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

REPLY BRIEF FOR RESPONDENTS

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REPLY BRIEF

S.B.7072 is a compendium of First Amendment problems. It requires a select handful of private actors to disseminate third-party speech against their will and restricts their ability to decide how to organize and present that speech. It draws distinctions based on content, speaker, and viewpoint. And it does all this because Florida dislikes how websites like Facebook and YouTube have exercised their editorial discretion and wants to amplify speakers and messages the state prefers. In short, S.B.7072 uses forbidden means to achieve a forbidden end, as the First Amendment does not tolerate efforts to "restrict the speech of some elements in our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Remarkably, Florida insists that S.B.7072 does not regulate speech at all. That claim blinks reality and belies Florida's own explanations for the law, which are replete with professed concerns about the messages that it perceived certain websites to convey through their editorial choices. It also defies this Court's cases, which have held time and again that disseminating the speech of others is core expressive activity that is just as protected by the First Amendment as disseminating one's own speech. That is equally true when it comes to speech on the Internet. While new technologies allow websites to display and disseminate more content than the average newspaper or bookstore, that does not make their editorial judgments any less protected. They still wish to edit out some speech, and S.B.7072 was prompted primarily by speech that ended up on the

cutting-room floor. The notion that these websites are common carriers is refuted by S.B.7072 itself, which, as the state emphasizes, permits covered websites to discriminate based on the content of their users' speech if they do so consistently (and affirmatively requires them to discriminate in favor of political candidates and journalistic enterprises). Equally important, common-carrier treatment has never been extended to those engaged in expressive activity directed to broad audiences, as this Court underscored just last term. Finally, S.B.7072's onerous duty-to-explain obligation shares all these First Amendment defects and imposes too many burdens on too few speakers to be justified under precedents allowing targeted disclosure provisions that prevent misleading advertising.

In the end, Florida has no answer to decades of settled precedent. Fifty years ago, this Court rejected Florida's effort to override editorial judgments to "ensure that a wide variety of views reach the public." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247-48 (1974). Florida offers no reason for a different result this time around.

ARGUMENT

I. S.B.7072 Interferes With The Rights Of Private Parties To Exercise Editorial Discretion In The Selection And Presentation Of Speech.

1. Florida insists that S.B.7072 regulates conduct, not expression protected by the First Amendment. That assertion is fanciful and belies Florida officials' own justifications for enacting S.B.7072. When a website organizes, displays, and disseminates

compilations of speech to its users that include some of the website's own speech and excludes some user speech deemed inconsistent with its terms of use and business model, it engages in expression protected by the First Amendment. Resp.Br.19-20; U.S.Br.14-16. This Court has long recognized that all manner of private parties—from newspapers and bookstores to movie theaters and broadcasters—engage in "communicative acts" when they disseminate a "compilation of the speech of third parties." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995).

Florida claims that newspapers, bookstores, and the like are different because they select and compile the materials they present. Fla.Br.24. But websites like Facebook and YouTube do just that by deploying human reviewers and customized algorithms and systems to arrange and display the content they deliver. JA112-13; JA132-33. Florida maintains that newspapers, bookstores, and movie theaters are more selective about what they disseminate. Fla.Br.23-24. But this Court has already rejected the notion that First Amendment protection turns on how much speech a private party excludes. The parade organizers in *Hurley* were "rather lenient in admitting participants," but that did not deprive them of First Amendment protection. 515 U.S. at 569. In fact, when those exercising editorial discretion are "rather lenient," the message they send by excluding specific content is particularly clear. That message via exclusion is precisely what prompted both Massachusetts in *Hurley* and Florida here to try to

level the playing field—and that message is precisely what the First Amendment protects.

Florida suggests that newspapers and bookstores are justified in excluding some third-party speech only because of capacity constraints that the Internet lifts. Fla.Br.36-37. That suggestion is doubly flawed. First, as this Court observed in *Tornillo*, "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." 418 U.S. at 258; *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 18 (1985) ("*PG&E*") (plurality op.). Second, this Court has long made clear that First Amendment principles generally, and *Hurley* in particular, apply with full force to the Internet. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997); *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023). The Internet may enable Amazon.com to carry far more titles than a traditional brick-and-mortar bookseller and NYTimes.com to carry more letters to the editor than the print version of the New York Times. But the First Amendment fully protects decisions by Amazon.com and NYTimes.com to exclude certain books and letters.

Florida contends that the "amalgamations of content that appear on the platforms" are not the "platforms' own expression" because "user choice, not platform choice, drives most of what each user views." Fla.Br.23-25. But the fact that websites can use algorithms designed by their employees to tailor their

content to individual viewers only increases the expressive nature of their services and heightens the need for First Amendment protection. While the First Amendment would protect websites even if they did no more than post third-party content in reverse chronological order (which is itself an editorial choice), the amalgamations of content that users actually receive reflect far more editorial discretion. Websites filter out some offensive content, add addendums and disclaimers to other content, and factor in some user input when determining what to display and how. After all those editorial choices, the resulting compilation of speech is plainly the website's own expression. Pet.App.6a; U.S.Br.19.

Government efforts to override those editorial choices trigger First Amendment scrutiny, as cases like *Tornillo*, *PG&E*, and *Hurley* confirm. Florida tries to distinguish those decisions as invalidating laws that interfered with the "speaker's own message." Fla.Br.32. But S.B.7072 does just that. Although Florida occasionally quibbles at the margins, it does not seriously dispute that S.B.7072 requires covered websites to include messages they would rather exclude and forces them to arrange their presentations in a manner they deem suboptimal or impractical. That is the law's entire point. In *Hurley*, the Court held that requiring parade organizers to include a message they wished to exclude impermissibly required them to "alter the expressive content of their parade." 515 U.S. at 572-73. Just so here: "Since every participating unit affects the message conveyed," forcing a website to include speech it wants to exclude and to arrange speech in ways it

would rather not necessarily interferes with the website's own speech. *Id.*

Florida insists that the *Hurley* decision was "motivated" by a risk of "misattribution" that is "absent here." Fla.Br.34. But far from treating that risk as dispositive, *Hurley* disclaimed the need to determine "the precise significance of the likelihood of misattribution." 515 U.S. at 577. And as Florida does not dispute, there was zero risk of misattribution in *Tornillo* and *PG&E*. Yet the Court found a First Amendment violation in both cases anyway. In all events, Florida is simply wrong to deny a misattribution risk here. Users and advertisers often perceive a website's choices about what to display as reflecting its own views about what speech warrants presentation. Resp.Br.45-46; Yoo Amicus.Br.2; U.S. Chamber Amicus.Br.5-6. And to the extent disclaimers matter, that is a further strike against S.B.7072, which limits the ability of websites to include a Florida-made-me-do-it or we-think-this-speech-is-false disclaimer to speech by the state's favored speakers.

With no basis to distinguish the cases that matter, Florida relies heavily on *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*"). But even Florida concedes that the mall owner in *PruneYard* never claimed to be engaging in expressive activity of its own. Fla.Br.21. "The principle of speaker's autonomy was simply not threatened in that case." *Hurley*, 515 U.S. at 580. As for *FAIR*, the Solomon Amendment did not "interfere with any message of the school" because it targeted

recruiting sessions, not classrooms, and "schools are not speaking when they host interviews and recruiting receptions." 547 U.S. at 64. Here, by contrast, S.B.7072 is not limited to access to job boards or physical premises. It targets websites' editorial decisions as to which messages to exclude and countermands their decisions about how to arrange and display compilations of content. And *FAIR* is hardly the last word on these issues. The state in *303 Creative* repeatedly tried to extrapolate from *FAIR* broad authority to force the dissemination of third-party speech over the Internet. This Court would have none of it, distinguishing *FAIR* and reaffirming that those who organize and display speech are protected by the First Amendment. 600 U.S. at 596.

Florida is thus left trying to ground its arguments in "history." Fla.Br.19. But while the state identifies a tradition of imposing a duty of non-discrimination on common carriers and places of public accommodation, Fla.Br.19, it identifies no comparable tradition of imposing common-carrier-like obligations on private parties that disseminate collections of *speech* to the public. Resp.Br.48-49; Professors of History Amicus.Br.27; Protect the First Foundation Amicus.Br.10-18. This Court has repeatedly recognized, including in *Hurley* and *303 Creative*, the vast difference between "requiring an ordinary, non-expressive business" like an inn, railroad, or grocery store "to serve all customers," and applying such laws "to expressive activity to compel speech." *303 Creative*, 600 U.S. at 592, 598 n.5. When states have attempted

the latter, the Court has not hesitated to strike down their efforts. *Id.* at 592; *see Hurley*, 515 U.S. at 573.[1]

To be sure, some states have extended common-carrier obligations to telephone and telegraph companies. But that is because those services are, in fact, "carriers"—i.e., mere conduits for end-to-end communications. Resp.Br.50; U.S.Br.25. Telephone and telegraph services do not disseminate speech to broader audiences in the way that newspapers, broadcasters, and websites like Facebook and YouTube do, which is why they do not generate advertising revenue or need to worry about disseminating content that will cause their users to abandon the service. JA113-16, 130; Resp.Br.49-50; U.S.Br.25; U.S. Chamber Amicus.Br.5-6; TechFreedom Amicus.Br.6-10.

Florida insists that telegraph companies are more than just "dumb pipes" because they prioritize urgent messages and refuse to transmit messages containing unlawful content, while phone companies may filter spam, junk, and the like. Fla.Br.37-38. But as Florida acknowledges, the law has always recognized limited

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[1] Florida barely tries to distinguish *303 Creative*. Lacking a substantive distinction, Florida seizes on the procedural detail that *303 Creative* involved an as-applied challenge, whereas this is a facial challenge. Fla.Br.38-39. But 303 Creative brought an as-applied challenge because Colorado's public accommodations law lawfully applied to a vast array of "ordinary, non-expressive business[es]." 600 U.S. at 598 n.5. S.B.7072, by contrast, does not apply to non-expressive businesses; it exclusively singles out entities in the business of expression and countermands their decisions about what speech to disseminate and how. That targeting of expressive businesses is hardly a virtue; it renders S.B.7072 unconstitutional on its face.

exceptions to the general obligation of common carriers to accept all comers. That telephone and telegraph services likewise are not literally required to serve every potential customer (or to do so in the exact same manner) does not change the reality that they provide a *carriage* service involving the efficient transmission of private communications, rather than the dissemination of compilations of content to a broader audience, where companies compete on how they arrange the content and promote a distinct environment to attract users and advertisers.[2] Conversely, the fact that S.B.7072 not only exempts myriad comparable services based on their size and revenue, but by the state's own telling leaves websites free to adopt "discriminatory standards" of their own choosing, Fla.Br.26, belies any claim that S.B.7072 is of a piece with historical common-carrier regulations.[3]

2. Florida's efforts to characterize specific provisions of S.B.7072 as conduct regulations are equally unavailing. Florida does not seriously dispute that the candidate and journalistic-enterprise provisions override websites' choices about what speech to disseminate and how. It just tries to minimize the problem, insisting that covered websites remain free to "deplatform" or "censor" journalistic enterprises for reasons "unrelated to the content of the

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[2] Florida's references to net neutrality miss the mark for the same reason. Internet service providers do not shape and edit compilations of speech in the same way. U.S.Br.25.

[3] That further distinguishes S.B.7072 from rules prohibiting telegraph companies from "discriminating against disfavored newsgathering organizations and political speech like strike-related telegraphs." Fla.Br.19.

enterprise's reporting." Fla.Br.27-28. And it disputes the Eleventh Circuit's observation that S.B.7072 would require YouTube Kids to disseminate PornHub content by invoking the law's acknowledgment of what the Supremacy Clause independently commands—namely, that S.B.7072 may only be "enforced to the extent not inconsistent" with 47 U.S.C. §230(c)(2). Fla. Stat. §501.2041(9). Florida took a much narrower view of §230(c)(2) in the Eleventh Circuit. CA11.Fla.Br.13-18. But however Florida may now think §230(c)(2) constrains S.B.7072's reach, it does not solve the core First Amendment problem. At bottom, the candidate and journalistic-enterprise provisions override websites' editorial judgments about what third-party speech to disseminate and how to arrange and display it. Recognizing that reality does not require "speculation about imaginary cases." Fla.Br.30. Countermanding those judgments is the entire point of S.B.7072.

Florida argues that the journalistic-enterprise provision "leaves the platforms free to 'express whatever views they may have' on the content of the enterprise's publications and broadcasts." Fla.Br.30. But that is demonstrably untrue, as the state acknowledges that S.B.7072 prohibits covered websites from "'post[ing] an addendum' to content because they disagree with the enterprise's reporting." Fla.Br.30. Florida claims that this disclaimer-restriction lawfully "regulates speech only as an incident to conduct." Fla.Br.30. But prohibiting a private party from issuing a disclaimer is a direct regulation of speech (and suffices to distinguish *FAIR*). Florida defends the provision as necessary to prevent a website from "drown[ing] out" the "hosted

enterprise" with "endless addenda." Fla.Br.30. But the prohibition forecloses even the first addendum, and Florida's drowning-out concern just highlights that it is trying to restrict the speech of some "to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49.

More fundamentally, Florida is wrong to suggest that its interference with editorial decisions is somehow less problematic because websites can respond to the third-party speech they are required to disseminate. If anything, that need-to-reply doubles the compulsion. Resp.Br.45. In *PG&E*, the plurality noted that because "TURN has been given access in part to create a multiplicity of views in the envelopes, there can be little doubt that appellant will feel compelled to respond to arguments and allegations made by TURN." 475 U.S. at 16. "That kind of forced response," the plurality explained, "is antithetical to the free discussion that the First Amendment seeks to foster," as the government cannot "require speakers to affirm in one breadth that which they deny in the next." *Id.*

Florida's attempt to defend the post-prioritization provision likewise misses the mark. Florida appears to acknowledge that the provision overrides websites' editorial choices about what speech to give pride of place. Fla.Br.31. It just complains that the record contains insufficient detail about exactly how each website chooses which content to prioritize. Fla.Br.31. But it makes no constitutional difference why or how a private party decides to exclude a certain message. "[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view,

and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

Turning to the consistency provision and the 30-day restriction on changing terms, Florida again does not dispute that those provisions require covered websites to disseminate speech they do not wish to disseminate. Resp.Br.25. Nor does Florida dispute that those provisions prevent websites from disseminating speech they *want* to disseminate. Resp.Br.25. Florida just repeats its mantra that they are similar to non-discrimination provisions and insists that it is regulating the *conduct* of "inconsistent treatment." Fla.Br.26. But that argument is impossible to square with *303 Creative*, which rejected the notion that Colorado was regulating the "conduct" of discrimination when it deployed its public-accommodations law to compel speech. 600 U.S. at 596. Perhaps sensing as much, Florida tries to liken the provisions to "consumer-protection measures." Fla.Br.26. But no consumer-protection rationale justifies preventing websites from updating their fully disclosed terms of use, and imposing a consistency mandate on editorial choices is antithetical to the First Amendment. The New York Times proudly proclaims that it includes "All the News That's Fit to Print," but a law purporting to empower any newsmaker whose event was left uncovered to sue would constitute censorship, not consumer protection.[4]

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[4] Florida claims that its consistency mandate does not prohibit "adopt[ing] a policy of removing content that promotes

As for the user opt-out provision, Florida again does not dispute that it avowedly overrides websites' decisions about how to organize and display speech, even to the point of costing them advertising revenue. Fla.Br.26. It nevertheless contends that the provision does not "interfere with expression" because it "affects only the content that the user sees." Fla.Br.26-27. But "the content the user sees" when logging on a website is the heart of the website's protected expression. Some users might prefer their newspapers, bookstores, or broadcasts to be arranged differently, but neither the user nor the state gets to override the editorial judgments of those who make the content available. That remains true if the compilation is tailored in part to individual users, as the precise degree of individualized tailoring is itself an editorial judgment that the state may not override.

II. S.B.7072 Is Content, Speaker, And Viewpoint Based.

S.B.7072 not only interferes with First Amendment rights, but does so based on content, speaker, and viewpoint—triggering strict scrutiny three times over.

1. Florida denies that S.B.7072 is content based. But this Court has squarely held that "[m]andating speech that a speaker would not otherwise make

terrorism," but rather just prohibits excluding "content praising ISIS but allow[ing] content praising Al-Qaeda." Fla.Br.27. Because defining what groups constitute terrorists is no simple matter, and S.B.7072 does not define "consistent manner," it is not at all clear whether that is correct. But whether the law mandates "consistency" on a content basis or viewpoint basis does not alter the underlying First Amendment problem.

necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *see also Nat'l Inst. of Fam. Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2371 (2018) ("*NIFLA*"). And requiring a website to include speech it wants to exclude or arrange speech in ways it would rather not alters the content of its message. *See Hurley*, 515 U.S. at 572-73. Some of S.B.7072's provisions are even more glaringly content based. 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 law prohibits making various editorial judgments concerning any "journalistic enterprise based on the content of" its speech. *Id.* §501.2041(2)(j). As the district court observed, that is "about as content-based as it gets." Pet.App.89a.

Florida does not (and cannot) deny that S.B.7072 requires covered websites to disseminate content they otherwise would not. It just recycles its argument that dictating what content websites must disseminate "do[es] not target any expression of the platforms." Fla.Br.40. That argument fails for all the reasons already explained, leaving the state with no answer to the law's facial content-based discrimination.

2. S.B.7072's speaker-based discrimination is just as unmistakable, as the law singles out a few websites for distinct—and distinctly unfavorable—treatment. Florida never denies that S.B.7072's size and revenue requirements ensure it will cover "Big Tech" while exempting smaller companies with a different perceived ideological bent. Nor does it offer any legitimate "special characteristic," *Turner Broad. Sys.*

Inc. v. FCC, 512 U.S. 622, 659-61 (1994), of the covered websites that could justify that line-drawing. While the Eleventh Circuit speculated that the distinction "might be" based on "market power," Pet.App.54a, Florida does not defend that claim, and for good reason. The newspapers in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), had market power, yet the Court nevertheless applied strict scrutiny to a tax that singled them out. Resp.Br.30-32.

Florida's sole effort to distinguish *Minneapolis Star* is to claim that the "statute invalidated there applied to just two Minnesota newspapers." Fla.Br.45. Florida gets its facts wrong. *See Minneapolis Star*, 460 U.S. at 578-79 (explaining that "11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974," and "13 publishers, producing 16 out of 374 paid circulation papers, paid a tax" in 1975). More fundamentally, *Minneapolis Star* did not turn on the precise number of speakers singled out. It turned on the concern that "differential treatment" of entities disseminating speech is a tell-tale sign "that the goal of the regulation is not unrelated to suppression of expression." 460 U.S. at 585.

3. S.B.7072 also reflects the gravest of First Amendment sins: viewpoint discrimination.[5] Florida

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[5] Florida argues that the Court lacks "jurisdiction" to consider S.B.7072's viewpoint discrimination because it denied Respondents' cross-petition. Fla.Br.44-45. But Respondents may "urge any grounds which would lend support to the judgment below." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419

insists that S.B.7072 is not viewpoint discriminatory because it applies to the targeted websites regardless of the viewpoint they express. But the websites covered by S.B.7072 are subject to its onerous requirements because of their perceived viewpoints, while other websites with different perceived biases are left unregulated. A law that imposes a burdensome tax on daily newspapers above a specified circulation level would not be deemed viewpoint neutral if the state enacted it because it was tired of perceived liberal views from the Northeast dominating the news. Nor is this some strained attempt to conjure forbidden intent from legislative history. Florida has no explanation for S.B.7072's formal legislative findings, the Governor's statement during the official signing ceremony, the original theme-park carveout (and subsequent repeal), or its own defense of the law—all of which confirm that the entire point of S.B.7072's speaker distinctions is to target websites that exercise their editorial discretion in ways the state dislikes. Resp.Br.32-35.

III. S.B.7072 Cannot Survive Any Level Of Heightened Scrutiny, Let Alone Strict Scrutiny.

Florida makes no effort to justify S.B.7072 under strict scrutiny. While it now suggests that S.B.7072 satisfies intermediate scrutiny, that argument is a

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(1977). Not only did Respondents press viewpoint discrimination below, but the district court enjoined the law on that basis. Florida insists that Respondents can no longer press viewpoint discrimination because doing so would "enlarge the judgment." Fla.Br.44-45. But Respondents seek only to defend, not enlarge, the judgment. *See Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364-65 (1994); *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013); *id.* at 82 n.1 (Kagan, J., dissenting).

non-starter.[6] Under intermediate scrutiny, Florida must prove that S.B.7072 is "narrowly tailored to serve a significant governmental interest." *Packingham v. N. Carolina*, 582 U.S. 98, 105-06 (2017). Florida does not come close.

1. Florida argues that the candidate and journalistic enterprise provisions serve the state's important interest in "ensuring Americans' access to 'a multiplicity of information sources.'" Fla.Br.44 (quoting *Turner*, 512 U.S. at 663). But when it comes to efforts to amplify certain voices at the expense of others, that is a First Amendment vice, not a valid interest. Resp.Br.36-37; U.S.Br.33. Indeed, that same purported interest has been repeatedly offered—and repeatedly repudiated—as a justification for efforts to compel the dissemination of third-party speech. In *Tornillo*, for example, the candidate argued that the statute was critical "to ensure that a wide variety of views reach the public," in part because of "homogeneity of editorial opinion, commentary, and interpretive analysis" in the press. 418 U.S. at 247-48. And in *PG&E*, California tried to justify the order on the ground that it "offer[ed] the public a greater variety of views." 475 U.S. at 12. Yet the Court concluded in both cases that the First Amendment *forbids* restricting the speech of some "in order to 'enhance the relative voice'" of others. *Id.*

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[6] In fact, Florida affirmatively disclaimed any effort to satisfy intermediate scrutiny in the Eleventh Circuit, and tried to dissuade the court from addressing intermediate scrutiny at all because Florida failed to establish a factual record to satisfy it. CA11.Fla.Reply.25-26.n.4.

Turner permitted a rare exception to that bedrock principle, but it did so based on the "special characteristics of the cable medium." 512 U.S. at 661. As this Court explained in *Hurley*, cable is "a franchised channel giving monopolistic opportunity to shut out some speakers." 515 U.S. at 577. "This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed." *Id.* But where "there is no assertion comparable to the *Turner Broadcasting* claim that some speakers will be destroyed in the absence of the challenged law," *Turner*'s rationale does not apply. *Id.*

Florida does not argue that political candidates and journalistic enterprises "will be destroyed in the absence of the challenged law." *Id.* It just argues that the covered websites are important and popular vehicles for disseminating their speech. Fla.Br.43-44. But while the "size and success" of certain websites may make them an "enviable vehicle for the dissemination" of content, that alone cannot justify government efforts to override their editorial judgments. *Hurley*, 515 U.S. at 577-78. Florida insists that the "unfathomable vastness of the internet compared to cable broadcasting" makes S.B.7072 "even more critical." Fla.Br.42. But that just underscores why *Turner*'s rationale is inapplicable, as that "vastness" ensures that speakers (including candidates and journalistic enterprises) "have numerous ways to communicate with the public besides any particular social-media platform that might prefer not to disseminate their speech," including on "more permissive platforms" or "their

own websites." Pet.App.60a. That makes the Internet the very last place the government may try to level the playing field in the name of scarcity or bottlenecks. *See Reno*, 521 U.S. at 870.

As for the consistency provision, the 30-day restriction, and the user opt-out requirement, Florida invokes its interest in "preventing discrimination." Fla.Br.39. But Florida claims elsewhere that the "neutrality provisions … allow platforms to have discriminatory standards if they apply them consistently." Fla.Br.26. How a provision can serve the state's interest in "preventing discrimination" while allowing "discriminatory standards," the state never explains. Nor does Florida try to square its argument with *303 Creative* or *Hurley*. While both cases lauded the importance of preventing discrimination, they nevertheless viewed that interest as insufficient to justify "requir[ing] speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Hurley*, 515 U.S. at 578; *see 303 Creative*, 600 U.S. at 592.

Perhaps recognizing these problems, Florida asserts a fallback interest in "preventing consumer deception." Fla.Br.39. But if a state perceives that a newspaper or broadcaster is not applying its editorial policy consistently, the answer is plainly more speech (e.g., criticizing hypocrisy), not more regulation. Government efforts to enforce consistency or forbid perceived hypocrisy are censorship. Moreover, S.B.7072 is "wildly underinclusive when judged against" a consumer-protection interest, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011), as it singles

out only a subset of websites providing similar services. That "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.*

In all events, it is Florida's burden to show that S.B.7072 will actually advance its professed interest. *Turner*, 512 U.S. at 664. It cannot "simply posit the existence of the disease sought to be cured." *Id.* Yet Florida makes no effort to explain why it needs these onerous provisions when it already has the full range of broadly applicable consumer protection statutes at its disposal to address any actual misrepresentations. And preventing a website from changing its terms of use more than once in a 30-day period and forcing websites to allow a user to opt out of editorial judgments central to their business model bears no obvious relationship to preventing consumer deception.

2. S.B.7072 burdens far more speech than necessary to achieve any legitimate ends. Resp.Br.37-38. Florida does not dispute that the law severely restricts editorial discretion over wide swaths of what journalistic enterprises and political candidates post and what users say about such candidates, no matter how blatantly that content may violate a website's rules. Nor does it dispute that the law mandates "consistency" for the millions of editorial decisions covered websites make each day. And the state does not deny that the 30-day restriction prohibits websites from changing their editorial policies in the face of rapidly evolving challenges. JA119-20, 142.

While this Court has made clear that intermediate scrutiny requires narrow tailoring, *see Packingham*, 582 U.S. at 106, Florida does not even try to explain how those restrictions on speech are meaningfully (let alone narrowly) tailored to serve its purported ends. At most, it disagrees that the law is overinclusive because it sweeps in e-commerce, suggesting (without explanation) that Etsy poses some lurking threat to public discourse by refusing to feature mass-produced goods. Fla.Br.45. But Etsy—unlike exempt websites like Rumble, Gab, and Truth Social—is hardly where "Americans increasingly discuss the issues of the day." Fla.Br.1. Nor does Florida explain why it is necessary to sweep in other "information service[s]" and "Internet search engine[s]" to achieve its ends. Fla. Stat. §501.2041(1)(g). And Florida has no meaningful explanation for S.B.7072's vast *under*inclusion—likely because it is most readily explained by the fact that S.B.7072 targets only perceived viewpoints with which Florida disagrees.

IV. S.B.7072's Onerous Detailed-Explanation Requirement Cannot Withstand Any Applicable Form Of Scrutiny.

Florida does not argue that S.B.7072's onerous detailed-explanation requirement, backed by up to $100,000 in damages per violation, could withstand even intermediate scrutiny. It instead defends the provision only under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). But that is the wrong standard for a law that discriminates based on content, speaker, and viewpoint. Indeed, that is the wrong standard even

setting aside those deficiencies, as this Court has never applied *Zauderer* outside the context of correcting misleading advertising. Resp.Br.39; U.S. Chamber Amicus.Br.19-22; FIRE Amicus.Br.31-32.

Florida insists that limiting *Zauderer* to the misleading advertising context would be "arbitrary," Fla.Br.47, but that ignores the central, context-specific premise of *Zauderer*. As the Court explained there, an advertiser has only a "minimal" interest in withholding "purely factual" information necessary to avoid misleading consumers "in his advertising." 471 U.S. at 651. After all, if the government may *ban* misleading advertisements without running afoul of the First Amendment, *see In re R.M.J.*, 455 U.S. 191, 205 (1982), it follows that it may preclude misleading commercial advertisements by requiring disclosures to ensure accuracy. *See Zauderer*, 471 U.S. at 651.

That logic does not translate to efforts to force websites to give "a thorough rationale explaining" each of the millions of editorial decisions they make each day on pain of millions (or even billions) of dollars in statutory damages. Far from demanding "purely factual and uncontroversial information about the terms under which … services will be available," *Zauderer*, 471 U.S. at 651, this detailed-explanation requirement seeks to achieve the same forbidden end as the other challenged provisions: countermanding editorial judgments. Resp.Br.39-40. Such a duty-to-explain mandate raises the same basic problem as a right-to-reply law: Both subject speakers to special burdens for engaging in expressive activity. Reporters Committee Amicus.Br.25-26. Had Florida required the Miami Herald to give "a thorough rationale

explaining" why it chose not to run Tornillo's op-ed, that compelled speech would still violate the First Amendment and could not have been justified as a benign effort to stop misleading claims about the paper's op-ed policies.

In all events, the detailed-explanation requirement cannot withstand even *Zauderer* scrutiny given its onerous burdens. Florida complains that the full extent of those burdens "has not yet been tested by discovery given the expedited nature of the preliminary-injunction proceedings below." Fla.Br.48. But it is *Florida*'s burden to prove that its compelled-speech mandate is "neither unjustified nor unduly burdensome." *NIFLA*, 138 S.Ct. at 2377. To the extent the present record is too sparse to do so, that is a reason to affirm the injunction, not to reverse it. *Id.*

Seeking to remedy that record deficiency, Florida observes that some covered websites have undertaken voluntary efforts to explain their editorial choices. Fla.Br.48. But those efforts are nothing like what S.B.7072 requires. Florida notes that Meta recently introduced "new messaging globally telling people the specific policy they violated for its Hate Speech, Dangerous Individuals and Organizations, and Bullying and Harassment policies," and "a global rollout of messaging telling people whether human or automated review led to their content being removed." Meta Oversight Board, *2022 Annual Report* (June 2023), http://tinyurl.com/yc6rabaz. Telling people what policy they violated (for just three categories of content) and whether a human or an algorithm flagged the issue is a far cry from providing—for every decision to restrict content—"a thorough rationale

explaining the reason" for the decision 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 … to flag the user's content or material as objectionable." Fla. Stat. §501.2041(3)(c)-(d). Florida notes that some websites have endorsed the Santa Clara Principles. But, again, those principles look nothing like the "precise and thorough explanation" S.B.7072 demands. *See* Santa Clara Principles, http://tinyurl.com/4f4srasa (last visited Feb. 13, 2024). If anything, they illustrate that Florida has options far less onerous than subjecting websites to up to $100,000 in statutory damages every time a jury decides that an explanation for one of their infinite editorial choices was insufficiently "thorough."

Finally, Florida briefly alludes to the European Union's Digital Services Act (DSA). But Florida does not detail how that law compares to S.B.7072. In fact, the DSA is materially different from S.B.7072 in terms of both its substantive requirements and its enforcement mechanisms. For example, while the DSA requires explanations that are "as precise and specific as reasonably possible under the given circumstances," Regulation 2022/2065, art. 17, 2022 O.J. (L 277), S.B.7072 requires a precise and thorough explanation every time, no matter how infeasible. The DSA likewise includes nothing akin to S.B.7072's private right of action, which permits any Floridian to seek up to $100,000 in statutory damages per violation without any need to show actual damages. And, of course, the European Union is not constrained by the First Amendment. That Florida's final redoubt is a flawed analogy to foreign regulations just underscores

that S.B.7072 is wholly foreign to our deep national commitment to free speech.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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