No. 22-393

In the
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

NATHANIEL MARKS
Counsel of Record
Team 16886
Regis High School
55 East 84th Street
New York City, New York 10028

EDWARD NAPOLI
Team 16886
Regis High School
55 East 84th Street
New York City, New York 10028

12/15/2023

QUESTIONS PRESENTED

1. Whether the laws' content-moderation restrictions comply with the First Amendment.
2. Whether the laws' individualized-explanation requirements comply with the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Constitutional Provisions

SUMMARY OF ARGUMENT

On May 24th, 2021, the Governor of Florida signed into law Florida Senate Bill 7072, a first-of-its-kind bill that placed restrictions on the content moderation abilities of social media platforms. Its restrictions, both regarding content moderation specifically as well as individualized explanations for deplatforming, violate the First Amendment's Free Speech Clause. The bill proscribes platforms' speech and compels other speech, and discriminates against certain viewpoints, failing strict scrutiny.

Firstly, the bill's clauses fall beyond the pale of valid regulation. They prevent platforms from expressing their own messages through the moderation of content on their sites and compel platforms to publish speech contrary to what they wish to publish, which cannot be excused by claims of speech host or common carrier status.

Secondly, the circumstances around the bill's creation prove that, while facially neutral, the bill's restrictions are targeted to control a specific perceived viewpoint. When facially neutral speech regulations are tainted by discriminatory purposes, they are invalid.

Finally, the bill, in regulating the expression and content of speech itself, must meet a standard of strict scrutiny to be constitutional. However, it fails that standard, as the bill neither addresses a compelling government interest nor is narrowly tailored to meet its goal.

In toto, Senate Bill 7072 cannot stand as good law in this Court. It restricts platforms from moderating certain content, compels them to publish other content, discriminates on the basis of viewpoint, and flunks strict scrutiny. Therefore, we ask this Court to uphold the Eleventh Circuit's ruling.

ARGUMENT

I. The Content-Moderation and Individualized-Explanation Provisions of the Bill Regulate Speech in an Impermissible Manner.

A. The Content-Moderation Restrictions Prevent Platforms From Expressing the Messages They Wish to Express.

The content moderation provisions of Senate Bill 7072 are simply not permissible under the First Amendment's protections. Firstly, as a threshold matter, First Amendment issues are specifically at issue here, as the "freedom of speech and of the press which are protected by the First Amendment from abridgement by Congress" are similarly protected "by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652 at 666 (1925). The First Amendment, incorporated into the Fourteenth Amendment, holds that the States "shall make no law… abridging the freedom of speech[.]" U.S. Const. amend. I. With this in mind, SB 7072's restrictions cannot stand.

The content moderation restrictions of the bill are sweeping: platforms may not "deplatform" (that is, remove from their sites) political candidates

whatsoever, Fla. Stat. § 106.072(2), platforms may not "shadow ban" (that is, limit other users' access to) users without notification, *id.* at § 501.2041(2)(d)(1), platforms must allow users to opt-out of content prioritization algorithms, *id.* at § 501.2041(2)(f)(2), and platforms may not deplatform or shadow ban a "journalistic enterprise" based on its content, *id.* at § 501.2041(2)(j), among other restrictions. These restrictions are not simply commercial regulations – they actively prevent social media platforms from engaging in constitutionally protected free speech.

This Court has held before in no uncertain terms that "First Amendment protection extends to corporations." *Citizens United v. FEC*, 130 S.Ct. 876 at 899 (2010). What does that protection extend to? "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak." *Id.*, quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Unfortunately, "dictating the subjects about which persons may speak" is precisely what the bill does.

Just over four years ago, in *Manhattan Community Access Corp. v. Halleck*, this Court dealt with a similar issue to the one in this case: whether a private entity in control of a large forum of speech may constitutionally censor speech in that forum. In *Halleck*, the Manhattan Neighborhood Network, a corporation charged by the State of New York with running Manhattan's public access channels, prohibited a producer from using the channels after the producer made a film critical of the MNN. This Court held that "when a private entity provides a

forum for speech… [they] may thus exercise editorial discretion over the speech and speakers in the forum." *Manhattan Community Access Corp. v. Halleck,* 139 S.Ct. 1921 at 1930 (2019). Editorial discretion is the right and ability of groups hosting speech (e.g. broadcasters, newspapers, publishing houses, social media platforms, etc.) to choose which messages to express, as well as what messages to not express. Platforms exercise this discretion by moderating the posts on their platform, using guidelines that reflect their views, which is without a doubt "conduct… 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 491 U.S. 397 at 404 (1989), quoting *Spence v. Washington*, 418 U.S. 405 (1974).

The right to "editorial discretion" as part of First Amendment free speech finds its foundations in *Miami Herald Pub. Co. v. Tornillo*, which held that the "treatment of public issues and public officials" in privately controlled content constituted "the exercise of editorial control and discretion." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 at 258 (1974). Furthermore, this Court held that the violation of the right to editorial discretion alone, without the existence of other burdens on an editing body's First Amendment rights, was enough to void a law, saying that "[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," a law would still be unconstitutional "because of its intrusion into the function of editors." *Ibid.* This Court rightfully stated that editorial discretion was an independent bar to the

validity of a law, contrary to what other lower courts might say. See *NetChoice v. Paxton*, No. 21-51178 (CA5 Sep. 16, 2022) (stating that *Miami Herald* did not even imply that "editorial discretion is *itself* a freestanding category of constitutionally protected expression" (emphasis in original)). This Court should uphold its decision in *Miami Herald* by affirming.

Editorial discretion, as a concept, is rooted in a bedrock principle of First Amendment law, "that the speaker has the right to tailor [their] speech," which "applies… to expressions of value, opinion, or endorsement," among other things. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 at 573 (1995). In *Hurley*, this Court not only reiterated its earlier affirmation of a right to editorial discretion in *Miami Herald*, *id.* at 574 (stating that "the point of all speech protection [ ] is to shield… choices of content"), but also tied that right into the original goal of the First Amendment, which was to enshrine the belief that "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men." Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 281 (2018). The "freedom to have opinions" is intrinsically connected to "a correlative freedom to express opinions," but SB 7072 substitutes the fundamental values of the First Amendment for the judgement of the government of Florida. *Ibid.*

Social media platforms make their speech public by removing or deprioritizing posts that are opposite to their values. For example, X (formerly known as Twitter) removes any posts that "attack

other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease," a policy that expresses X's disapproval of such "hate speech." *The X Rules*, X, https://help.twitter.com/en/rules-and-policies/x-rules (last accessed November 23, 2023). YouTube removes posts that "advanc[e] false claims that widespread fraud, errors, or glitches occurred in past elections[,]" by which YouTube encourages respect for democratic processes and election integrity. *Election misinformation policies*, YouTube, https://support.google.com/youtube/answer/10835034?hl=en (last accessed November 23, 2023). Generally, social media platforms publish very little content of their own. The way by they make their views known is through these policies, but SB 7072 curtails the abilities of platforms to express themselves through actions taken under these policies.

It is impossible to square the First Amendment and this Court's opinions with SB 7072, which can be shown using an example of a platform's speech above. If a candidate for office in Florida posted on X that they wanted to create a non-Islamic ride share app because they didn't want to pay a Muslim immigrant, they would ordinarily have their post or account removed for violating X's Rules. See *A self-described 'proud Islamophobe' banned from social media just won a GOP nomination*, Chris Cillizza, https://www.cnn.com/2020/08/19/politics/laura-loomer-donald-trump-florida/index.html (last accessed November 23, 2023). However, under Section 106.072(2), a part of SB 7072, X would be forced to keep that candidate on their site, and X would be

unable to express their own beliefs. This is just an example for a single clause, but the same concept applies for the bill's restrictions on journalistic enterprises, "shadow banning," and use of algorithms. However much a legislature may dislike the platforms' use of their content moderation powers, that content moderation is still protected speech.

B. The Individualized-Explanation Regulations Compel Platforms to Express Messages They Do Not Wish to Express.

Going hand-in-hand with this Court's doctrine regarding restricted speech is its doctrine regarding compelled speech, which is the inverse of the doctrine of restricted speech. SB 7072 violates both: it prohibits platforms from expressing wanted speech and requires them to express unwanted speech. Its speech compulsion provisions provide that, if a person is deplatformed or shadow banned, a notification must be sent within seven days with a "precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable." Fla. Stat. § 501.2041(3)(d).

This Court has held before, in the seminal case of *Zauderer v. Office of Disc. Counsel*, that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 at 651 (1985). That case dealt with the mere disclosure of information regarding contingent fees for lawyers, so it made sense that this Court held that "warning[s] or disclaimer[s] might be

appropriately required… in order to dissipate the possibility of consumer confusion or deception." *Ibid.*, quoting *In re R.M.J.*, 455 U.S. 191 (1982). *Zauderer*'s rule in general is that States may validly require companies to provide "purely factual and uncontroversial information" to their clients, and of course that such requirements must not be unjustified or unduly burdensome. *Ibid.* However, SB 7072's requirements are not only extremely burdensome but are also beyond the pale of basic disclosure.

Every day, people send an average of nearly 500 thousand tweets on X, watch nearly 4.2 million videos on YouTube, and post nearly 50 thousand photos on Instagram. *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, Bernard Marr, https://bernardmarr.com/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/ (last accessed November 26, 2023). Out of those tweets sent, X removes on average roughly 21 thousand (*Twitter Removed 3.8M Tweets for Violating Twitter Rules in Second Half of 2020*, David Cohen, https://www.adweek.com/media/twitter-removed-3-8m-tweets-for-violating-twitter-rules-in-second-half-of-2020/ (last accessed November 26, 2023), and out of those videos watched, YouTube takes down more than 61 thousand (*Number of videos removed from YouTube worldwide from 4th quarter 2017 to 4th quarter 2022*, Statista, https://www.statista.com/statistics/1132890/number-removed-youtube-videos-worldwide/ (last accessed November 26, 2023). SB 7072 requires not only that an explanation for all of these actions be delivered within seven days, but also that such a notice must have a "'thorough rationale' for the decision and a 'precise and

thorough explanation of how [the platform] became aware' of the material… This requirement not only imposes potentially significant implementation costs but also exposes platforms to massive liability[.]" *NetChoice v. Attorney General*, No. 21-12355 at 64 (CA11 May. 23, 2022). Platforms can be assigned millions of dollars in damages if they fail to abide by the precise terms of SB 7072, something they simply cannot do due not only the enormity of the task, but also because of the vagueness of the words used in the requirements. The definitions of the terms used in the bill, like "precise" and "thorough," can be extremely broad or very narrow, depending on the disposition of the judge. Setting aside vagueness doctrine concerns, the bill makes it impossible for platforms to know what is required of them, which is undoubtedly unduly burdensome on their operations.

Even if the requirements of SB 7072 were not so burdensome, they go far beyond mere disclosure. The bill requires platforms to publish explanations for the exercise of protected speech, something that is without a doubt "unjustified or unduly burdensome." Furthermore, those explanations aren't just appended to normal business actions – the content moderation actions that the bill regulates are the ways that the platforms express speech. This Court has never held that a legislature may validly order a person to justify the exercise of their First Amendment rights, and it has never held that unwanted speech can be required to be appended to wanted speech – this Court should not do either now.

When a person is forced to justify their speech, that mandated justification is also speech in its

content, as "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 at 795 (1988). Therefore, as the individualized-explanation requirements of the bill are not valid as commercial disclosure requirements under *Zauderer*'s rule, and as the individualized-explanation requirement compels platforms to publish speech that they would otherwise not, the bill's relevant provisions have to be examined under this Court's compelled speech doctrine.

Fundamentally, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 at 642 (1943). In *PG&E v. Public Utilities Comm'n*, this Court restated that principle at a more basic level: "the choice to speak includes within it the choice of what not to say." *PG&E v. Public Utilities Comm'n*, 475 U.S. 1 at 16 (1986). *PG&E* dealt with a somewhat similar situation to the one at hand here: a State ordered a corporation to append to their speech a notice that was itself speech. The Court held that because "*all* speech inherently involves choices of what to say and what to leave unsaid," *id.* at 11 (emphasis in original), a regulation that forces corporations to turn "unsaid" speech into "said" speech unconstitutionally violates the "freedom *not* to speak publicly." *Ibid.*, quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524 (1984) (emphasis in original).

There is a baseline standard for what to do

when a system of laws protects speech, and the standard is that that system must also "guarantee the concomitant right to decline to foster such" speech. *Wooley v. Maynard*, 430 U.S. 705 at 714 (1977). This Court continued that line of thought eighteen years later, where it held that a parade "invoke[d] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another," simply by selecting or not selecting groups to march in the parade. *Hurley*, at 574. The Court even admitted that the parade's choices of participants may not have "produce[d] a particularized message," which may sometimes be the case with the content moderation choices of platforms, but it still held that the choice to simply "exclude a message it did not like from the communication it chose to make" or to not communicate at all still merits First Amendment protections. *Ibid*. The same goes for the rights of platforms: platforms have the right to not speak about certain things, including explanations for content moderation decision, meaning that a law that compels such an explanation compels speech and is invalid.

There is, though, a fundamental difference between *Maynard* and *Hurley*. In *Maynard*, this Court entirely voided the statute in question, which required a state motto to be placed on license plates. However, in *Hurley*, this Court simply invalidated the enforcement of a certain law, a non-discrimination accommodations law, against the parade's organizers. This Court's resolution in this case should be more similar to its broader resolution in *Maynard* than to its narrower one in *Hurley*, because the nature of this case's merits is closer to that of *Maynard*'s. In *Maynard*, this Court found that the statute's sole

purpose was to compel speech, and that the statute lacked valid reasoning. In that scenario, therefore, there were no valid applications of the law that the Court could find, and so the entire statute was invalid. In *Hurley*, by contrast, it was not the substance of the non-discrimination statute that was in question, but rather its enforcement against a particular group to stop that group's valid exercise of free speech. As it was only the enforcement and not the statute itself that was the issue, this Court reversed a lower court that held otherwise, and invalidated only the enforcement. SB 7072's individualized explanation requirements have no valid application. They necessarily compel speech, and almost always compel unwanted speech. The only enforcement of those requirements that would be valid is a lack of enforcement totally, and so the requirements themselves should be voided.

C. Neither Petitioner's Speech Host Arguments Nor Their Common-Carriage Arguments Are Convincing.

Petitioner presents a few reasons for why their restrictions on speech are justified. They argue that the platforms can be legally required to host speech, Pet. at 18-22 , that the content moderation decisions of the platforms are not expressive, *id.* at 22-23, that the platforms could be regulated as common carriers, *id.* at 23-25, that the restrictions should not be subjected to strict scrutiny, *id.* at 25-27, and that the restrictions are not "burdensome" under the rule established in *Zauderer*, *id.* at 27. The argument that content moderation decisions are not speech was disposed of in Subpart A of this Part, *supra* at 2-7, the argument that the restrictions are not "burdensome" was disposed of in Subpart B of this Part, *supra* at 7-12, and the

argument that the restrictions should not be held to strict scrutiny will be disposed of below, *infra* at 26-30. Therefore, this Subpart will deal with Petitioner's arguments that SB 7072's regulations are justified by claims of speech host and common carrier status.

1. Firstly, to the argument regarding the supposed speech host status of platforms. Petitioner's argument rests on three separate theories: that regulations compelling the hosting of speech do not violate the First Amendment because of historical precedent, that *PruneYard Shopping Center v. Robins* presents a base in this Court's precedent for upholding SB 7072, and that *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* presents a base in this Court's precedent for upholding SB 7072. None of their arguments find support either in law or in precedent.

Petitioner's argument that historical precedent supports the compelled hosting of speech, which in and of itself is speech, is misguided. They cannot provide any actual evidence for their claims that "hosting rules were commonplace around the time of the ratification of the Fourteenth Amendment." Pet. at 29. Petitioner cites *The Non-First Amendment Law of Freedom of Speech* for support, but in reality, the situations referenced are entirely different from those present in this case. *Ibid*. Petitioner presents an example of a federal law passed around the time of the Fourteenth Amendment requiring companies to "operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever." Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARVARD

L.REV. 2320 (2021). Petitioner presents this as historical evidence that broad "speech hosting" rules have been present since the application of the First Amendment to the States, but the circumstances are not analogous. Telegraph companies never claimed or even implied to be speaking through the regulation of the content that passed through their wires or the companies that used those wires, and generally, the use of telegraph wires was an open business. However, social media platforms make it eminently clear that there are rules to the use of their platforms, rules that include the ability of platforms to remove content at their discretion. X's Terms of Services state that users may not "engage in any conduct that violates [their]… Rules and Policies," and that X retains the right to "remove or refuse to distribute any Content on the Services, [or] limit distribution or visibility of any Content on the service[.]" *X Terms of Service*, X, https://twitter.com/en/tos (last accessed November 28, 2023). YouTube has a similar clause in its Terms of Service, which states that if there is content on YouTube that violates its Community Guidelines, Terms of Service, or otherwise harms YouTube other parties, they reserve the right to "remove or take down some or all of such Content in [their] discretion." *YouTube Terms of Service*, YouTube, https://www.youtube.com/static?template=terms (last accessed November 28, 2023). The platforms are not and never have claimed to be mere transmitters of messages from one user to the next, and have always been clear that they retain content moderation rights to express themselves and their values. Petitioner purports that their historical reference justifies their restrictions, but in reality, their analogy to

restrictions on telegram companies simply does not line up with the reality of social media platforms.

Petitioner's cited case law presents no more support for their arguments than their cited historical precedent does. They first cite *PruneYard Shopping Center v. Robins*, which Petitioner claims justifies the bill's hosting regulations. In *Robins*, a shopping center in California sought to enforce a general ban on handbilling on its premises, and a group of students sought to be exempted from that ban, claiming that it violated their First Amendment rights. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 at 77-79 (1980). This Court distinguished the merits in *Robins* from the merits in previous cases, like *Maynard* and *Miami Herald*, in three ways: firstly, the shopping center was "open to the public to come and go as they please," secondly, "no specific message [was] dictated by the State," and thirdly, the owners of the center had the ability to "expressly disavow any connection with the message" through the use of signs or other media. *Id.* at 87. However, the merits in this case line up far more with the merits of *Maynard* and *Miami Herald* than they do with *Robins*. In terms of the first metric, as stated before, social media companies are not simply open to the public like shopping centers are, but rather "make it eminently clear that there are rules to the use of their platforms." *Supra* at 14. They tell their users upfront that there are terms to the use of their services, while customers at a shopping center "come and go as they please," without an obligation to agree to anything before entering. Secondly, regarding whether a specific message was dictated by the state, there is an issue. Whether a specific message was

dictated has never been a requirement for whether compelled speech was impermissible. In *Hurley*, this Court prevented compelled speech merely because there was a right to "spea[k] on one subject while remaining silent on another," and that that right existed no matter what the subject in question was. *Hurley*, at 574. In *Miami Herald*, Florida did not dictate that the Herald host any particular view, but rather that they simply host replies to articles and editorials. By Petitioner's arguments, the regulations in *Miami Herald* should have been valid, but the Court instead held that it was impossible to see "how governmental regulation of [editorial discretion could] be exercised consistent with First Amendment guarantees[.]" *Miami Herald*, at 258. The compelled hosting of speech that the host wishes not to keep, regardless of the message expressed in the end, is unconstitutional. Finally, while it is true that platforms could try to express their messages by other means, this Court has never held that limited speech was a good replacement for broader speech. This Court has not held that a small black sticker would be a good substitute for a black armband, see *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969), or that a protest at the funeral of a dead soldier could have been held somewhere else, see *Snyder v. Phelps*, 562 U.S. 443 (2011), or that voters wearing political attire in a polling place could instead wear them just outside of it, see *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018). Instead, this Court has always held that when a particular action is protected by the First Amendment, it essentially cannot be restricted. The reason why the shopping center's actions in *Robins* were not protected by the First Amendment is

because the shopping center's policy was entirely unrelated to speech. "The shopping center had adopted a strict policy against the distribution of handbills within the building complex and its malls, and it made no exceptions to this rule." *Robins*, at 80. The center's policy was no different from a policy banning outside food or preventing open alcohol on the property. The center did not care about the content of speech, but instead had a uniform policy against it. By contrast, the content moderation decisions of the platforms do contain messages. They express the values of the platforms, like tolerance and inclusivity. Both the shopping center's policies and the platforms' policies have the effect of excluding the speech of third parties, but only the platforms' policies express speech. Furthermore, SB 7072 actually prohibits the "posting [of] signs in the area where the speakers… stand." *Robins*, at 87. SB 7072 prohibits platforms from "censor[ing]," whose definition includes "post[ing] an addendum to any content or material posted by a user." Fla. Stat. § 501.2041(1)(b). Petitioner cannot claim that the platforms retain the ability to disclaim content on their sites when *Petitioner themselves* prevents the platforms from disclaiming content. Given that the platforms are not fully open to people coming and going, that a specific message being dictated by a state is not necessary, and that broader speech cannot be substituted for narrower speech, *Robins* cannot provide guidance in this case.

Rumsfeld v. Forum for Academic and Institutional Rights provides no more guidance here than *Robins* does. In *Rumsfeld*, an association of law schools sued the Secretary of Defense, claiming that a policy

denying schools funding if they denied military recruiters access to their campuses was unconstitutional and violated the First Amendment. However, there are significant differences between the merits of this case and in *Rumsfeld*. This Court specifically held in *Rumsfeld* that the only reason why *Hurley* and *Miami Herald* were not controlling in a case that clearly regarded the accommodation of speech was that "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. Forum for Academic and Institutional Rights,* 547 U.S. 47 at 63 (2006). This Court stated that "the schools [were] not speaking when they host[ed] interviews and recruiting receptions," meaning that "there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views[.]" *Id.*, at 64-65. By comparison, the compelled hosting of content on platforms by SB 7072 is in fact violating the ability of the platforms to speak freely. As said before, they express their speech through their content moderation, *supra* at 6, and there is no way to square the prohibition of content moderation by platforms as not affecting the "[platforms'] own message."

2. Petitioner's analogy to common carriage is not accurate in this case. The definition of what a common carrier actually *is* is elusive, but the various qualities that have been used to define common carriage from time to time still don't match with the qualities of the platforms. Justice Clarence Thomas has described common carriers as being open to "serve all comers," *Biden v. Knight First Amendment*

Institute at Columbia Univ., 593 U.S. ___ at 4 (2021) (Thomas, J., concurring), as having monopolistic "substantial market power," *ibid.*, as being "of public interest," *id.* at 5, and as receiving "special government favors," *ibid.*, but a business merely meeting some of these descriptors does not make it a common carrier. Firstly, the platforms do not serve all comers, as shown above. *Supra* at 13-14. They have rules that users are obligated to abide by, which users must agree to before using the platform. They have always utilized their editorial discretion to present their own views on the platform, something that common carriers do not do. Even if the platforms did none of these things, "not all businesses that serve the public… are common carriers," like department stores, beauty salons, or restaurants. Ashutosh Bhagwat, *Why Social Media Platforms are Not Common Carriers*, __ J. FREE SPEECH L. 8 (2022). Similarly, the argument that monopoly power confers common carriage status is not compelling either. The platforms in question are not generally monopolies. The rise of "conservative" social media platforms in opposition to the "liberal" platforms that SB 7072 is focused on shows that they don't have the kind of control over commerce that historic common carriers, like railroads or telegraph companies, did. In fact, monopolistic power has never been determinative in whether a specific corporation is a common carrier. The concept of monopolies as common carriers originated in 1904 as an attempt to synthesize a "long history of restrictive regulation of common carriers with the emerging Lochnerian vision of freedom of contract and inviolable property rights[.]" Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net*

Neutrality, *Digital Platforms, and Free Speech*, 1 J. FREE SPEECH L. 466 (2021). The public interest standard is not only impossible to limit but has already been rejected by this Court. Almost any business in the United States could be defined as a public interest, and therefore, following the public interest standard, almost any business in the United States could be regulated as a common carrier. The category of public interest-focused businesses has been described as including "ferries, wharves, warehouses, taverns, inns, mills, bridges[,] turnpike roads… housing, textile manufacturing, the construction of machinery[,] the printing of books… banking, fire insurance, and the wholesale marketing of ice." *Id.*, at 468-469. Clearly not all of or even most of these businesses are common carriers, and to use the public interest standard to describe social media similarly does not make sense. This Court has already held that the public interest standard is far too broad to be useful. In 1934, in *Nebbia v. New York*, this Court said simply that the public interest standard is "not susceptible of definition and form[s] an unsatisfactory test." *Nebbia v. New York*, 291 U.S. 502 at 536 (1934). This Court should not reverse that finding now. Finally, special government protections do not turn a business into a common carrier. It is true that common carriers have often been given certain "favors" from the government, like "legal monopolies or limitations on liability," but many industries that get such benefits, like "cable television operators and television broadcasters," are not common carriers. Bhagwat, at 5. Only industries whose responsibilities were "spelled out in the license or franchise itself rather than being imposed after the fact" may be regulated like common carriers, but the

platforms have never signed on to such an agreement, and Florida seeks to assign them common carrier status nonetheless. *Yoo*, at 473. The court below soundly rejected the concept that the diktat of Florida could turn a platform into a common carrier if it was not before. It wrote that "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier," a concept that is self-evident when applied to any other right in our Constitution (e.g. a state may not define a mosque as a common carrier and compel it to host Christian services) but is still under contest in this case. Either way, this Court should rule in favor of liberty and against the concept of social media platforms as common carriers.

II. The Bill's Purpose is Unconstitutional Content-Based Speech Discrimination.

A. If a Bill Has a Discriminatory Intent, Then It is Invalid.

This Court, in *United States v. O'Brien*, outlined a basic standard for the regulation of speech with a nexus to conduct, holding that an "incidental limitation[ ] on First Amendment freedoms" can be justified by "a sufficiently important governmental interest." *United States v. O'Brien*, 391 U.S. 367 at 376 (1968). SB 7072, of course, goes far beyond this standard in at least two ways. Firstly, the bill's restrictions are far stricter mere "incidental limitations" on conduct. Instead, they target speech-based actions themselves, without regard for the First

Amendment rights of the platforms. *Supra* at 2-12. Secondly, the bill's restrictions to not meet the level of important government interest ("sufficiently important government interest") that is required to pass meet *O'Brien*'s standard. This Court stated a few of the terms that it has used to describe what "sufficiently" means: "compelling; substantial; subordinating; paramount; cogent; strong." *O'Brien*, at 377 (cleaned up). Frankly, using the word "sufficiently" to describe these words undersells them. The first word in the list more accurately sums up the list: "compelling." The state must have a "compelling interest" in the regulation to justify the regulation, a strict scrutiny standard, more about which can be found below. *Infra* at 26-30. Aside from an "incidental limitation" and strict scrutiny standard, however, *O'Brien* applies a third bar that the government must meet: "the governmental interest [must be] unrelated to the suppression of free expression." *O'Brien*, at 377. It's not just the application of the law that's at issue, but also the intent of the law. We disagree with the Eleventh Circuit's holding that discriminatory motivation or intent does not impact the validity of a law, *Attorney General*, at 50-54, and this Court should continue its current line of precedent and correct the Eleventh Circuit's error.

The concept that the intent behind a regulation may invalidate it originates in the seminal case of *Tinker v. Des Moines Independent School District*. This Court held that the restriction of the wearing of armbands in school was not put in place for the content neutral purpose of keeping order in school in case of protests, but rather "was directed against "the principle of the demonstration" itself. *Tinker*, at 546

n.3. Content neutral regulations on conduct that burden speech generally don't violate the First Amendment. There would have been nothing wrong with the school's restriction on wearing armbands if there had been a valid fear of disorder, but because "it was not fear of disruption that motivated the regulation prohibiting the armbands," the restrictions could not pass the test. *Ibid.* In order "[f]or a… regulation to be valid, it must be neutral as to the content of the speech to be regulated." *PG&E*, at 20. Though regulations that target certain content are almost always invalid, like a law calling out anti-abortion or pro-abortion protests as restricted, the intent behind a law, like that behind a law restricting protests outside of abortion clinics or pro-life clinics, can similarly disqualify the law as non-content neutral. This Court said simply, "[e]ven if [a] hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional." *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 at 2665 (2011). Purpose and intent play an important role in judging the validity of speech-regulating laws.

The Eleventh Circuit rejected this reasoning, pointing to their own precedent and to *O'Brien* "for the proposition that courts shouldn't look to a law's legislative history to find an illegitimate motivation for an otherwise constitutional statute." *Attorney General*, at 51. We argue here that the Circuit's decision in this regard is incorrect, and that *O'Brien,* which that decision and the Circuit's precedent relied on, does not in fact preclude this Court from looking at purpose when judging a statute. In *O'Brien*, the Court

stated that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, at 383. The Court was wary of "misreading Congress' purpose," arguing that "what motivates one legislator to make a statute is not necessarily what motivates scores of others to enact it[.]" *Id.*, at 384. It's true that taking just a few legislators' opinions in isolation can give a misreading of a statute, but in this case, the intent of SB 7072 is clear – it was enacted for the sole purpose of preventing the perceived "censorship" of conservative speech by platforms, as shown below. *Infra*, at 25-26. Furthermore, the standard in *O'Brien* has been abrogated by two later cases, *Turner Broadcasting System, Inc. v. FCC* and *Rosenberger v. Rector and Visitors of the University of Virginia*. In *Turner*, this Court rejected *O'Brien*'s rhetoric regarding discriminatory legislative motive, instead correctly holding that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 at 645 (1994). Just a year later, the Court furthered that line of thinking, holding that "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 at 829 (1995). This Court's more recent and more correct decisions, like *Turner* and *Rosenberger*, are instructive in this case, as they present the correct guidelines for understanding that the discriminatory purpose of a law can invalidate it. In this case, as in those cases, "the State's asserted interest in [enacting the regulation] is not – and does

not purport to be – content-neutral." *PG&E*, at 20.

B. SB 7072 is Targeted at the Content of Certain Speech and is Therefore Invalid.

Florida did not attempt to hide the purpose of SB 7072. At a press conference, Governor Ron DeSantis of Florida stated that the bill would "lead to more speech, not less speech… [b]ecause speech that's inconvenient to the narrative will be protected." *Florida governor signs law to block 'deplatforming' of Florida politicians*, Makena Kelly, https://www.theverge.com/2021/5/24/22451425/florida-social-media-moderation-facebook-twitter-deplatforming (last accessed December 14, 2023). The goal of the bill was to target the "narrative," a perceived left-wing bias by social media platforms that supposedly harmed Floridians. SB 7072, contrary to Governor DeSantis' statements, was not meant to open up platforms to users' speech; it was meant to close them off to platforms' speech.

The bill's supporters also showed the purpose of the bill. Senator Ray Rodrigues, who introduced the bill in the Florida Senate, argued that "Big Tech has a responsibility to be fair... regardless of [Floridians'] political ideology." *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, Governor's Staff, https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/ (last accessed December 14, 2023). The bill's sponsor in the Florida House of Representatives, Representative Blaise Ingoglia,

directly stated that the perception of "[Floridians'] freedom of speech as conservatives, under attack by the "big tech" oligarchs," was the motivation behind the bill. *Ibid.* Lieutenant Governor Jeanette Nuñez, said clearly that the purpose of the bill was to stop "an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations… [who] censor [you] if you voice views that run contrary to their radical leftist narrative." *Ibid.* There was clearly a desire to prevent social media companies from removing right-wing political speech, whether the fear of such removal was justified or not. SB 7072 unconstitutionally prevents the free expression of speech by social media companies for political gain. We have already shown that social media companies have editorial discretion regarding what is on their sites *supra*, at 2-7, and that they have a right to not have speech compelled, *supra*, at 7-12, meaning that the SB 7072's content-discriminatory regulations constitute a violation of the First Amendment and "an egregious form of content discrimination." *Rosenberger*, at 829.

III. The Bill Fails Under the Strict Scrutiny Standard of Judicial Review.

A. The Bill Ought to Be Examined Under Strict Scrutiny.

As established in *United States v. Carolene Products Co.*, there is a "narrower scope... of the presumption of constitutionality" for cases involving rights contained in the Bill of Rights or the Fourteenth Amendment. *United States v. Carolene Products Co.*, 304 U.S. 144 at 155 n.4 (1938) This narrower scope, which this Court has expanded upon in the doctrine of

strict scrutiny, even applies specifically to "restraints upon the dissemination of information," restraints which without a doubt include the restrictions on platforms' ability to make their opinions known by removing the content of users. *Ibid.* Therefore, it is proper that this case be judged under strict scrutiny.

SB 7072 should be examined under strict scrutiny for multiple reasons aside from *Carolene Products*' precedent. Firstly, the bill imposes inherently content-based restrictions upon social media companies. As stated in *Police Dep't of Chicago v. Mosle*, the government may not restrict speech or expression "because of its message, its ideas, its subject matter, or content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 at 95 (1972) This Court, for decades, has held laws regulating expressive speech to the highest standard of strict scrutiny. While normally content-discriminatory laws are discriminatory on their face, on occasion, "distinctions based on a message… are more subtle, defining regulated speech by its function or purpose." *Reed v. Town of Gilbert*, 135 S.Ct. 2218 at 2227 (2015). Though SB 7072 may appear facially content neutral, the bill was adopted with the purpose of content discrimination, as shown above. *Supra*, at 25-26. Because it discriminates based on the messages of the speakers that it restricts, it is substantially similar to facially non-content neutral laws in that regard, and as "[b]oth are distinctions drawn based on the message a speaker conveys," they are therefore "subject to strict scrutiny." *Reed*, at 2227.

B. The Bill Does Not Pursue a Compelling Government Interest.

SB 7072 does not fulfill a compelling

government interest. Rather, the bill fills a purely political interest in preventing social media companies from "disproportionately" deplatforming conservative users. In a press conference after signing the bill, Florida's governor, Ron DeSantis, remarked that "[h]e took action to ensure that 'We the People' — real Floridians across the Sunshine State — [we]re guaranteed protection against the Silicon Valley elites." *Governor Ron DeSantis Signs Bill.* This bill is a blatant attempt to unfairly portray "Big Tech" as the boogieman due a perceived bias contrasting with the right-wing government's agenda.

The metric for a compelling government interest to actually be a "compelling" interest simply does match up with SB 7072. For a government interest to be compelling, no other "institution in society [may have] a significant cost advantage in pursuing [that] end." Robert T. Miller, *What is a Compelling Governmental Interest?*, __ MORALITY AND MARKETS J. __ at 2 (2018). Classic compelling interests, like national security and domestic order, are interests that are necessary to the safety of society. This Court has recognized that principle before in terms of strict scrutiny for speech, calling the interest necessary "subordinating" and "paramount." *O'Brien*, at 377 (cleaned up). Florida has presented no such compelling interest. The Florida state government does not have a particularly significant advantage in interest in attempting to regulate the content on social media platforms against the will of the platforms. Never has this Court held before that the hosting of speech "subordinates" other societal interests, and it should not hold so today. Florida's real interest is evident in the intent of its supporters. *Supra*, at 25-26.

There was clearly a political bias within the Florida state government that led to the enactment of the bill, and that bias does not meet the standards of a compelling government interest. The Florida state government can claim that "big tech censorship" is a deeply rooted, systemic issue whose elimination warrants the classification of a compelling government interest, but they bear the burden of proving so, and have not even claimed so in the lower courts. The bill fails here, as it cannot be established what Florida's compelling interest truly is in this case.

C. The Bill is not Narrowly Tailored in Its Restrictions.

SB 7072 additionally fails strict scrutiny analysis because its clauses are not "narrowly tailored" to fit its purpose. As established in *Shelton v. Tucker*, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479 at 488 (1960). SB 7072 violates this principle, as its proposed measures are inefficient and needlessly stifle individual liberties. The express purpose of SB 7072 relating to social media regulation is to prevent platforms from "tak[ing] any action in bad faith to restrict access or availability to Floridians." Ch. 2021-32, § 1(1), Laws of Florida. Yet, clauses within the bill, such as the regulations for deplatforming a user, are blatantly convoluted and rationally impossible to exact. The requirement listed that social media companies must provide a "thorough rationale explaining the reason that the social media platform censored a user" would be impossible to fulfill, as social media platforms perform millions of

moderation actions each year. Fla. Stat. § 501.2041(3)(c). Another requirement, forcing social media companies to allow users to opt out of data sorting algorithms would be equally impossible to implement, as companies are unable to individually tailor users' feeds without the use of mass sorting methods such as algorithms. Fla. Stat. § 501.2041(2)(f)(2). The clause allowing for up to "[u]p to $100,000 in statutory damages per proven claim" for violations of SB 7072 presents a huge liability for social media companies, especially since it only requires a violation be "imminent" and not even actual. Fla. Stat. § 501.2041(5-6). Any sort of innocuous program malfunction can provide grounds for a suit, even if it's not purposeful. Errors can easily happen, as they already do in the status quo, but this bill makes it so that these errors can bankrupt the platforms. There are other ways for Florida to pursue its goals of an open forum that do not rope in completely innocent conduct on the part of the platforms, and so these laws that cover that conduct are far broader than the "narrowly tailored" requirement of strict scrutiny.

CONCLUSION

SB 7072 violates the basic First Amendment right to editorial discretion, unconstitutionally compels speech, and subtly discriminates on the basis of content. Its defenses find no support in history or precedent, and when correctly tested under strict scrutiny, it fails entirely. The bill did not stand as good law in the district court, or in the court of appeals, and it should not stand as good law in this Court.

We pray that the Court affirms the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

NATHANIEL MARKS
Counsel of Record
Team 16886
Regis High School
55 East 84th Street
New York City, New York 10028

EDWARD NAPOLI
Team 16886
Regis High School
55 East 84th Street
New York City, New York 10028

12/15/2023