensuring that a wide variety of views reach the public, that interest cannot justify compelling private parties to disseminate content with which they disagree. Indeed, the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. At any rate, S.B.7072 is not remotely tailored. It sweeps in all covered entities regardless of whether they are websites for disseminating vast swathes of speech or more narrowly focused e-commerce websites like Etsy. And it conveniently excludes many websites that differ in their perceived ideological bent.

Florida did not even try to argue below that S.B.7072 could survive heightened scrutiny on this record. Instead, the state dedicated its efforts to arguing that S.B.7072's core provisions do not implicate the First Amendment at all because requiring websites to "host" third-party speech regulates "conduct," not speech. The Eleventh Circuit rightly rejected that remarkable claim. This Court has repeatedly held that the dissemination of speech is itself speech within the meaning of the First Amendment. Florida cannot evade First Amendment scrutiny by calling that protected activity "hosting"

any more than it could evade First Amendment scrutiny by calling a censorship regime a regulation of the conduct of writing or publishing.

The Eleventh Circuit likewise correctly rejected Florida's attempt to justify S.B.7072 as a common-carrier regulation. Contrary to Florida's suggestion, there is no historical tradition of imposing common-carrier obligations on private parties that disseminate collections of speech. And in all events, S.B.7072 looks nothing like a traditional common-carrier regulation. It does not regulate all those in the business of providing a certain type of service. It instead singles out only a subset of those providing such services for disfavored treatment. And far from imposing non-discrimination requirements, S.B.7072 favors certain content and speakers. In short, the law seeks to *commandeer* editorial discretion, subjecting sensitive decisions about which speech to disseminate and how to do so to the oversight of the state. That is not a common-carrier regulation. It is a forbidden abridgement of core First Amendment rights.

ARGUMENT

I. S.B.7072 Violates The First Amendment.

A. S.B.7072 Interferes With the Rights of Private Parties to Exercise Editorial Discretion in the Selection and Presentation of Speech.

1. The First Amendment prohibits the government from interfering with the right of private parties to exercise "editorial discretion in the selection and presentation" of speech. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). That rule follows from two well-established principles.

First, "dissemination of information" is plainly "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). After all, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). That is so even when the private party does not "generate, as an original matter, each item featured in the communication" or "isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. The "presentation of an edited compilation of speech generated by other persons" falls "squarely within the core of First Amendment security." *Id.* at 570. This Court thus has long recognized that newspapers, cable television providers, publishing houses, bookstores, and movie theaters engage in protected First Amendment activities when they disseminate works created by others. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

Second, it is bedrock First Amendment law that "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. Indeed, since "*all* speech inherently involves choices of what to say and what to leave unsaid," it is axiomatic that "one who chooses to speak may also decide 'what not to say.'" *Id.* at 573. The First Amendment therefore "prohibits the government from telling people what they must say," *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013), as it protects "both the right to speak freely and the right

to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). And just as the government may not compel private parties to convey its own message, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), it may not compel one private speaker to convey the message of another, *see 303 Creative LLC v. Elenis*, 600 U.S. 570, 588-89 (2023); *Hurley*, 515 U.S. at 573; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11 (1986) ("*PG&E*") (plurality op.); *Tornillo*, 418 U.S. at 258.

Those principles lead to a straightforward rule: When a private party disseminates speech to others, the First Amendment fully protects its editorial choices about what speech to include and exclude and how to arrange and present it. This Court's decision in *Tornillo* is instructive. There, the Court struck down a Florida law that required newspapers to give political candidates space to respond to negative coverage. Although the response would have been the candidate's speech in the first instance and clearly labeled as such, the Court concluded that forcing a newspaper to run it nevertheless would violate the First Amendment. As the Court explained, the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment," which is itself protected speech. 418 U.S. at 258. The law's "intrusion into the function of editors" thus failed to "clear the barriers of the First Amendment." *Id.*

Notably, the Court reached that conclusion in the face of arguments strikingly similar to those Florida

has recycled here. Like Florida, Tornillo argued that the right-of-reply statute was critical "to ensure that a wide variety of views reach the public." *Id.* at 247-48. The press, he lamented, had become "enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 249. The "result," he continued, was "to place in a few hands the power to inform the American people and shape public opinion," leading to "homogeneity of editorial opinion, commentary, and interpretive analysis" and "abuses of bias and manipulative reportage." *Id.* at 250. The Court was not unsympathetic, granting that "much validity may be found in these arguments." *Id.* at 254. But it concluded that "compulsion exerted by government on a newspaper to print that which it would not otherwise print" simply cannot be squared with the First Amendment. *Id.* at 256.

2. *Tornillo*'s core insight—that "the editorial function itself is an aspect of 'speech'" with which the government generally may not interfere, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.)—is by no means "restricted to the press." *Hurley*, 515 U.S. at 574. The Court has applied the same rule to "ordinary people engaged in unsophisticated expression," as well as to "business corporations generally." *Id.*

Hurley provides a clear example. There, veterans organizing a St. Patrick's Day parade refused to include GLIB, a group of gay, lesbian, and bisexual individuals. GLIB argued that Massachusetts' public accommodations law entitled it to participate in the parade, but this Court disagreed. A parade, the Court

explained, is constitutionally protected expression. *Id.* at 568. And just as a newspaper's "presentation of an edited compilation of speech generated by other persons" falls "squarely within the core of First Amendment security," so too does the "selection of contingents to make a parade." *Id.* at 570. That is so regardless of whether its organizers "generate, as an original matter, each item featured," regardless of whether they are strict or "lenient in admitting participants," and regardless of whether they "edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70. Those editorial judgments are for the parade organizers, not the government, to make. *Id.* at 574-75.

PG&E is much the same. There, a California state agency ordered a "privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]." 475 U.S. at 4 (plurality op.). Even though the third party was "required to state that its messages are not those of" the private utility company, *id.* at 7, the Court held that the requirement violated the First Amendment, *id.* at 20-21; *id.* at 25 (Marshall, J., concurring in judgment). While the state agency defended the order as "offer[ing] the public a greater variety of views," the plurality concluded that the "variety of views that the Commission seeks to foster" cannot be obtained by requiring private parties to carry the messages of speakers with whom they disagreed. *Id.* at 12-13. Doing so would "impermissibly burden[]" the company's "own expression" by requiring it to "disseminate hostile views." *Id.* at 13-14. And while a company may not "have the right to be free from

vigorous debate," it "*does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id.* at 14 (quoting *Buckley*, 424 U.S. at 49).

Nothing about those principles changes when the medium of dissemination is the Internet. *See 303 Creative*, 600 U.S. at 587; *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). After all, "whatever the challenges of applying the Constitution to ever-advancing technology," the First Amendment's basic principles "do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). And just as a newspaper, cable television provider, publishing house, bookstore, or movie theater engages in speech when disseminating works created by others, a website engages in speech when disseminating "curated compilations of speech" created by others. Pet.App.26a. A website thus has just as much of a right as a newspaper, cable television provider, publishing house, bookstore, or movie theater to "exclude a message" it does not like. *Hurley*, 515 U.S. at 574. As then-Judge Kavanaugh put it, the government may no more "tell Twitter or YouTube what videos to post" or "tell Facebook or Google what content to favor" than it may "tell *The Washington Post* or the *Drudge Report* what columns to carry" or "tell ESPN or the NFL Network what games to show." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also id.* at 392 (Srinivasan, J., concurring in denial of rehearing en banc).

3. Applying those principles, S.B.7072 interferes with the First Amendment rights of covered websites in multiple ways. First, the prohibition on "deplatforming" political candidates and applying "post-prioritization" or "shadow banning algorithms" on content "by or about" them directly abridges the right of these private parties to decide for themselves what speech to disseminate and how to arrange it. Those provisions prohibit websites from suspending or removing a candidate no matter what the candidate posts or how blatantly the candidate violates the website's terms of use. S.B.7072 even goes so far as to prohibit websites from deprioritizing or restricting *any* speech posted "by or about" a candidate—no matter how dangerous, defamatory, or obscene—thus forcing them to disseminate everything from threats to deepfakes to adult content. Pet.App.61a-62a; *cf.* K. Frederick, *Twitter Bans Florida Candidate Luis Miguel Over Call to Shoot FBI, IRS, ATF Agents*, N.Y. Post (Aug. 19, 2022), https://tinyurl.com/4vtm6hhu; N. Nehamas, *DeSantis Campaign Uses Apparently Fake Images to Attack Trump on Twitter*, N.Y. Times (June 8, 2023), https://tinyurl.com/yd3kcutd; K. Garger, *Florida Porn Actor Running For Office in America's 'Second Gayest City,'* N.Y. Post (June 10, 2020), https://tinyurl.com/2dddb38b.

The prohibition on "censoring," "deplatforming," and "shadow banning" a journalistic enterprise "based on the content of its publication or broadcast" likewise forces websites to disseminate content that they do not wish to disseminate. That provision requires covered websites to allow any entity with the requisite content and users to post anything that it wants short of true obscenity. It even prohibits websites from appending

their own speech to that content, such as a disclaimer or warning. *See* Fla. Stat. §501.2041(2)(j). As the Eleventh Circuit explained, the provision would seemingly "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." Pet.App.62a. And it would seemingly "prohibit Facebook or Twitter from removing" or appending a graphic-violence warning to "a video of a mass shooter's killing spree if it happened to be reposted by an entity that qualifies for 'journalistic enterprise' status." Pet.App.62a.n.23.

The consistency requirement, the 30-day restriction on changing terms, and the user opt-out provision likewise countermand editorial judgments. Though S.B.7072 does not even try to define the phrase "consistent manner," the consistency requirement appears to force a website to disseminate speech against its will when it has disseminated speech that the state (or a jury) deems sufficiently similar. Conversely, it prevents a website from disseminating speech it *wants* to convey if it has declined to disseminate comparable speech in the past. Pet.App.46a-47a. The 30-day restriction forces a website to disseminate content it does not want to disseminate unless it has already adopted rules covering that content. JA108-09, 119-20. And the user opt-out provision requires websites to display content in a "sequential or chronological" order even if they would prefer to present it in a different manner. Just as telling a newspaper what constitutes front-page news or Amazon which books to feature on its

homepage impermissibly countermands editorial judgments, so too does telling a website what third-party speech to give pride of place.

The detailed-explanation requirement burdens the exercise of editorial discretion as well. Much like the right-of-reply statute burdened the exercise of editorial discretion in *Tornillo* by requiring newspapers to run opposing views only if they chose to criticize a political candidate, *see* 418 U.S. at 256-57, S.B.7072's detailed-explanation requirement imposes onerous burdens on covered websites if they choose to deprioritize or refuse to disseminate third-party speech. "Faced with the penalties that would accrue" should its explanation be deemed insufficient, a website "might well conclude that the safe course is to avoid controversy" by not exercising editorial discretion at all. *Id*. at 257. Florida may not require Facebook and YouTube to explain their editorial choices any more than it may require the Washington Post to explain why it chose not to publish a letter to the editor, or CNN to explain why it chose not to interview a particular commentator. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566.

* * *

In sum, bedrock First Amendment principles repeatedly reaffirmed by this Court compel the conclusion that websites have the same right as any other speaker to decide what speech to disseminate and how. When it comes to the First Amendment, then-Twitter's decision not to publish tweets by former President Trump is every bit as protected as Fox

News' decision not to air an interview with him, *see* J. Peters, *Fox News, Once Home to Trump, Now Often Ignores Him*, N.Y. Times (July 29, 2022), https://tinyurl.com/46z5ctzr, or the Wall Street Journal's decision to publish an op-ed written by him. *See* D. Trump, *Why I'm Suing Big Tech*, Wall St. J. (July 8, 2021), https://tinyurl.com/3drdfbjd. Each of those editorial decisions is just as constitutionally protected as the decisions overridden by S.B.7072.

B. S.B.7072 Is Content, Speaker, and Viewpoint Based.

S.B.7072 not only interferes with constitutionally protected editorial discretion. It does so based on content, speaker, and viewpoint, triggering strict scrutiny multiple times over.

1. It is the "most basic" principle of the First Amendment that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown*, 564 U.S. at 790-91. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Laws that compel speakers to "alter the content of their speech" are necessarily "content based." *Nat'l Inst. of Fam. Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2371 (2018) ("*NIFLA*"). In *NIFLA*, for example, the Court held that a California law that required clinics to provide patients with a "script about the availability of state-sponsored services, as well as contact information for how to obtain them," was content

based because it "compel[led] individuals to speak a particular message," "alter[ing] the content" of the clinics' own speech. *Id.* In *Hurley*, the Court held that requiring the parade organizers to include a message they did not want to include would "alter the expressive content of their parade." 515 U.S. at 572-73. And in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Court held that a law that required professional fundraisers to disclose specific information to potential donors was content based. *Id.* at 795. "Mandating speech that a speaker would not otherwise make," the Court explained, "necessarily alters the content of the speech." *Id.* (citing *Tornillo*, 418 U.S. at 256).

Applying those principles, S.B.7072 is plainly content based. When Facebook, YouTube, or X disseminates speech to its users, it conveys a message about the type of speech it finds acceptable and the community it hopes to foster. Pet.App.26a-27a. "Since every participating unit affects the message conveyed," requiring a website to include speech it does not want to include or present speech in ways it would rather not necessarily alters the content of its message. *Hurley*, 515 U.S. at 572-73.

That alone is enough to trigger strict scrutiny. But S.B.7072 is shot through with other content-based distinctions too. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Multiple provisions of S.B.7072 do just that. The candidate provision, for example, applies only to "content and material posted by or about … a candidate." Fla. Stat.

§501.2041(2)(h). And the journalistic-enterprise provision prohibits making various editorial judgments concerning any "journalistic enterprise based on the content of" its speech. *Id.* §501.2041(2)(j). The law thus "singles out specific subject matter for differential treatment." *Reed*, 576 U.S. at 169. That is "about as content-based as it gets." *Barr v. Am. Ass'n of Political Consultants*, 140 S.Ct. 2335, 2346 (2020) (plurality op.).

The consistency provision is also content based because its entire purpose is to compel and amplify content that a website would otherwise not disseminate. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) ("If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction … that restriction may be content based."). In *PG&E*, the access order was content based because its "acknowledged purposes" were "to offer the public a greater variety of views in appellant's billing envelope, and to assist groups … that challenge appellant in the Commission's ratemaking proceedings in raising funds." 475 U.S. at 12-13 (plurality op.). The order thus forced PG&E to "contend with the fact that whenever it speaks out on a given issue, it may be forced … to help disseminate hostile views." *Id.* at 14.

Here, too, the acknowledged purpose of the consistency requirement is to "grant access to" speakers "on the ground that the content of" their speech "will counterbalance the messages" that the website would voluntarily disseminate. *Turner*, 512 U.S. at 655. If Facebook disseminates speech

criticizing ISIS, the consistency requirement would seemingly require it to disseminate speech praising ISIS, even if it prefers not to "disseminate hostile views." *PG&E*, 475 U.S. at 14. The consistency requirement is thus content based for the same reasons that the access order in *PG&E* was content based.

2. Making matters worse, S.B.7072 singles out a select group of websites for disfavored treatment, causing another First Amendment problem. This Court is deeply skeptical of laws that "distinguish[] among different speakers." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). After all, a speaker and her speech are so often "interrelated" that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* "Speaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" *NIFLA*, 138 S.Ct. at 2378.

That principle has especial force when a law singles out for disfavored treatment some but not all of those in the business of disseminating speech. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936). Laws that "discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns" because they create very real and unacceptable "dangers of suppression and manipulation" of the medium and risk "distort[ing] the market of ideas." *Turner*, 512 U.S. at 659-61; *see also Leathers v. Medlock*, 499 U.S. 439, 448 (1991).

Thus, unless the "differential treatment" can be "justified by some special characteristic" of the speakers singled out, such laws trigger strict scrutiny. *Turner*, 512 U.S. at 659-60.

Minneapolis Star is illustrative. There, Minnesota imposed a "use tax" on the cost of paper and ink products used in the production of a publication. 460 U.S. at 577. Because the state exempted the first $100,000 of paper and ink used by a publication in any calendar year, the tax applied to just a handful of the largest newspapers in the state. *Id.* at 577-78. Although there was "no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature," *id.* at 580, the Court nevertheless held that the tax triggered strict scrutiny, *id.* at 585. "Whatever the motive of the legislature," the Court concluded, "recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 591-92; *see also Ark. Writers' Project*, 481 U.S. at 228-29 (striking down an Arkansas law that imposed a tax on "only a few Arkansas magazines" even though there was "no evidence of an improper censorial motive").

The same principles trigger strict scrutiny here. On its face, S.B.7072 singles out just a subset of websites, saddling them—and only them—with a slew of onerous burdens. And unlike in *Minneapolis Star*, the "censorial motive" behind S.B.7072 is plain to see: The law's size and revenue requirements are carefully crafted to target "Big Tech," while exempting smaller

companies with a different perceived ideological bent. No legitimate "special characteristic" justifies singling out websites like Facebook, YouTube, and X while exempting smaller websites like Rumble, Truth Social, and Gab. The Eleventh Circuit speculated that the distinctions "might be" based on "market power," Pet.App.54a, but the same thing could have been said in *Minneapolis Star*, yet this Court still refused to allow the state to single out the largest publications for disfavored treatment. 460 U.S. at 592. And rightly so, as the Court has reaffirmed time and again—in "one of the most important sentences in First Amendment history," *U.S. Telecom*, 855 F.3d at 432 (Kavanaugh, J.)—that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley*, 424 U.S. at 48-49. That principle carries no less force when the government attempts to restrict the First Amendment rights of entities with "market power." *See PG&E*, 475 U.S. at 17 n.14; *Minneapolis Star*, 460 U.S. at 592; *Tornillo*, 418 U.S. at 254.[4]

3. S.B.7072 "goes even beyond mere content discrimination" and speaker discrimination "to actual viewpoint discrimination." *R.A.V.*, 505 U.S. at 391. If

[4] At any rate, the "market power" explanation ignores that S.B.7072 initially exempted some companies with substantial market power because of their Florida ties. *See supra* at 7-8. Florida later repealed that carve-out—not because Disney and Universal Studios gained market share, but because Disney executives criticized a different Florida law. Thus, the through-line that explains S.B.7072's speaker-based distinctions, as enacted and as amended, reflects perceived viewpoints, not market power.

the "censorial motive" in *Minneapolis Star* was undetectable, S.B.7072's effort to target disfavored viewpoints was barely disguised.

As both the district court and the Eleventh Circuit recognized, one of S.B.7072's key premises is the perception that certain large websites exercise their editorial discretion in an "ideologically biased" manner. Pet.App.29a, 82a. That view leaps off the legislative record. S.B.7072's official findings complain that certain websites have exercised their editorial judgment "unfairly"—i.e., in ways Florida does not like. S.B.7072 §1(9); *see Sorrell*, 564 U.S. at 565 (finding viewpoint discrimination in part because formal legislative findings complained that disfavored speakers' actions were "often in conflict with the goals of the state"). The Governor's official signing statement left even less to the imagination: He proclaimed that the state was enacting the law to provide "protection against the Silicon Valley elites" and to check the "Big tech censors" that "discriminate in favor of the dominant Silicon Valley ideology." Pet.App.7a. And the official statement quotes one of the law's sponsors as saying: "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." Pet.App.89a. Viewpoint discrimination does not get clearer than that.

To be sure, courts must be careful to avoid imputing the motives of "a handful of Congressmen" to the entire legislature. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). But that hardly means that

courts must blind themselves to codified legislative findings and official statements of the sole executive who signed a law. To the contrary, this Court has repeatedly demanded a searching inquiry into whether facially unmistakable speaker preferences—and especially preferences for certain speakers in the business of disseminating speech—reflect impermissible preferences for content, viewpoint, or both. *See Sorrell*, 564 U.S. at 565. In *Grosjean*, for example, the Court applied strict scrutiny to a tax that singled out certain newspapers because it had the "plain *purpose* of penalizing the publishers and curtailing the circulation of a selected group of newspapers." 297 U.S. at 251 (emphasis added); *see also Minneapolis Star*, 460 U.S. at 580. In rooting out discrimination in the free-exercise context, the Court considers "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). There is no reason to ignore all that context when it comes to incursions on free speech. *See Turner*, 512 U.S. at 645-46 (citing *Lukumi*, 508 U.S. at 534-35). "Judges are not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.).

Here, not only the legislative record, but Florida's defense of S.B.7072, confirms that the law's speaker distinctions both are "directed at" and "present[] the danger of suppressing, particular ideas." *Leathers*,

499 U.S. at 453; *see also Minneapolis Star*, 460 U.S. at 585. Florida included an extraordinary 800 pages of materials in its appellate appendix detailing supposedly biased editorial decisions, CA11.App.891-1693, and the state has continued to complain about supposedly biased editorial decisions in its briefs to this Court. In its petition, Florida decried a purported "censorship regime" in which "social media giants" use their power to "suppress particular views." Pet.10. And it left no doubt about which views it thinks they are suppressing. Pet.10-11. All seven articles Florida included in its petition appendix criticize the purportedly "liberal viewpoint" of Big Tech. Pet.App.89a. One complains about "Twitter, Facebook and Amazon Censorship of Conservatives." Pet.App.131a-35a. Another complains about Facebook's decision to remove satirical content posted by the conservative-leaning Babylon Bee. Pet.App.109-11a. Others complain about decisions to limit content about Hunter Biden's laptop, "the property-buying habits of one of the founders of Black Lives Matter," and the origins of the coronavirus. Pet.App.118a-30a. Florida thus has not even tried to hide the fact that S.B.7072 singled out "Big Tech" precisely because the state does not like the viewpoint that it perceives their websites to advance.

C. S.B.7072 Cannot Survive Any Level of Heightened Scrutiny, Let Alone Strict Scrutiny.

Because strict scrutiny applies, Florida bears the heavy burden of demonstrating that S.B.7072 is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478

(2014). Indeed, even under intermediate scrutiny, Florida would have to prove that S.B.7072 is "narrowly tailored to serve a significant governmental interest." *Packingham v. N. Carolina*, 582 U.S. 98, 106 (2017). Florida cannot come close to doing so—which likely explains why it did not even try below. Pet.App.58a.

1. First, Florida has not identified a significant, let alone compelling, justification for its content, speaker, and viewpoint discrimination. To the extent the state seeks to justify the law on the theory that it has an interest in ensuring that the public has equal access to competing viewpoints, that effort is squarely foreclosed by this Court's precedents. As the Court explained in *Tornillo*, whatever interest Florida may have in "ensur[ing] that a wide variety of views reach the public," that interest cannot justify compelling private parties to publish speech they do not want to publish or disseminate content with which they disagree. 418 U.S. at 247-48. Simply put, the "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.

To the extent the state seeks to "promot[e] the widespread dissemination of information from a multiplicity of sources," *Turner*, 512 U.S. at 662, that formulation fares no better. As this Court has explained, *Turner* rested on "special characteristics of the cable medium." *Id.* at 661. Those special characteristics, just like the special characteristics of the broadcast medium, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), "are not applicable to other speakers," *Reno*, 521 U.S. at 868. Indeed, this Court

has explicitly held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Id.* at 870. That is equally true when it comes to the websites at issue here, as Floridians "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." Pet.App.60a.[5] And while the "size and success" of a website like Facebook or YouTube may make it "an enviable vehicle for the dissemination" of views, that alone cannot justify countermanding private editorial judgments. *Hurley*, 515 U.S. at 577-78. After all, the government cannot force Fox News or the Wall Street Journal to disseminate its preferred views just because they are popular.

2. Even if the state could articulate a compelling (or even substantial) interest, S.B.7072 burdens far more speech than is necessary to achieve any such

[5] Recent developments in the industry underscore the wisdom of not extending *Turner* to the Internet. While this case was pending in the Eleventh Circuit, Elon Musk acquired Twitter, renamed it X, and announced many changes to its policies "to loosen moderation guidelines on the site." J. De Avila, *Twitter Under Elon Musk Abandons Covid-19 Misinformation Policy*, Wall St. J. (Nov. 29, 2022), https://tinyurl.com/4muxnvx6. In response, X's competitors developed new services with different approaches of their own. *See* S. Rodriguez, *Meta's Threads Draws Power Users Seeking Alternative to Elon Musk's X*, Wall St. J. (Oct. 24, 2023), https://tinyurl.com/5czv7wut. Those developments undermine any attempt to equate this market to the "bottleneck monopoly power exercised by cable operators" in *Turner*. 512 U.S. at 661.

goal. The law prohibits or severely restricts editorial discretion over virtually all material posted by "journalistic enterprises" and "candidates," no matter how blatantly it violates a website's rules. It mandates "consistency" for the entire universe of editorial judgments, from routine application of clear rules to delicate and context-dependent value judgments. It imposes an arbitrary 30-day waiting period that bars changes to editorial policies even in the face of rapidly evolving challenges, and even when bad actors exploit loopholes in the website's current rules. And the law imposes a detailed-explanation requirement that is practically impossible to satisfy given the millions of posts that websites remove or deprioritize each day. Florida does not and cannot explain why such sweeping and draconian restrictions are necessary to achieve its objectives—unless the goal is simply to punish "Big Tech" for speech the state disfavors.

In fact, S.B.7072 is both overinclusive and underinclusive. It is overinclusive because the definition of "social media platform" sweeps in entities regardless of whether they disseminate the kinds of speech with which the state purports to be concerned or are e-commerce websites like Etsy. And it is underinclusive because Florida has no explanation for the arbitrary size and revenue requirements that exempt websites that are not meaningfully different in the core services they offer save for their perceived ideological bent. "Such underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 138 S.Ct. at 2376. In short, the law burdens

too much and furthers too little, and thus fails any level of heightened scrutiny.

3. Finally, although the detailed-explanation requirement is subject to traditional heightened scrutiny, it fails to survive even more relaxed scrutiny under *Zauderer*.[6] As this Court recently reiterated, *Zauderer* puts the burden on the state to prove that its disclosure requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 138 S.Ct. at 2377. Florida has not even tried to make that showing here.

Nor could it. Websites like Facebook and YouTube remove "millions of posts per day" that violate their policies, and they make countless more decisions about how to prioritize and arrange third-party speech on their websites. Pet.App.64a. S.B.7072 would require them to provide a "precise and thorough" explanation for every one of those decisions, which are often determined by proprietary algorithms and countless dynamic variables. Not only would that be paralyzingly burdensome, but S.B.7072 could expose a website to "millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn't provide sufficiently 'thorough'

[6] This Court has never applied *Zauderer* to uphold a speech mandate outside the context of correcting misleading commercial advertising. To the contrary, the Court has repeatedly described *Zauderer* as confined to efforts to "combat the problem of inherently misleading commercial advertisements" by mandating "only an accurate statement." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *see also, e.g.*, *Hurley*, 515 U.S. at 573 (describing *Zauderer* as permitting the government only to "requir[e] the dissemination of 'purely factual and uncontroversial information'" in the context of "commercial advertising").

explanations when removing posts." Pet.App.64a. "Faced with the penalties that would accrue," on top of the already significant compliance burdens (including the disclosure of proprietary algorithms), a website "might well conclude that the safe course is to avoid controversy" by not exercising editorial discretion at all. *Tornillo*, 418 U.S. at 257.

II. Florida's Contrary Arguments Lack Merit.

Rather than attempt any argument that S.B.7072 survives any form of meaningful First Amendment scrutiny, the state has devoted the bulk of its efforts to arguing that S.B.7072 does not implicate the First Amendment at all. The Eleventh Circuit correctly rejected that remarkable claim.

A. S.B.7072 Regulates Speech, Not Conduct.

Florida's principal contention is that requiring websites to "host" third-party speech "regulates conduct, not speech." Pet.18. That is just word play. This Court has repeatedly held that the "dissemination of information" is itself "speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570. Calling that protected activity "hosting" changes nothing. Publishing books does not lose First Amendment protection just because the state claims to be regulating the "conduct" of publishing. *See Bantam Books*, 372 U.S. at 64. Disseminating speech over cable is not any less protected if the state labels the activity the "conduct" of programming. *See Turner*, 512 U.S. at 636. And a restriction on door-to-door advocacy implicates the First Amendment even if the state claims to be regulating the "conduct" of soliciting. *See Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002).

Here, too, calling a private party's decisions about what third-party speech to disseminate "hosting" neither advances the ball nor allows "hosting" regulations to evade First Amendment scrutiny—especially when they compel speech and discriminate based on content, speaker, and viewpoint. By Florida's logic, the Miami Herald could be made to "host" a rebuttal op-ed, and parade organizers could be made to "host" floats reflecting unwelcome messages. And in all events, S.B.7072 goes much further than requiring websites to "host" speech they do not want to host. It forbids them from editing, deprioritizing, or restricting access to that speech, and even prohibits them from engaging in speech that they created themselves by adding an addendum or a disclaimer to third-party content. *See* Fla. Stat. §§501.2041(1)(b), (e), (f).

Neither *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), nor *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), supports the state's argument. In *PruneYard*, the owner of the shopping center did not claim that the center was engaging in any expressive activity of its own. 447 U.S. at 85-88. Indeed, the "owner did not even allege that he objected to the content of the pamphlets." *PG&E*, 475 U.S. at 12 (plurality op.). "The principle of speaker's autonomy was simply not threatened in that case." *Hurley*, 515 U.S. at 580. *FAIR* likewise had nothing to do with overriding editorial judgments or compelling the dissemination of speech. The law schools were not disseminating any speech when they simply allowed interviewers access to campus, and nothing in the Solomon Amendment required law schools to

disseminate any message about the military or even "say anything." 547 U.S. at 60. The only remotely expressive activity required of them, the Court found, was sending emails and posting notices conveying interview logistics, which was plainly incidental to the Solomon Amendment's regulation of "what law schools must *do*." *Id.* at 60-61.

Here, by contrast, the websites S.B.7072 covers "are in the business of expression." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 761 (1988). They engage in their own speech protected by the First Amendment when they choose what speech to disseminate and how; indeed, those decisions are central to how they compete for users and advertisers. And there is nothing incidental about the burdens S.B.7072 imposes on that protected activity. To the contrary, altering how websites exercise their editorial discretion is the law's *raison d'être*. Had the Solomon Amendment compelled law schools to give pro-military speakers equal time in classrooms, *FAIR* would have come out the other way.

Florida insists that websites "have no message," Pet.22, because they do not curate and present speech in a way that promotes a sufficiently "common theme," Pet.App.39a. But the same complaint was lodged against the parade organizers in *Hurley* to no avail. 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 also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000). Countless speech compilations—from op-ed pages to open-mic events to

art fairs—have no "common theme" beyond their medium and terms of use. Yet they are unquestionably protected. Nor does it matter that some websites are "rather lenient" in deciding what third-party speech to disseminate. *Hurley*, 515 U.S. at 569. Whether to be highly selective, somewhat selective, or open to all comers is itself an exercise of editorial judgment protected by the First Amendment. *Id.* Newspapers vary in selectivity when deciding what to run on their op-ed and letter-to-the-editor pages, but no one doubts that all those decisions are protected. So too with websites. Some tout their hands-off policies, while others tout policies designed to foster values such as "authenticity," "safety," and "privacy," JA114, 131-32, while still others foster dialogue about specific subjects, like handmade crafts or sports or cooking, JA151. Those choices are protected by the First Amendment no matter where a website draws the line.

Florida protests that S.B.7072 does not "require that platforms host any particular message; it requires that all candidates and journalists are hosted—regardless of message." Pet.20. But that just forces onto private parties an indiscriminate and all-inclusive editorial policy, in violation of the bedrock principle that what people decline to say is every bit as important as what they choose to say. Every one of this Court's compelled-speech cases reinforces that principle. While some involved laws compelling private parties to speak specific messages, *see Wooley*, 430 U.S. at 707; *Barnette*, 319 U.S. at 626-29, many do not. The statute in *Tornillo*, for example, did not specify the message the Miami Herald must print. It just required the Herald to print "any reply the

candidate may make." 418 U.S. at 244. Likewise, the order in *PG&E* "placed no limitations on what TURN or appellant could say in the envelope." 475 U.S. at 7 (plurality op.). And the law in *Hurley* did not specify any particular message a parade organizer must carry; indeed, this Court described GLIB's message as "not wholly articulate." 515 U.S. at 574.

Florida fares no better with its claim that "there is little likelihood that the public will misattribute a user's speech to the platform." Pet.20. To be sure, the possibility of misattribution exacerbates the First Amendment problem, which is why S.B.7072's no-disclaimer provision is so problematic. *See Hurley*, 515 U.S. at 575-76. But the principle that the government may not force a private speaker to disseminate the speech of others does not turn on such risk. The compelled speech in *Wooley* was unconstitutional even though every resident in the Granite State understood that the state's slogan was mandatory. 430 U.S. at 713-15. No reasonable observer would have confused the political candidate's reply to the Miami Herald as the newspaper's own message. And there was zero risk of misattribution in *PG&E* because the state commission specifically ordered the third party "to state that its messages are not those of" the Pacific Gas & Electric Company. 475 U.S. at 7 (plurality op.). Ordering the utility company to disseminate the third party's message violated the First Amendment just the same.

It therefore would make no difference whether websites could say "that they do not endorse their users' speech." Pet.20. But that is not even generally true here, as S.B.7072 restricts, and sometimes even

prohibits, adding "an addendum to any content or material posted by a user." Fla. Stat. §501.2041(1)(b). That aside, it is well-established that the possibility of disclaiming compelled speech—say, by placing a give-peace-a-chance bumper sticker alongside a live-free-or-die license plate—does not eliminate the First Amendment problem. After all, the argument that a speaker can "dissociat[e]" itself from forced speech by "simply post[ing] a disclaimer" would "justify any law compelling speech." *Masterpiece Cakeshop v. Colo. Civ. R. Comm'n*, 138 S.Ct. 1719, 1745 (2018) (Thomas, J., concurring in part and concurring in the judgment).

If anything, the prospect that websites may feel obligated to explain away speech that they are compelled to disseminate only doubles the compulsion. The prospect that PG&E "may be forced … to respond" to the third-party speech that it was required to include in its newsletter was itself "antithetical" to the First Amendment. 475 U.S. at 15-16 (plurality op.). "Because the government cannot compel speech, it also cannot 'require speakers to affirm in one breath that which they deny in the next.'" *Masterpiece Cakeshop*, 138 S.Ct. at 1745 (Thomas, J.) (quoting *PG&E*, 475 U.S. at 16).

In all events, the risk of misattribution is present here in spades. As the record demonstrates, users, advertisers, and members of the public often perceive a website's choices about what to display and disseminate and what to remove or restrict as reflecting its own views about what speech warrants presentation. Pet.App.39a. Indeed, the animating force behind S.B.7072 is Florida's perception that websites like Facebook and YouTube have a "leftist"

bias—a perception derived in substantial part from decisions those websites make about what content to disseminate and how. Pet.App.29a. If Florida forces websites to display and disseminate speech in ways they otherwise would not (which is the entire point of the law), it is hard to fathom how the public, especially outside Florida, would not be confused about whose editorial judgments those actions reflect. Pet.App.39a. Such mandates would inevitably change the nature and character of the websites themselves. If YouTube Kids really were forced to start disseminating PornHub content, odds are the average parent would complain to YouTube.

B. S.B.7072 Cannot Be Justified as a Common-Carrier Regulation.

Florida's effort to justify S.B.7072 as a common-carrier regulation is equally meritless. This Court has never held that the government may evade First Amendment scrutiny by purporting to regulate a private party as a "common carrier." As Justice Thomas explained in the context of a regulation that required cable operators to lease channels to certain programmers, "[l]abeling leased access a common carrier scheme has no real First Amendment consequences." *Denver Area*, 518 U.S. at 825 (Thomas, J., concurring in the judgment in part and dissenting in part). "Whether viewed as the creation of a common carrier scheme or simply as a regulatory restriction on cable operators' editorial discretion, the net effect is the same: operators' speech rights are restricted to make room for access programmers." *Id.* Here, too, whether one calls S.B.7072 a common-carrier regulation, an editorial-discretion regulation, or

something else, what matters is that it requires websites to alter the content of their own speech by disseminating messages that they do not wish to disseminate. It therefore implicates—and violates—the First Amendment regardless of whether Florida thinks such websites "should be treated similarly to common carriers." S.B.7072 §1(6).

In trying to characterize S.B.7072 as common-carrier regulation, Florida cannot mean that the websites targeted for regulation *already* operate as common carriers, and thus are subject to some greater degree of regulation. Indeed, the genesis of S.B.7072 was that Florida lawmakers did not like how the targeted companies were exercising discretion over which content to disseminate and how. Thus, Florida does not seek to regulate the targeted websites because they already *are* common carriers; it seeks to convert them *into* common carriers that must disseminate the messages of all comers (or at least the state's hand-picked preferred speakers). But that is just another way to describe the state's impermissible effort to force a different and more indiscriminate editorial policy onto companies engaged in the dissemination of speech. *Cf. FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 (1984) (explaining that requiring broadcasters "to accept all paid political advertisements … would intrude unnecessarily upon the editorial discretion of broadcasters"). The First Amendment forbids such efforts no matter what they are labeled.

That conclusion follows directly from this Court's decision in *303 Creative*. There, the Court considered whether applying Colorado's public accommodations

law to compel a private party to speak a message she did not wish to speak would violate the First Amendment. 600 U.S. at 578. The Court noted that such laws "grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants." *Id.* at 590. Yet despite those historical roots, the Court reiterated that "no public accommodations law is immune from the demands of the Constitution," especially when it is applied to businesses engaged in expressive activities and thus "deployed to compel speech." *Id.* at 592. "When a state public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.* Just so here. Even if S.B.7072 could be conceptualized as a common-carrier law, it would still compel speech and still violate the First Amendment.

History reinforces that conclusion. To be sure, the common law imposed a duty on "common carriers and places of traditional public accommodations" like innkeepers, ferries, and stagecoaches to serve the public without discrimination. *303 Creative*, 600 U.S. at 590-91; *see also* 3 W. Blackstone, *Commentaries on the Laws of England* 164 (1768); J. Story, *Commentaries on the Law of Bailments* §§495, 591 (1837). But there is no comparable common law tradition of imposing common-carrier-like regulations on private parties that disseminate curated collections of speech. Indeed, while some in "our early history" held the "view … that the publisher must open his columns 'to any and all controversialists, especially if paid for it,'" that was decidedly not the Framers' view. *Columbia Broad. Sys., Inc. v. Dem. Nat'l Comm.*, 412 U.S. 94, 152 (1973) (Douglas, J., concurring in the

judgment) (quoting F. Mott, *American Journalism: A History* 55 (3d ed. 1962)). "At the time of the Founding, … the Federal Government could not compel book publishers to accept and promote all books on equal terms or to publish books from authors with different perspectives." *U.S. Telecom*, 855 F.3d at 427 (Kavanaugh, J.). As Benjamin Franklin aptly put it, his newspaper was not "a stagecoach, with seats for everyone." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1931 (2019).

Common-carrier obligations were eventually extended to certain services people use to communicate with each other, principally telegraph and telephone companies. But that is because such services are just "conduit[s] for the speech of others," transmitting it on an "unedited basis" from point A to point B. *Turner*, 512 U.S. at 629. Websites like Etsy, Facebook, Pinterest, Reddit, and YouTube, by contrast, are no mere "passive receptacle[s] or conduit[s] for news, comment, and advertising." *Tornillo*, 418 U.S. at 258. They do not hold themselves out as making their websites available on an indiscriminate or neutral basis. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 701-02 (1979). Their entire business instead depends on making decisions about which speech to disseminate and how—a point that they make explicit in their terms of service, which expressly reserve the right to exercise discretion over content on their websites. *See Am. Orient Express Ry. Co. v. Surface Transp. Bd.*, 484 F.3d 554, 557 (D.C. Cir. 2007); *U.S. Telecom*, 855 F.3d at 392 (Srinivasan, J., concurring in the denial of rehearing en banc) ("Facebook, Google, Twitter, and YouTube … are not common carriers that hold

themselves out as affording neutral, indiscriminate access to their platforms without any editorial filtering"). In fact, Congress has gone out of its way to enable websites to weed out objectionable content, *see* 47 U.S.C. §230, and has specifically disclaimed any intent to treat them as common carriers, *see id.* §223(e)(6), underscoring that they are nothing like traditional common carriers.

Imposing common-carrier obligations on services engaged in the mere "transmission of person-to-person communications does not implicate the same editorial discretion issues" as imposing them on those engaged in the dissemination of curated compilations of speech to the public. *U.S. Telecom*, 855 F.3d at 434 n.13 (Kavanaugh, J.). Moreover, Florida's effort to target websites with a perceived liberal bias undermines any claim that the websites it has targeted are mere conduits. A law targeting only liberal telegraph companies or conservative telephone companies would be constitutionally problematic and belie the argument that such websites exercise no editorial discretion. Having complained about certain websites' perceived "liberal" biases, and targeted only a subset of companies providing comparable websites, Florida "cannot compel [that subset of websites] to operate like 'dumb pipes' or 'common carriers' that exercise no editorial control." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1321-22 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).[7]

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[7] As with the flawed "market power" explanation for S.B.7072, any effort to justify the law as a common-carrier regulation cannot explain its original carve-out for Disney and Universal

Indeed, S.B.7072 looks nothing like a traditional common-carrier regulation. The hallmark of common-carrier regulation is a duty on all involved in providing a particular service to serve all comers alike, without impermissible discrimination. *See, e.g.*, Telegraph Lines Act, ch. 772, §2, 25 Stat. 382, 383 (1888) (requiring telegraph operators to operate their lines "without discrimination in favor of or against any person, company, or corporation whatever"); *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1895) (requiring telegraph company to "transmit and deliver" dispatches "with impartiality and good faith, and with due diligence"); *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894) (telegraph companies are "bound to serve all customers alike, without discrimination").

That is decidedly not what S.B.7072 requires. Rather than impose its onerous obligations on *all* those who operate certain types of websites, the law singles out only the largest websites based on their perceived ideological bent. Rather than require regulated companies to serve *all* comers, the law seeks to *control* how a website exercises its editorial discretion through novel burdens like the detailed-explanation requirement and the 30-day restriction. And far from demanding non-discrimination, S.B.7072 expressly *requires* websites to favor certain content (material about political candidates) and speakers (political candidates and journalistic enterprises). That is not common-carrier regulation; it is an

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Studios. Those companies were not somehow less like common carriers because of their in-state theme parks, and they did not become any more like common carriers after Disney criticized the Governor.

unadorned effort to "burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-79. Because such efforts remain every bit as "foreign to the First Amendment," *Buckley*, 424 U.S. at 49, today as they were at the Founding, S.B.7072 cannot stand.

CONCLUSION

For these reasons, this Court should affirm.

Respectfully submitted,

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