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 PETITIONERS

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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.

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SUMMARY OF ARGUMENT

Florida's Senate Bill 7072 should be affirmed and protected by this Court for two reasons.

First, S.B. 7072 addresses important modern questions about the dangers of social media. With unprecedented control over the public square, social media companies must be regulated to provide fair and equally accessible public forums. This Court has established the precedent that public forums can be subject to legislation that ensures open access and debate for the public. Modern social media companies are public forums due to the influential role they play as an avenue for expression. This Court has also allowed non-editorial and non-speaking editorial enterprises, such as social media companies, to be regulated by reasonable legislation.

Second, S.B. 7072 is a content-neutral law that should receive and pass intermediate scrutiny. This Court has made it clear that content-based laws receive strict scrutiny, while content-neutral legislation warrants intermediate scrutiny. S.B. 7072 is content-neutral legislation because it applies broadly to require a social media platform to fairly and consistently apply its own guidelines without regard to the content of censored information or the parties being censored. S.B. 7072 passes intermediate scrutiny because it is reasonably tailored, not making distinctions among parties more than necessary, and because it achieves the important government interest of promoting equal representation on our country's

most important public forums, providing fair and necessary regulation of powerful social media companies.

This Court should reverse the decision of the 11th Circuit and uphold S.B. 7072 in its entirety.

ARGUMENT

I. The Eleventh Circuit's Decision Regarding Senate Bill 7072 Is Inconsistent with This Court's Interpretation of the First Amendment.

This Court has issued several decisions regarding the restriction of First Amendment rights. These precedents exemplify how common carriers and public forums have been historically allowed to be reasonably regulated by legislation. Furthermore, the precedents display how common carriers, such as social media companies and telephones companies, must offer the same services to all. S.B. 7072 promotes the equality of services on digital platforms, helping social media companies to comply with this standard. Finally, precedent exemplifies how S.B. 7072's hosting and disclosure requirements for social media companies are not compelled speech, and can be limited by Florida under the First Amendment.

A. Public Forums Can Be Limited by Legislation to Provide Fair and Equal Access to All.

Public forums are places that have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 46 (1983) (quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939)).

They can be separated into 3 sections, traditional public forums, designated public forums, and limited public forums. The latter two are traditionally government controlled, but the first category would include private services such as telegraph lines, internet providers, shopping malls, and social media companies. Where private carriers have a significant market presence or influence by hosting others' speech in a forum, this Court has required private parties to host the speech of others to ensure access for all. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994). Furthermore, "[t]he Court has sought to protect the right to speak in this spatial context." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Speech should be protected in public forums because it provides individuals with a safe space to express their views under the First Amendment. In the modern context, where social media companies dominate the public square, these public forums, even when privately owned, should and can be regulated by legislation to ensure that they are providing equal access to speech for all of the American public.

In *PruneYard*, the Court dealt with speech rights in a privately owned public forum. When independent groups expressing speech were removed from a shopping center, the First Amendment was immediately called into question. The California State Constitution stated that private forums such as shopping centers must host speech within their jurisdiction. The California Supreme Court in its preliminary decision concluded "Shopping centers to which the public is invited can provide an essential

and invaluable forum for exercising those rights." *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (1979). In regarding the shopping center as a public forum, California ruled in favor of Robins, allowing the independent speech to continue. This Court held that the California law did not violate the First Amendment by compelling a private party to host the speech of another party because the shopping center was a public forum and the law did not require the mall owner to state or endorse a particular message. *See PruneYard Shopping Ctr.*, 447 U. S. at 74. This decision means that state legislation can require a private party to host speakers in a public forum in order to provide equal access to speech for all who may use the forum. *Pruneyard* demonstrates legitimate regulation of a public forum, which is exactly what S.B. 7072 intends to do.

Second, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), deals with public forum access. When a public school in New York (legislatively required to host community groups) denied after-hours access to a Christian organization, the Supreme Court had to decide if Milford School was indeed a public forum, open to all, or if the school maintained the right of restriction. The Court assumed that Milford operated a limited public forum, and concluded that Milford violated the Club's free speech rights when it excluded the Club. *Id.* at 106-112. This decision displays how legislation can require organizations to host speech when the legislation is intended to promote the equal access of any and all community groups. To promote the equal speech of the community, Milford's public forum was required by the

Supreme Court to host the Christian group as well as any other groups.

Next, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), dealt with common carrier and public forum law. According to the Fifth Circuit, social media companies are "private enterprises providing essential public services" and "must serve the public." *Id.* at 469. In the eyes of the district court, social media companies are public forums. The district court stated that the law in question "protects Texans' ability to freely express a diverse set of opinions through one of the most important communications mediums used in that State." *Id.* at 454. Furthermore, that Court stated the "State can regulate conduct in a way that requires private entities to host, transmit, or otherwise facilitate speech." *Id.* at 455. This ruling demonstrates the need for more equal representation on social media platforms, and the precedent constitutionality of regulating the conduct of social media platforms like Facebook and Twitter.

Last, in *Marsh v. Alabama*, 326 U.S. 501 (1946), the oldest public forum case, the Court stated, "the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to state regulation." *Id.* at 506. Public forums can be privately owned, and can be legislatively regulated to create equality.

If States want to regulate the public forums of

social media, they have every right to do so. Precedent has shown that when a private enterprise is operating as a public forum, regulation through legislation has passed (given that the law also passes scrutiny). This restriction can come through a State Act, a federal bill, a state constitution, or any other means of legislation. It is a fair and valid restriction of a private enterprise to demand that "such entities provide equal access to the public." Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299, 2320-21 (2021).

B. Social Media Companies Are Public Forums.

The Florida Senate concluded in enacting S.B. 7072 that "[s]ocial media platforms have transformed into the new public town square," and "have become as important for conveying public opinion as public utilities are for supporting modern society." *Stop Social Media Censorship Act*, S.B. 7072 § 1(4) & (5) (2021) (legislative findings). This legislation recognizes social media companies as public utilities that are open and available to all for the dissemination of information, and the Court should affirm that view.

Justice Thomas discussed social media legislation in *Biden v. Knight First Amendment Institute at Columbia Univ.*, 141 S. Ct. 1220 (2021). When Donald Trump, then President of the United States, banned several users from interacting with his account on Twitter, he was sued under the allegation that he "violated the First Amendment" by restricting

these users from his own "public forum." *Id.* at 1211. Eventually, Mr. Trump was removed from Twitter entirely, rendering this case moot. In a concurring opinion, Justice Thomas explored the idea of social media companies being public forums after Twitter removed Mr. Trump. He stated that "legislatures might still be able to treat digital platforms like places of public accommodation" *Id.* at 1225. This definition is similar to a public forum. Justice Thomas thought "the more glaring concern must perforce be the dominant digital platforms themselves." *Id.* at 1227. This analysis further exemplifies how social media companies can be defined as public forums in some contexts.

Similarly, Professor Eugene Volokh agrees social media companies are like common carriers and could be regulated in the same way as the cable must-carry rules addressed in *Turner*. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 JOURNAL OF FREE SPEECH LAW 377, 382 (2021). Social media companies are primarily "communications networks", and they 'carry' information similarly to how shipping companies carry packages. *See Knight First Amend. Inst.*, 141 S. Ct. at 1224.

In *Packingham,* this Court recognized the importance of ensuring all people have access to critical social media platforms. In 2008, a North Carolina law restricted sex offenders from accessing social media platforms where they might be able to find vulnerable children. This legislation was challenged under the First Amendment. The court

concluded that foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights, revealing the necessity of social media platforms in appealing to all parties. *Id.* at 1736. The Court also determined the "vast democratic forums of the Internet" constituted "the most important place" to exchange and express ideas. *Id.* at 1732 (quoting *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997)). This precedent is essential to S.B. 7072 because of its relevance in recognizing social media platforms as critical public forums. These forums have traditionally been open to reasonable regulation and must serve all equally.

The Eleventh Circuit in Florida was incorrect in concluding "social media platforms are not . . . common carriers." *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1215 (11th Cir. 2022). Their reasoning for this argument was twofold. First, they argued platforms make "individualized" choices about "whether to publish particular messages." *Id.* at 1220. This argument is flawed because of the function of social media in general. Social media companies offer the same thing to every person: an online environment for sharing ideas. They discreetly discriminate, using algorithms and censorship, to create their own ideal online space, but their function remains universal. They exist to provide the public with a space to communicate and express opinions. This is the definition of a public forum. Their censorship doesn't hide the fact that Twitter, Facebook, and Instagram are open to all and exist to share ideas, making them public forums.

Second, Judge Oldham's opinion in *Paxton* noted that the Eleventh Circuit's reasoning is circular. He points out that the Eleventh Circuit uses precedent to argue that a social media company "can't become a common carrier unless the law already recognizes it as such, and the law may only recognize it as such if it's already a common carrier." *Paxton*, 49 F.4th at 494. For a private entity to be a public forum, no law must recognize it as such. In *Good News Club* and *Pruneyard*, the court was able to determine that private businesses were public forums without prior recognition as such. Reaching far back into US history, the Court even regarded primitive telegraph lines as common carriers/public forums without prior legislation labeling them so. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–21. The 11th Circuit's reasoning on S.B. 7072 was mistaken and should be reversed.

Respondents argue that social media companies are not public forums because public forums are usually "government-controlled spaces." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *see also*, *Pleasant Grove City v. Summum*, 555 U. S. 460, 469 (2009) ("government property and . . . government programs"); *Arkansas Ed. Television Comm'n v. Forbes*, 523 U. S. 666, 677 (1998) ("government properties"). This reasoning is flawed due to the Court's precedent. While most public forums are government-mediated spaces, shopping malls, private universities, telephone lines, television operators, and more have been universally recognized as public forums. In *Marsh v. Alabama*, which dealt with a privately-owned town, the Court stated the

town "is freely accessible and open to the people," and should be open to the people to "enjoy freedom of press and religion." *Marsh*, 326 U. S. at 508-09. The freedom of ideas and expression within this company owned town designates it as a public forum, giving one firm example of a privately owned public forum. Public forums do not need to be government controlled.

C. The Supreme Court Has Previously Allowed Government Regulation of Non-editorial Conduct, Differentiating It From Editorial Speech.

The right for social media companies to restrict others under their jurisdiction has been labeled as speech by the 11th Circuit. Their ruling determined that platform censorship decisions were "inherently expressive." *NetChoice, LLC*, 34 F.4th at 1212. They concluded, "when a platform selectively removes what it perceived to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in speech." *Id.* at 1210. The Eleventh Circuit thought that these "editorial judgments" of social media platforms should be protected as speech under the First Amendment. That court felt that social media companies, by removing and censoring content, are expressing their opinions and their political perspectives to the public. This logic is flawed for two reasons.

1. Social Media Platforms Are Not Publishing Editorial Speech and Therefore Can Be Reasonably Regulated.

Social media companies are not editorial enterprises, meaning that the public does not look towards digital media platforms themselves with the intent of finding the platform's opinion.

Social media platforms are best understood as hosting rather than speaking under this Court's precedents, as described above. This means that social media companies are in fact hosting, not speaking. Newspapers "publish a narrow 'choice of material'" and "are subject to legal and reputational responsibility for that material." *Paxton*, 49 F.4th at 492. In contrast, social media carriers don't publish any material. Instead, they act as a host for news outlets, journalists, and everyday citizens to express their views. In the opinion of the Eleventh Circuit, average citizens look to social media outlets as newspapers, and interpret ideologies when Twitter bans a politician or removes a video. That court stated a "reasonable person would likely infer 'some sort of message' from, say, Facebook removing hate speech or Twitter banning a politician." *NetChoice, LLC*, 34 F.4th at 1214. In reality, the average American social media user is only on Twitter to hear what popular influencers have to say, and is blissfully unconcerned with the censorship decisions of the platform itself. People don't use Twitter to hear what Twitter thinks; they use Twitter to hear what people think.

The most obvious precedent that contradicts

this ruling is in *Paxton*, where the Fifth Circuit determined that because additional speech by the platforms would be needed to explain the expressive aspect of censorship, the Fifth Circuit found that such censorship was not "inherently expressive." *Paxton*, 49 F.4th at 490 & n.41. A platform that is not inherently expressive surely "cannot invoke editorial discretion . . . to protect their censorship." *Id.* at 464. At the end of the day, there is a clear difference between the editorial discretion exhibited by a newspaper and the censorship of social media platforms. Social media platforms don't publish material like newspapers, and they aren't looked to for their opinion like newspapers are, meaning that they can never be considered an editorial enterprise, and their censorship can never be considered speech.

Further, social media companies' censorship decisions are not in fact open to the public. Social media companies rarely report censorship or even platform removal, and as referenced above, many victims of shadow-banning or deplatforming don't even know they are being censored. At the end of the day, nobody can assume any editorial expressiveness from social media platforms' censorship decisions because they don't have knowledge of the specific censorship decisions themselves.

This Court's precedents support the above assertion that hosting conduct differs from speaking, and that non-editorial enterprises can be restricted and have been in the past, while purely editorial, opinion-perceived enterprises that speak cannot be restricted.

2. Editorial Entities That Are Speaking Cannot be Subject to Legislative Limitations.

Editorial entities cannot be subject to legislation. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), a Massachusetts parade restricted an LGBTQ+ group from participating in its event. This restriction was challenged under the First Amendment. The Court ultimately concluded that "parades are . . . a form of expression, not just motion, and the inherent expressiveness of marching" warrants the private parade in question being granted "editorial control and judgment" from the Court. *Id.* at 568, 575 (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 258 (1974)). Given the concluded editorial nature of the parade and the opinions they wished to promote through their actions, their restriction of the LGBTQ+ group was in fact speech, meaning they were entitled to that restriction under the First Amendment. The Court furthered their ruling to conclude that "demonstration organizers" were not common carriers or public forums, and do not need to allow anyone who wishes to participate in their expressive parade. *Id.* at 559. This decision regards an editorial enterprise taking a unified opinion. As proven above, social media companies are not editorial enterprises because they are not looked towards for unified opinions, meaning they cannot be granted the title of "editorial" under the precedents of this Court, and they are subject to legislation.

In *Miami Herald Publishing Co.*, a Florida law

stated "if any newspaper in its columns assails the personal character of any candidate for nomination or for election . . . such newspaper shall upon request of such candidate immediately public free of cost any reply he may make." *Miami Herald Publishing Co.*, 418 U. S. at 244 n.2 (quoting relevant statute). This Court concluded that this legislation "whether fair or unfair" towards politicians, required "the exercise of editorial control and judgment." *Id.* at 258. The Court reached a unanimous decision and agreed on the importance of "the protection afforded to editorial judgment." *Id.* When a newspaper, parade, or other firmly opinionated source produces published content, it is speech, and it is distinctly editorial. However, this speech differs distinctly from the social media censorship practices of Respondents. In contrast to private newspapers, social media companies don't offer information to the public on their censorship decisions, and don't "publish" any material at all. Rather, they host material of other entities. This distinction clearly separates social media companies from the editorial enterprises exemplified in Hurley and Tornillo.

Finally, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), dealt with a content-based Vermont Statute that "restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." *Id.* at 552 (citing Vt. Stat. Ann., Tit. 18, 4631(d)). This law prevented pharmacies from sharing doctors' information for privacy purposes. The Court recognized that "restrictions on protected expression are distinct from restrictions on economic activity, or, more generally, on nonexpressive

conduct." *Id.* at 566-67. The Court defined pharmaceutical disclosure as the latter, conduct, not speech. Because pharmacies don't attempt to promote views of their own by sharing doctors' information, pharmacies are non-editorial. However, the Court still labeled Vermont's statute "unconstitutional" and struck down the law because Vermont's law enacts "speaker- and content-based burden[s] on protected expression" by singling out pharmacies and by barring any disclosure when recipient speakers will use the information for marketing. *Id.* at 571. This means that "educational communications" (Vt. Stat. Ann., Tit. 18, 4631(d)) and other types of disclosure remained legal. This content-based distinction "did not withstand such heightened scrutiny" and the law was struck down. The reason for overturning the lower court decision in *Sorrell* lay in the content-based nature of Vermont's legislation, not in the editorial nature of the restricted party.

All of these precedents are relied on by respondents as a basis to strike SB 7072. They do not control in this case because they involve content-based editorial speech. In this case, SB 7072 is content neutral and regulates non-editorial conduct, distinguishing it from these precedents.

3. Editorial Entities That Are Speaking Cannot be Subject to Legislative Limitations.

Non-editorial judgments may be regulated under this Court's precedents.

Rumsfeld v. Forum for Academic & Institutional

Rights, Inc., 547 U.S. 47 (2006), exhibits a non-editorial judgment in favor of a restriction. When the military adopted an infamous "Don't Ask, Don't Tell" policy regarding the hiring of openly homosexual applicants into the armed forces, certain law schools prohibited military recruiters from entering their campuses. This decision by the law schools directly violated the Solomon Amendment, which allowed military recruiters to access program information and attend campuses in the United States. The Court primarily determined that the Solomon Amendment was not "inherently expressive" because the statute requires law schools to provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers. *Id.* at 66 (citing *United States v. O'Brien*, 391 U. S. 367 (1968)). The Solomon Amendment didn't require law schools to publicly affirm the military in any way beyond any other employer. All it required was access to the campus. This legislation is non-editorial, and was upheld by the Court, which stated Congress may condition federal educational funding to law schools on whether they provide equal access to military recruiters. *Id.* at 58-70. This precedent again emphasizes the historical view of the Court: that any non-editorial entity may be limited by legislation (if the government has a legitimate interest and passes scrutiny).

PruneYard dealt with a non-editorial shopping center that removed independent activists, violating the California State Constitution. The ensuing legal case was decisively ruled upon by the Supreme Court. The Court decided that because of "the center's

commercial purposes," the shopping center exhibited no "inherently expressive" rhetoric; they were simply "using its trespass laws." *PruneYard*, 447 U. S. at 90. (PruneYard Shopping Center v. Robins, 447 U. S. 74 (1980)). In this Court's opinion, the State Constitution trumps this trespass legislation, and is construed "to permit individuals reasonably to exercise free speech and petition rights on the property of a privately-owned shopping center." *Id.* at 80-88. This decision once again upheld prior legislation, highlighting the non-editorial nature of the shopping center.

New York v. Ferber, 458 U. S. 747 (1982), dealt with State legislation overruling non-editorial conduct. When Paul Ferber sold Child pornography from his bookstore, he violated a New York law that "prohibits persons from knowingly promoting a sexual performance by a child under the age of 16." Id. at 747. The Court determined that Ferber's actions constituted "conduct" that, "even if expressive . . . falls within the scope of otherwise valid criminal laws," and is therefore able to be regulated. *Id.* at 770. Since Ferber was not a newspaper, not "publishing material," and not inherently attempting to voice an opinion with his sale of pornography, he was considered non-editorial, and his actions were expressive conduct, not expressive speech. Once again, the Court concluded that non-editorial enterprises can be regulated by law.

In conclusion, when entities are editorial, they cannot be regulated, when entities are non-editorial, they can be restricted by legislation. This trend helps to clearly demonstrate the application of this

precedent with regard to social media companies. Because editorial companies must "publish" information and "express" views, social media companies don't meet this burden, relegating them to non-editorial entities, meaning they can be restricted under the precedents of this Court.

II. S.B. 7072 Does Not Trigger Strict Scrutiny and It Satisfies Intermediate Scrutiny.

A content-neutral law regulates speech or conduct "without reference to the content of the regulated speech" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and "will be sustained if it furthers an important or substantial government interest." *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). In *O'Brien*, the Court upheld the 1965 Amendment prohibiting the burning of draft cards, because it felt that the Amendment in question was content-neutral, restricting all speech or conduct without specifying the nature of the speech being restricted. *Id.* at 376. In other words, content-neutrality means that a law cannot specify the restriction of conservative viewpoints but not liberal viewpoints.

A. Content-Neutral Laws Do Not Trigger Strict Scrutiny Review.

First, *Pruneyard* dealt with a California Supreme Court statute that allowed private activists to express their views within privately-owned shopping centers. The Court decided "there is no basis

for strictly scrutinizing the intrusion authorized by the California Supreme Court." *PruneYard Shopping Ctr.*, 447 U. S. at 95. This ruling provides another example of content-neutral legislation being automatically regarded with intermediate scrutiny.

Second, *Turner* held that "intermediate scrutiny . . . is the appropriate standard of review" based on the "content-neutral restrictions" of the "The Cable Television Consumer Protection and Competition Act." *Turner Broadcasting Sys., Inc.*, 512 U. S. at 662. This Court, in regarding the legislation in question, concluded "they [the regulations] distinguish . . . based only upon the manner in which programmers transmit their messages to viewers, and not the messages they carry." *Id.* at 645. This precedent relates closely to the regulations of S.B. 7072. In the Florida social media legislation, social media companies are required to consider all censorship decisions with the same care and reasoning. The law doesn't relate to the "messages" each censored viewer carries, but the manner in which they are censored by social media companies.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court ruled that any category of legislation can be sufficiently declared as content-neutral. When a "state public indecency law" was challenged, the Court ruled nude dancing was not expressive conduct and the legislation in question was upheld because it was applicable to all people and all forms of expression, not only dancers. Id. at 586. The Court used intermediate scrutiny and upheld the law due to the presence of a government interest and the content-

neutral nature of the legislation in question.

Last, *Cohen v. California*, 403 U. S. 15 (1971), dealt with the "offensive conduct" of citizens wearing clothing "bearing the words "F--- the Draft." The Court acquitted the offender but held that the California Penal Code in question was content-neutral, and "lacks power to punish Cohen for the underlying content of the message the inscription conveyed." *Id.* at 18. The legislation was opinion-blind, punishing any obscenity, liberal or conservative, as it should be. This warranted intermediate scrutiny and allowed the continuance of the California Penal Regulation.

At the end of the day, a content-neutral regulation of expressive conduct is subject to intermediate scrutiny. *See Turner*, 512 U.S. at 643–44, 662. Florida's legislation has been proven above as both content-neutral and conduct-regulating (non-editorial). It's clear to see that any and all Supreme Court precedents regarding content-neutral legislation have been relegated to intermediate scrutiny and evaluated based on the criteria for intermediate First Amendment analysis.

B. S.B. 7072 is Content-Neutral.

S.B. 7072 fits in this category, and should be analyzed with intermediate scrutiny. First, Paxton remains the most recent precedent. The 5th Circuit determined that Texas' social media legislation "satisfies the intermediate scrutiny that applies to content-neutral laws." *Paxton*, 49 F.4th at 448. Not

only does this ruling establish social media regulation as content-neutral legislation, it actually states that content-neutral laws are always tied to intermediate scrutiny.

The actual content of S.B. 7072 states "[a] social media platform must apply censorship, deplatforming, and shadow-banning standards in a consistent manner among its users on the platform", and only requires social media platforms to "inform each user about any changes to its user rules, terms, and agreements." Fla Stat. § 501.2041(h)(2)(b) & (c). The language of S.B. 7072 is clearly content-neutral and identity-neutral. It doesn't require the promotion of any particular viewpoints, but promotes the freedom of the platform as a whole by creating equal standards for every user of prominent social media platforms.

Respondents argue that S.B. 7072 is correlated with "efforts to counteract the perceived biases of the targeted websites", making it conservative-aiding and non-neutral in its content restrictions. *See* Reply Brief for Cross-Petitioners, at 3. The language of S.B. 7072 refutes this claim thoroughly. All S.B. 7072 pursues is "a consistent manner" of censorship across the entirety of social media platforms. Nothing about this legislation favors one group over another. At the end of the day, S.B. 7072 simply promotes the fair dissemination of ideas across the forums of modern digital media with fairly reasoned restriction from social media companies.

In *Turner*, this Court emphasized how, to warrant strict scrutiny, the cable legislation would

have to "single out certain members of the press for disfavored treatment." *Turner Broadcasting Sys., 512 U.S.* at 653. The legislation in *Turner* doesn't make such distinctions, and neither does S.B. 7072, as it regulates the continuity of censorship notification across all demographics and political groups. Respondents often rely on *Tornillo* to attempt to assert that S.B. 7072 is a content-based law. However, "the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates" . . . "exact[ing] a penalty on the basis of content." *Id.* at 256. This content-based distinction is clear, only applying to content that is critical of politicians in nature. S.B. 7072 doesn't have any of these content-based distinctions. All parts of S.B. 7072 apply to all social media giants, and relegate all users to equal treatment with content-neutral restrictions designed to enhance the public forums of social media. Furthermore, in *PG&E v. Public Utilities Commission*, 475 U.S. 1 (1986), this Court ruled the regulation conferred benefits to speakers based on viewpoint, creating an identity-based distinction that constituted strict scrutiny and discrimination. *Id.* at 21. S.B. 7072, in contrast, has no identity-based requirements, and applies to all users of social media platforms.

FAIR stated "[c] ontent-neutral laws that target conduct rather than speech generally pose no First Amendment problem even when they impose ""incidental" burdens on expression." *FAIR*, 547 U.S. at 62. S.B. 7072 is unique in this way. As demonstrated above, it targets the non-editorial conduct of social media companies, and does so in a

content-neutral setting, meaning it is ultimately constitutional under the First Amendment.

C. S.B. 7072 is Reasonably Tailored to Protect the Right of Speech for All Groups.

To survive intermediate scrutiny as many restrictive precedents have in the past, a law needs to be reasonably tailored and achieve a substantial government interest. *See Packingham*, 137 S. Ct. at 1736. "Reasonably tailored" refers to the ability of a law to achieve its purpose without incidentally removing the rights of companies or citizens more than is necessary. In the context of S.B. 7072, to pass intermediate scrutiny, Florida's legislation must be tailored to achieve the intended purpose of equal representation on social media platforms without harming social media companies (the censoring body) and their rights more than necessary.

Social media regulation, especially in the case of S.B. 7072, is reasonably tailored to protect all classes involved. In allowing social media companies to keep their "censorship, deplatforming, and shadow banning standards", S.B. 7072 protects the restriction rights of social media platforms, only creating "consistent manner" mandates among their censorship practices. Fla. Stat. § 501.2041(h)(2)(b). S.B. 7072 does all it can to protect the rights of social media companies, while also achieving its major governmental interest of promoting equal representation in our nation's most important social forums.

D. Florida Has An Important Government Interest in Attempting to Stop Social Media Companies from Unfair Hosting Practices That Restrict the Speech of Certain Individuals.

S.B. 7072 states its primary government interest, which has held up under inspection. The Florida Senate found: "The state has a substantial interest in protecting its residents from inconsistent and unfair actions by social media platforms" *Stop Social Media Censorship Act*, S.B. 7072 § 1(10). The protection of Florida's residents warrants the use of classifications and justifies Florida's actions in S.B. 7072.

Social media platforms are the main method of communication and expression in the modern world. Indeed, "The percentage of US adults who use social media increased from 5% in 2005 to 79% in 2019." Esteban Ortiz-Ospina, *The Rise of Social Media, Our World in Data* (Sept. 18, 2019), https://tinyurl.com/mwz4946s. The average American adult spends over 2 hours on social media sites, and the average minor devotes 3 hours and 4 minutes daily. Josh Howarth, WORLDWIDE DAILY SOCIAL MEDIA USAGE (NEW 2024 DATA) EXPLODING TOPICS (2023), https://explodingtopics.com/blog/social-media-usage (last visited Dec 10, 2023). The average American relies upon a feed of constant stimulation from a small number of platforms. These platforms, including Facebook, Twitter, Instagram, and Tiktok, are now so deeply ingrained into our society that they replace

communication, learning, and thought.

In the modern digital age, those who control social media platforms "wield enormous power over billions of citizens worldwide." Frederick Mostert & Alex Urbelis, *Social media platforms must abandon algorithmic secrecy*, Financial Times (June 16, 2021), https://perma.cc/GN74-6DDH. Social media giants have two ways of regulating speech within their realms.

First, they censor certain information. If a post is considered propaganda, inaccurate, or dangerous, platforms can remove it completely from others' feeds. For example, in 2021, when "Senator Rand Paul . . . opined about the relative inefficacy of cloth masks in combating the COVID-19 pandemic . . . Youtube forbade him from discussing the matter on its platform", and removed all previous videos he had made. *See, e.g.*, Associated Press, *YouTube suspends Rand Paul after misleading video on masks,* PBS News Hour (Aug. 11, 2021), https://perma.cc/U2PD-K76U. Traditional censorship is dangerous throughout society because social media platforms have no criteria for the removal of information, meaning they can simply remove anything they want from their domains. Censorship doesn't always provide equal access to all, as the First and Fourteenth Amendments guarantee.

Second, social media companies engage in censorship by using algorithmic shadow-banning or deplatforming. Facebook, Twitter, and other media giants create AI algorithms that attempt to "reduce

the flow of content likely to stoke political extremism and hatred." Paul Barrett, Justin Hendrix & Grant Sims, *How tech platforms fuel U.S. political polarization and what government can do about it*, Brookings Institute (Sept. 27, 2021), https://perma.cc/UQ6A-3VP3). The results of this censorship, however, are more subtle. Instead of being removed from a platform entirely, victims may be shadow banned, resulting in a very low number of interactions with their posts. Users end up with "no way of telling for sure whether they have been shadowbanned or whether their content is simply not popular." Gabriel Nicholas, *Shadowbanning Is Big Tech's Big Problem*, The Atlantic (April 28, 2022), https://perma.cc/MW3Y-LYDZ).

Any and all digital censorship by social media companies is incredibly important in today's media-driven world. Due to the societal reliance on social media and the intrinsic necessity of digital media, society must aim for equality and fairness in the forums of our future, and that is what Senate Bill 7072 promotes.

According to Justice Thomas, "today's digital platforms provide avenues for historically unprecedented amounts of speech." *Knight*, 141 S. Ct. at 1221. He asserts the "concentrated control of so much speech in the hands of a few private parties" warrant "concerns about stifled speech." *Id.* at 1222. This argument is distressing to much of the public. Social media companies, with their unprecedented power over communication and expression, must be subject to regulations to ensure the First Amendment

rights of the public, as Justice Thomas argues. This concern creates an obvious and pressing government interest that motivated the creation of S.B. 7072. Politicians' concern over the censorship practices of all-powerful media giants certainly warrants intervention and legislation.

Finally, *Packingham* dealt with the power of social media. After North Carolina made it a felony for a registered sex offender to access a commercial social networking web site, obvious concerns emerged about sex offenders' obvious restriction from expressing their opinions under the First Amendment, ultimately leading the Court to rule that the North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. *See Packingham*, 137 S. Ct. at 1736. The Court's commentary during this case highlights the modern power of social media. They contend the Cyber Age is a "revolution of historic proportions," with "vast potential to alter how we think, express ourselves, and define who we want to be." *Id.* at 1735-36. This opinion once again supports the argument that social media is vital to a modern existence, meaning that state governments have an extremely important interest and duty in preserving the intellectual morality of these platforms. S.B. 7072, in essence, provides the basis for the equality of viewpoints in highly important cyber-forums. The government interest exemplified by Florida in passing S.B. 7072 is incredibly strong, and clearly warrants the use of "classifications" to provide equal access for all in regards to these ever-important digital forums.

CONCLUSION

For the reasons above, the Court should rule in favor of the Petitioners and uphold S.B.7072 in its entirety.

Respectfully submitted,

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