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 PETITIONER

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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.

PARTIES TO THE PROCEEDING

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

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

RELATED PROCEEDINGS

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

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

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

NetChoice v. Moody, No. 21-12355 (May 23, 2022)

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INTRODUCTION

"No right was deemed by the fathers of the Government more sacred than the right of speech. It was in their eyes, as in the eyes of all thoughtful men, the great moral renovator of society and government." Frederick Douglass, *A Plea for Free Speech in Boston,* address to Tremont Temple Baptist Church (December 3, 1860). Indeed, freedom of speech has been cherished by Americans as among the greatest civil liberties bestowed by the Bill of Rights. The first Amendment and free speech more broadly, however, are "often inconvenient" in requiring the freedom of contrarian and unpopular speakers. *Intl. Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 at 701 (1992) (Kennedy, J., concurring in judgments). While speech in today's digital age looks very different from speech in the Founding era, the core principle of "freedom for the thought that we hate" remains the same. *United States v. Schwimmer,* 279 U.S. at 655 (1929) (Holmes, J., dissenting).

Government censors are far from the only threat to free speech in the digital age. Social media companies hold vast power to censor and control speech on their platforms, posing a threat to free speech that rivals even what the government might do. While the First Amendment only bars government censorship of speech, the legislative power of the federal and state governments authorizes them to take further action and enjoin private infringement upon free speech. To this end, the State of Florida enacted the Stop Social Media Censorship Act to regulate the content moderation of social media platforms. *See* Fla. S.B.

7072; Fla. Stats. §501.2041 and §106.072. Among other things, the Act requires social media companies to provide a justification for each content moderation decision and prohibits certain content moderation actions which infringe upon free speech. Nowhere is the Act "abridging the freedom of speech" held by the companies, for it regulates actions and behavior alone. U.S. Const. amend. I.

The First Amendment gives social media companies the necessary right of free speech, and it is imperative that this right is defended against all governmental infringement. However, taking action to silence another without justification is not speech or expression—it is an attack on speech and expression. "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the States," including the power to regulate conduct that affects their citizens. U.S. Const. amend. X. Florida therefore has the right and the duty to defend its citizens against this attack on speech. Nothing in the text, history, or tradition of the First Amendment suggests social media companies bear a "freewheeling censorship right from the Constitution's free speech guarantee." *NetChoice, LLC v. Paxton,* 49 F.4th 439, 494 (5th Cir. Sept. 16, 2022).

Social media companies have no constitutional right to silence speakers on their platforms while refusing to justify their content moderation decisions. Moderation is not protected speech or expressive conduct, and this Court should affirm Florida's authority to prevent it from infringing upon the same.

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution states:

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

The pertinent statutory provisions, Florida Statues §501.2041 and §106.072, are reproduced in the appendix to the petition for certiorari. App.95a–108a.

STATEMENT OF THE CASE

In the last two decades, social media has undoubtably taken on an incredibly important role in politics and public discourse. Although "[n]ot in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok," these platforms are now among the most important forums for political and ideological discussion. *NetChoice v. Moody,* 34 F.4th 1196 at 1203 (11th Cir. 2022). As recent research shows, the largest social media platforms are used by significant proportions of the population, as detailed below.

- **Facebook**: In early 2023, Facebook had 175.0 million users in the U.S., reaching 51.6% of the total population and 60.9% of the eligible audience (those aged 13 and above). DataReportal – Global Digital Insights, *Digital 2023: The United States of America* (2023), https://datareportal.com/reports/digital-2023-united-states-of-america

- **YouTube**: YouTube had a similar reach with 246.0 million users, equivalent to 72.5% of the total population and 79.0% of the total internet user base. *Id.*

- **Instagram**: Instagram reached 42.3% of the total U.S. population and 46.1% of the internet user base, with 143.4 million users in early 2023. *Id.*

- **TikTok**: TikTok had 113.3 million users aged 18 and above, reaching 42.7% of adults and 36.4% of the internet user base. *Id.*

- **Snapchat**: Snapchat reached 31.7% of the total population and 37.4% of the eligible audience, with 107.4 million users. *Id.*

- **Twitter**: Twitter had 95.40 million users, reaching 28.1% of the total population and 33.2% of the eligible audience. *Id.*

- **Pinterest**: Pinterest reached 24.9% of the total population and 29.4% of the eligible audience, with 84.60 million users. *Id.*

Given this significant proportion of speech occurring online, social media companies hold great power to censor and control speech. A significant percent of Americans today use some social media platform, and the influence of social media communication in the modern world is immense. Few forums are so potent for the dissemination of ideas and political thought as social media. Despite its many promises, this new technology comes with a dark side. Through their content moderation policies, social media companies can silence an unpopular speaker across all mainstream digital forums, impeding free speech and political discourse.

This case concerns four particular forms of content moderation—censoring, deplatforming, post-prioritization, and shadow banning. These moderation actions are defined by Florida's S.B. 7072 as follows:

- **Censorship:** To "censor" is to "delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user," or to "inhibit the ability of a user to be viewable by or to interact with another user of the social media platform." Fla. Stat. §501.2041(1)(b).

- **Deplatforming:** To "deplatform" is to "permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.,* §501.2041(1)(c).

- **Post-prioritization:** To "post-prioritize" is to "place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results," except "based on payments by that third party." *Id.,* §501.2041(1)(e).

- **Shadow banning:** To "shadow ban" is to, whether "by a natural person or an algorithm . . . limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform" even if "not readily apparent to a user." *Id.,* §501.2041(1)(f).

Each of these tactics, almost universally used by major platforms, either directly silences a user and prevents them from speaking in a given digital forum,

or indirectly silences them by reducing the extent to which their speech can be viewed by others. While content moderation has legitimate purposes such as protecting the privacy of minors or preventing the distribution of illegal content, policies against "misinformation" or "hate speech" are often utilized to strike down controversial statements. Facebook, one of the largest and most influential social media corporations, admittedly removes "content that is likely to directly contribute to interference with the functioning of political processes." Facebook Community Standards, *Policy Rationale,* transparency.fb.com/policies/community-standards/misinformation. Other statements, for example inaccurate health-related remarks or associating oneself with extreme political groups, can also lead to removal and censorship. On these platforms, in many ways akin to "the modern public square," control of users' speech can severely impede public discourse and the free exchange of ideas. *Packingham v. North Carolina,* 137 S. Ct. at 1737 (2017). Under the unchecked totalitarian control of social media companies, this virtual town square can be subjected to any and all restrictions on speech; it is a far cry from free.

To protect Floridians from censorship and provide for free and vigorous discourse online, in May 2021 he Florida Legislature passed and Governor Ron DeSantis signed Senate Bill 7072, the Stop Social Media Censorship Act. As Florida Senator Ray Rodrigues stated, the Act insists that "Big Tech has a responsibility to be fair and transparent to all of its users, regardless of our political ideology." Florida

Governor Ron DeSantis, *Governor Ron DeSantis Signs Bill to Stop Censorship of Floridians by Big Tech* (May 24, 2021) https://tinyurl.com/mpemppra. While Act was spurred by concern for censorship of conservative speakers by companies of a liberal persuasion, it treats all users equally and protects unpopular liberal speakers in the same way. In its provisions, the Act in question outlines the following restrictions on social media companies:

- **"Candidate deplatforming:** A social-media platform 'may not willfully deplatform a candidate for office.'" *NetChoice v. Moody,* 34 F.4th 1196 at 1206, citing Fla. Stat. § 106.072(2).

- **"Posts by or about candidates:** 'A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about . . . a candidate.'" *Id.,* citing Fla. Stat. § 501.2041(2)(h)

- **"Journalistic enterprises:** A social-media platform may not 'censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.'" *Id.,* citing Fla. Stat. § 501.2041(2)(j)

- **"Consistency:** A social-media platform must 'apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform.'" *Id.,* citing Fla. Stat. § 501.2041(2)(b)

- **"30-day restriction:** A platform may not make changes to its 'user rules, terms, and agreements . . . more than once every 30 days.'" *Id.,* citing Fla. Stat. § 501.2041(2)(c).

- **"User opt-out:** A platform must 'categorize' its post-prioritization and shadow-banning algorithms and allow users to opt out of them; for users who opt out, the platform must display material in 'sequential or chronological' order." *Id.,* citing Fla. Stat. § 501.2041(2)(f).

- **"Standards:** A social-media platform must 'publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban.'" *Id.*, at 1206-07, citing Fla. Stat. § 501.2041(2)(a).

- **"Rule changes:** A platform must inform its users 'about any changes to' its 'rules, terms, and agreements before implementing the changes.'" *Id.,* at 1207, citing Fla. Stat. § 501.2041(2)(c).

- **"View counts:** Upon request, a platform must provide a user with the number of others who viewed that user's content or posts." *Id.,* citing Fla. Stat. § 501.2041(2)(e).

- **"Candidate free advertising:** Platforms that 'willfully provide free advertising for a candidate must inform the candidate of such in-

kind contribution.'" *Id.,* citing Fla. Stat. § 106.072(4).

- **"Explanations:** Before a social-media platform deplatforms, censors, or shadow-bans any user, it must provide the user with a detailed notice. In particular, the notice must be in writing and be delivered within 7 days, and must include both a 'thorough rationale explaining the reason' for the 'censor[ship]' and a 'precise and thorough explanation of how the social media platform became aware' of the content that triggered its decision." *Id.,* citing Fla. Stat. § 501.2041(2)(d).

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

The Act contains no provisions prohibiting social media companies from stating or otherwise expressing their political positions, nor do its provisions expressly demand such companies to associate with anyone or hold any particular opinion.

Following the enactment of S.B. 7072, NetChoice, an association of tech companies that purports to "make the Internet safe for free enterprise and free expression," filed suit against the State on May 27, 2021, requesting the law be enjoined. NetChoice, *Our Mission, https://netchoice.org/about/#our-mission.*

The district court found for plaintiffs and the Eleventh Circuit affirmed in part and vacated in part, holding unconstitutional the content-moderation restrictions and individualized-explanation requirement of S.B. 7072. Certiorari was granted by this Court on September 29, 2023.

SUMMARY OF ARGUMENT

Social media has revolutionized modern-day communication unlike anything before, holding a place of great prominence in public discourse and politics. With this importance comes the vast censorship power of social media companies, to control speakers and silence their expression. Florida's S.B. 7073 is a necessary measure in this new digital age, and one completely consistent with the demands of the First Amendment.

If this Court's First Amendment precedents make anything clear, it is that speech and expression, not conduct, are protected. While social media platforms are an important forum for speech, the speech itself is not of the platform but rather its users. Quite plainly, Florida does not infringe upon the speech of platforms. No message appears to be communicated from these actions, and social media companies do not make editorial judgments in the way newspapers do. Social media companies are passive hosts of speech serving the role of common carriers. Therefore, their content moderation does not express anything and the state can require such moderation be applied fairly.

Florida's individualized-explanation requirement is also in accordance with this Court's precedents. *Zauderer* permits the state to compel companies to disclose factual information notwithstanding their First Amendment protection. Because the mandated explanations are just factual disclosures of information about company operations, Florida can compel them under *Zauderer*.

In short, social media companies have no constitutional right to censor users and evade disclosures. Florida's law conforms to First Amendment as understood through the precedents of this Court, and therefore it must be upheld.

ARGUMENT

I. The Stop Social Media Censorship Act does not restrict the speech of social media companies.

Few rights are so central to this nation's civil discourse and very sense of identity as the First Amendment guarantee of free speech. This right of free expression extends not only to individuals, but further to associations of persons such as social media corporations. But regardless of whether the Stop Social Media Censorship Act would survive under strict scrutiny, this tier of review is only appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments." *United States v. Carolene Products Co.,* 304 U.S. at 152, n. 4 (1938). Because the content moderation of social media companies is neither verbal speech nor expressive conduct, the First Amendment is not implicated. Since the threshold requirement of a specific violation of constitutional rights is not met, the Act must be evaluated under the rational basis test—which it clearly passes.

A. Social media posts are the speech of the user, not the platform.

Social media companies are merely a host for the speech which is posted on their platform, not a speaker in its own right. That is, every social media post is the

speech of the user who creates it, which is merely distributed and made visible to other users through the medium of the platform. Further clarifying this distinction between the platform hosting speech and the user speaking is Section 230 of the Communications Decency Act. Enacted to allow the growth of the Internet by shielding companies from liability for conduct which they host, the statute provides in relevant part:

> "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Clearly, posts on social media are information of some form or other, created and provided not by the media platform but rather the user. Section 230 enshrined into statute the principle that an online hosting service is a "distributer . . . as opposed to a publisher," (or speaker, for that matter). *Cubby, Inc. v. CompuServe, Inc.,* 766 F. Supp. at 139 (S.D.N.Y. 1991). The very layout of social media websites is indicative of this, with most platforms indicating who the speaker of each post is. Although the platform plays an important role in transmitting the posts to the speaker's audience, no one would argue the company itself is speaking through them.

The role of an internet provider or social media platform is nothing more than hosting and distributing the posts of another, which are the verbal speech of the user alone. While an individual bears a First Amendment right to speak or refrain from

speaking, a corporation who hosts this speech does not hold the same right to restrict it.

B. Conduct must express a message to merit First Amendment protection.

Given that symbolic forms of speech can be a "primitive but effective way of communicating ideas," they are protected in the same manner as verbal and written speech. *W.V. State Bd. of Educ. v. Barnette,* 319 U.S. at 632 (1943). Nevertheless, moderation and censorship on a social media is far from a symbolic way of speaking the view of a company; it is merely inexpressive conduct. As this Court's precedents have held, "regulation of conduct does not violate the First Amendment." *FAIR v. Rumsfeld,* 547 U.S. at 68 (2006).

Although this Court has adopted various standards for the definition of protected expressive conduct and the question of which ought to be used is unanswered and has led to a circuit split, each of this Court's precedents indicate the existence of a message to be necessary component of symbolic speech. That is, it is integral to the idea of expressive conduct that something is being expressed, however specific or abstract it may be.

Beginning with the test established in *Spence v. Washington,* this Court held that conduct is only considered expressive and therefore protected if "[a]n intent to convey a particularized message was present and in the surrounding circumstances, the likelihood was great that the message would be understood by

those who viewed it." 418 U.S. 405, 411-12 (1974). This standard was first applied in *Spence* to permit ornamentation of a flag as an expressive protest, and again in *Texas v. Johnson* to protect flag-burning in like manner. *Id.;* 491 U.S. 397 (1989).

Since the decision in *Spence,* however, this Court has since revised the standard for expressive conduct in *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston.* 515 U.S. 557 (1995). *Hurley* clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection," thus allowing organizers of a parade to exclude marchers with a message against their own. *Id.,* 568. Nevertheless, *Hurley* maintained the principle that "without expressing any message beyond the fact of the [act] itself," conduct cannot be in any sense expressive. *Id.,* at 568.

The Second, Third, Sixth, Ninth, and Eleventh, 3rd, Circuits are split on how best to apply *Spence* in light of *Hurley,* with multiple distinct and contradictory holdings between these courts of appeals. *See Church of Amer. Kts. of the Ku Klux Klan v. Keric,* 356 F.3d 197 (2d Cir. 2004); *Tenafly Eruv Ass'n v. Bourough of Tenafly,* 309 F.3d 144, 160 (3d Cir. 2002); *Kaahumanu v. Hawaii,* 682 F.3d 789 (9th Cir. 2012); *Blau v. Ft. Thomas Pub. Sch. Dist.,* 401 F.3d 381 (6th Cir. 2005); *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252 (11th Cir. 2004). While it will likely be necessary for this Court to resolve the split at some time, expressive conduct does not encompass hosting of speech under any of circuit precedents in question. By the Second Circuit's holding that *Hurley* "leaves intact the

Supreme Court's test for expressive conduct in [Spence]," content moderation fails the standard as it conveys no "particularized message." *Keric* at 205 n.6. Such conduct also fails the Third Circuit's modified standard that expression must be "intended subjectively . . . to communicate," as content moderation has no message to be communicated. *Tenafly Eruv Ass'n* at 161 (citing *Troster v. Pennsylvania State Dept., Correct,* 65 F.3d 1086 at 1091-92 (3d Cir. 1995)). While the Sixth, Ninth, and Eleventh Circuits all interpret *Hurley* as having modified the "particularized message" standard of *Spence* in slightly different ways, they nevertheless agree that conduct must be "some sort of message" if it is to be considered expressive. *See* Sandy Tomasik, *Can You Understand this Message? An Examination of Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston's Impact on Spence v. Washington,* 89 St. John's L. Rev. 265, 291 (2015).

C. Hosting speech online, as social media platforms do, is not expressive conduct.

The hosting and content moderation of a social media company is in no form expressive conduct, for it conveys no message whatsoever. Social media companies are not newspapers, which only consider articles from specific and qualified writers, edit the writing to fit the standards of the paper, and then make selective decisions regarding what to publish and what to toss. Rather, social media platforms generally allow any user to write or create anything—

without editing, prerequisites, or any review at all—before posting it online. Only once the speech is online do the company moderators comb through and strike posts according to the content policy. However, the ruling below held that these "'content-moderation' decisions constitute protected exercises of editorial judgment." 34 F.4th at 1203. This Court's precedents would indicate otherwise.

Editorial discretion is indeed protected as expressive speech, and, in many cases, by the freedom of the press. Fittingly, this Court's precedents "reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views." *Pittsburgh Press Co. v. Human Rel. Comm'n,* 413 U.S. at 391 (1973). Therefore, as was held in *Miami Herald Publishing Co. v. Tornillo,* "[g]overnment may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." 418 U.S. 241, 263 (1974) (Brennan, J., concurring). *Miami Herald* arose from Florida's right-of-reply statute, requiring the Miami Herald to publish state house candidate Pat Tornillo's reply to a critique in its pages. *See* Fla. Stat. § 104.38 (1971). Ruling for the Herald, this Court determined the paper had a First Amendment right to editorial discretion in what it chose to publish. "The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official—whether fair or unfair—constitute the exercise of editorial control and judgment," a form of expressive conduct clearly protected under the First Amendment. *Id.*

In finding the social media companies' actions protected under the First Amendment, the Eleventh Circuit held that the platforms "exercise editorial judgment that is inherently expressive" and protected under *Miami Herald*. 34 F.4th 1196, 1213. However, there is a fundamental difference between the work of a newspaper and a social media platform, for "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising" and a social media platform is not. *Id.,* at 258. Furthermore, the right-of-reply law at issue in *Miami Herald* "exacted a penalty on the basis of the content of a. newspaper," whereas the Florida statute makes no distinction between content moderation favoring one viewpoint that favoring another. *Id.,* at 256.

This Court's precedent in *PruneYard v. Robins,* 447 U.S. 74 (1980) better governs how hosting of speech by a third party, essentially the entire business of social media companies, may be regulated more broadly by the state. Beginning with *PruneYard,* it concerned a group of students removed from the PruneYard Shopping Center while canvassing for a political cause. In the wake of a controversial United Nations resolution condemning Zionism as "a form of racism and racial discrimination," the students set up a table and sought signatures for a petition of protest. U.N. Gen. Assemb. Res. 3379. Because permission was never given by the shopping center, security removed the protesters who filed suit claiming their freedom of speech had been infringed. Although this Court "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for

private purposes only," this applies only to the federal right to free speech. *Lloyd Corp. v. Tanner,* 407 U.S. at 568 (1972). States, in this case California, may "broadly proclaim speech and petition rights" that extend into speech hosted by a private party. *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899, 910, 592 P.2d 341, 347 (1979). *PruneYard* established that "neither appellants federally recognized property rights nor their First Amendment right[s]" are "infringed by . . . a right of appelles to exercise state protected rights of expression and petition on appellants' property." 447 U.S. 88. The provisions of Florida's Act clearly are constitutional under the standard of *PruneYard,* as the statute serves to grant users a right to free expression while on the digital property of social media companies.

The subsequent decision in *Pacific Gas & Electric Co. v. Public Utilities Comm'n,* that a law requiring a corporation "use its property for spreading a message with which it disagrees" is unconstitutional, does not apply to this case. 475 U.S. 1, 17 (1986). In *Pacific Gas,* it was held that the state "impermissibly burdens [one's First Amendment rights [when] it forces [one] to associate with the views of other speakers." *Id.,* 20. However, Florida does not force social media companies to associate with or agree with the views of other speakers. It would be absurd to think that the speech of a social media user is the opinion of the social media company. If this were not enough, platforms are still free to express their own viewpoints or clarify that all posts reflect only the view of the user. "Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's

exercise of his own right to speak." *Id.,* 12. This concern is again notably absent here. Further distinguishing *Pacific Gas*, there the Public Utilities Commission required PG&E include in its monthly newsletter statements from Toward Utility Rate Normalization that directly rebutted the message of the letter. The social media companies represented by NetChoice have no message whatsoever respecting the posts on their platform or their content moderation decisions, and therefore the standard in *Pacific Gas* is inapposite.

Corroborating the precedent set in *PruneYard,* this Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47 (2006) also demonstrates the content moderation of social media companies not to be expressive. *FAIR* arose from a coordinated protest to the military's "Don't ask, don't tell" policy," which prohibited openly homosexual persons from serving in the armed forces. *See* Dept. of Defense Directive 1304.26. When law schools opposed to the policy refused to permit military recruiters on campus in protest, Congress passed the Solomon Amendment to withheld federal funding from any school that "prohibits, or in effect prevents . . . [the military] from gaining access to campuses, or access to students . . . for purposes of military recruiting . . ." 10 U.S.C. § 983(b). FAIR, an association of law schools, sued and claimed their First Amendment right not to associate with the military (and by extension, its "Don't ask, don't tell" policy) was infringed. However, as this Court held, "[t]he Solomon Amendment neither limits what laws schools may say nor requires them to say anything." *FAIR,* 60. Because "[l]aw schools

remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy . . . the Solomon Amendment regulates conduct, not speech." *Id.*

This distinguishing characteristic of the fact pattern in *FAIR* is also present here. Social media companies remain free under S.B. 7072 to "express whatever views they may have" on political candidates and races, the media and current events, or any other subject for that matter. *Id.* The Act only restricts companies from taking action to restrict the ability of others to express their own views. Further supporting the application of *FAIR* is the inability of a viewer to know if and what a social media company is purportedly expressing with a content moderation decision. As this Court found in *FAIR,* "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military [or] all the law school's interview rooms are full." *Id.,* at 66. Notwithstanding the law schools' claim that their conduct was expressive, there is no way for an observer to determine whether a message is being conveyed by their conduct, and if so, what it might be. Likewise, when a user is banned or censored, "[a]n observer . . . could not know *why*." *Paxton,* 49 F.4th, at 490 n. 41. If the observer noticed the user switch to speaking on a different platform, "[m]aybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason." *Id.* Social media companies rarely if ever offer explanatory notes on their platforms, stating either what action was taken or why, so "[w]ithout more information, the observer has no basis

for inferring a 'particularized message' that [the platform] disapproved [a censored] post." *Id.* In fact, the observer has no basis for inferring any message or expression whatsoever.

Because there is no apparent message in the censorship and moderation of a social media platform, these actions cannot be considered expressive in light of *PruneYard* and *FAIR*. Quite simply, "[t]he First Amendment protects speech: It generally prevents the government from interfering with people's speech or forcing them to speak." *Paxton,* 49 F.4th 494. What the First Amendment does not protect is conduct, and because "[t]he platforms are not newspapers," "[t]heir censorship is not speech." *Id.*

D. The Act falls within the scope of the common carriage doctrine

The doctrine of common carriage, deeply rooted in the Anglo-American common law tradition, vests states with the power to impose non-discrimination obligations on industries such as social media. Emanating from early English courts, this doctrine compels private enterprises to provide certain services to the public impartially and without discrimination. Although originating in the context of ferries, common carriage has expanded throughout history to encompass many industries. Although the social media industry is at the vanguard of communication today, it fits well within the scope of this ancient doctrine.

As Justice Newton of the Court of Common Pleas explained, a common carrier is "required to maintain the ferry and to operate it and repair it for the convenience of the common people." *Trespass on the Case in Regard to Certain Mills, Certain Mills,* YB 22 Hen. VI, fol. 14 (C.P. 1444). By the time of the Founding, this principle had expanded under the common law, applying to "common callings" that included stagecoaches, barges, gristmills, and innkeepers. Blackstone, 1 Commentaries 64 (1765). As Blackstone put it, these businesses under the common carriage doctrine made an "implied promise to entertain all persons who travel that way." *Id.* Sir Matthew Hale expounded on this principle in his treatise *De Portibus Maris,* explaining the public interest associated with private wharves. According to Hale, if an individual built a single wharf within a port, it is necessarily "affected with a public interest" and therefore becomes obligated to serve the general public without partiality. *De Portibus Maris,* in a Collection of Tracts Relative to the Law of England 77-78 (Francis Hargrave ed., 1787).

By the 19th century, the most important implication of this regulation came with the advent of the railroad industry. Crucial to transcontinental shipping in the context of emerging industrialization, railroads were often embroiled in discrimination later deemed by courts as violations of their duties as common carriers. *See* Charles Haar & Daniel Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality* 109-40 (1986). Between controversy over rate differentials and

exclusive contracts, American courts did not yield in their enforcement of common carrier principles. *See, generally: Messenger v. Pa. R.R. Co.* 37 N.J.L. 531, 534 (1874); *New England Express Co. v. Me. Cent. R.R. Co.,* 57 Me. 188, 196 (1869).

Such regulation of common carriers did not stop with the railroad. The telegraph, invented in the 1830s to communicate rapidly over great distance, was the first communications industry subject to common carrier statutes in the United States. *See* Genevieve Lakier, *The Non First Amendment Law of Freedom of Speech,* 134 Harv. L. Rev. 2299, 2320-24 (2021). Extensive concern about private manipulation of information and communication via telegraph resulted in state laws curtailing discrimination regarding which messages could be transmitted. For example New York enacted in 1848 a statute requiring telegraph to "receive d[i]spatches from and for . . . any individual, and on payment of their usual charges . . . [and] to transmit the same with impartiality and good faith." Act of April 12, 1848, ch. 265 § 11, 1848 N.Y. Laws 392, 395. While telegraph companies were most certainly engaged in a far more straightforward business than social media companies, this history further shows the Florida law's consistency with the common carrier tradition. The ubiquity of social media makes deplatforming and censorship decisions so pressing for states to address, just as the ubiquity of the telegraph made partiality in its service so pressing in its time.

Today's social media platforms meet the historical common law standard to be classified as common

carriers. Such platforms stand at the core of contemporary public discourse, acting as one of the most essential forums for civic engagement, cultural discourse, and economic life. This Court recognized this societal prominence in *Packingham v. North Carolina*, understanding that social media represents "the modern public square." 137 S. Ct. at 1737 (2017). Since *Packingham,* this importance has only grown and today, the case for considering social media as a common carrier is stronger than ever before.

Respondent's resistance to this classification fails to acknowledge the history of the doctrine. As previously discussed, common carrier regulation applied to ferries, railroads, and telegraphs—services provided to the public in a non-exclusive manner. Later history, however, shows that regulated enterprises do not need to forego selectivity to be covered by content-neutrality requirements. Indeed, historical common carriers have frequently enjoyed the freedom to screen some kind of speech, a principle ingrained both in federal statute and judicial precedent. The following examples are particularly demonstrative:

1. **47 U.S.C. § 223 – Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications:** This statute indicates that although common carriers such as telephone companies must maintain a neutral standard respecting what content they carry, it is permissible, and sometimes obligatory, for such companies to restrict certain content. Section

233 shows how common carriers may filter content such as obscenity and harassment without running afoul of their non-discrimination duty.

2. ***Carlin Commc'ns, Inc. v. Mtn. States Tel. & Tel. Co.,* 827 F.2d 1291 (9th Cir. 1987)**: This case demonstrates that while telephone companies are considered common carriers and therefore expected to treat all messages equally, such companies have the right to screen or refuse access to certain content.

Social media companies, as the Texas legislature found, "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." Texas H.B. No. 20, § 1(3). Furthermore, these "social media platforms with the largest number of users are common carriers by virtue of their market dominance." *Id.,* § 1(4). Florida's legislature, too, determined social media platforms to be akin to "public utilities" that should be "treated similarly to common carriers." S.B. 7072 § 1(5), (6). While this Court is not bound by these legislative statements, the point still rings true.

Common carrier regulation is crucial to a free society where individuals are not under constant threat of censorship and discrimination, and social media companies should be treated no differently than traditional common carriers. Respondents argue that "social media marks the point where the underlying technology is finally so complicated that the

government may no longer regulate it to prevent invidious discrimination" *Paxton,* 49 F.4th at 479. While the technology may change, "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Ent. Merch. Ass'n,* 564 U.S. 786, 790 (2011) (citing *Joseph Burstyn Inc. v. Wilson,* 343 U.S. 495, 503 (1952)). Neither can the common carrier doctrine vary with the new and different communication medium of social media. These platforms fill today the role that railroads and telegraphs once did. If the latter was regulated under the common law as a common carrier, then so must social media be regulated as a common carrier.

II. The Act's disclosure provisions conform to *Zauderer*

When platforms provide information about their moderation policies and determinations, their speech is "proposing a commercial transaction" by articulating the terms under which the company will permit a user's speech. *Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm'n of NY,* 447 U.S. 557, 562 (1980). This Court's precedents have held such commercial speech "traditionally subject to government regulation" in a way more expressive or political forms of speech are not. *Id.* Therefore, this Court has found "intermediate scrutiny is appropriate for a restraint on commercial speech," in lieu of strict scrutiny which would otherwise apply. *Id.,* at 573 (Blackmun, concurring).

Florida's S.B. 7072 requires social media platforms to disclose their content moderation rules, provide users with viewership data, and offer individualized explanations to users who are moderated in some way. This serves to shed light on the otherwise opaque practices of tech companies, while also allowing users to know if they are being treated fairly and legally by the company content moderators. Although these provisions of S.B. 7072 do compel commercial speech on the part of social media companies, the regulation is rooted in the commercial speech precedents of this Court. The decision in *Zauderer v. Office of Disciplinary Couns. of Supreme Court of Ohio*, 471 U.S. 626 (1985) recognized the government's power to compel commercial enterprises to "purely factual and uncontroversial information about the terms under which [their] services will be available." *Id.,* 651. S.B. 7072 conforms to the ruling exactly.

The disclosures mandated by S.B. 7072 are purely factual, and involve no controversial messaging. The statute does not require the platforms convey any message fundamentally contradictory to their objectives or values. Rather, the disclosure requirements serve only to increase transparency, advancing the state's legitimate interest in preventing consumer deception in the digital marketplace. These requirements do not limit the speech of social media companies; they merely require the platforms to make public a clearer picture of their operational practices pertaining to content moderation.

The rule established in *Zauderer* that the state may compel a company to speak and disclose factual and uncontroversial information applies to the disclosure requirements of S.B. 7072. While all five required disclosures are covered under *Zauderer,* only the individualized-explanation rule was enjoined and found unconstitutional by the Eleventh Circuit. Florida has a legitimate interest in this notification, as it allows both greater transparency and accountability in content moderation practices. Requiring social media companies offer a case-specific explanation of their censorship actions will ensure a fairer and more transparent disciplinary process for users, allowing them to know the accusation against them and expect a reasoned justification for whatever is done. Furthermore, this allows social media companies to be held accountable for unjustified moderation, making the state's role in enforcing other provisions of S.B. 7072 significantly easier.

Although it has the ability to advance legitimate interests of the state, the individualized-explanation requirement is not facially burdensome to the companies and does not affect their editorial judgment or protected rights to speech and expression. Rather, it is a straightforward safeguard against procedural unfairness in the content moderation of the social media companies. "The First Amendment interests implicated by disclosure mandates are substantially weaker than those at stake when speech is suppressed." *Zauderer,* 651. Florida's compelling interests in holding social media companies accountable for discriminatory content moderation, increasing transparency surrounding the industry,

and mitigating consumer deception are all strong. In comparison, the companies' "constitutionally protected interest in not providing any particular factual information in [their] advertising is minimal" is quite weak. *Id.*

Respondents argue that this individualized-explanation requirement is "practically impossible to satisfy," however this could not be farther from the case. Br. of Appellees at 49. Unless social media companies make wholly arbitrary decisions pertaining to content moderation, they necessarily review the particular speech in question and from there decide if and how to censor it. S.B. 7072 only requires the companies inform users why their speech was censored, a determination which the company has already made. Social media companies can easily send a brief explanation of this rationale to users, at negligibly little cost.

This Court should apply its precedent in *Zauderer,* as S.B. 7072's individualized-explanation requirement is no different than any other disclosure obligation. While it indeed compels speech, it does so where the interests of the company are weakest and the interests of the state strongest. As in *Zauderer,* Florida here has "not attempted to '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.'" *Zauderer,* at 651 (citing *W. Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 at 642, (1943)). The State has only attempted to prescribe what shall be orthodox in a fair content moderation process on social media.

III. This Court must defer to the statute's severability clause.

Even if this Court finds a particular content moderation restriction or disclosure requirement to be constitutionally impermissible, it should allow all other provisions to stand. S.B. 7072 contains an express severability provision requiring this result:

> "If any provision of this act or the application 609 thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of 611 the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable." Florida S.B. 7072, § 6.

As the Court acknowledged in *Leavitt v. Jane L.,* 518 U.S. 137, 139 (1996) (per curiam), "Severability is of course a matter of state law," and therefore deference ought to be given to the Florida legislature's severability provision. Even if the Court chooses not to defer this legislative declaration, there is still no need or legal reason to enjoin all challenged provisions of S.B. 7072. If this Court finds a specific provision of the content-moderation regulations or disclosure obligations to be unconstitutional, any other provisions in which there is no fault should be considered severable and allowed to stand. To further "try to limit the solution to the problem" *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 328 (2006), this Court could also remand for the

lower courts to construct a more tailored remedy. Nevertheless, the tradition of this Court supports applying the principle of severability to S.B. 7072.

* * *

There is no right more important, no protected liberty more essential than the freedom of speech. The Framers of the Bill of Rights understood this, and enacted the First Amendment to protect the right of the American people to engage in free expression. However, social media companies have, "intentionally or not, undermined Americans' ability to communicate their ideas" through stringent content moderation and censorship. Gregory Dickinson, *Big Tech's Tightening Grip on Internet Speech,* 55 Ind. L. Rev. 101, 109 (2022). The greatest threat to free speech in Madison's time may have been the government, but today it is private corporations with unregulated and total control over the modern public square. By trying to regulate the suppression of voices and ideas, irrespective of whose speech is being attacked, Florida has formed a bulwark against corporate censorship. A free exchange of ideas, in both new and old mediums, is essential to democratic legitimacy and a free people, a lofty and venerable interest the State of Florida seeks to defend.

Notwithstanding this Court's recognition in *Miami Herald* of a "protection afforded to editorial judgment," the precedents in *FAIR* and *PruneYard* show that this does not apply to speech hosting. *Miami Herald,* at 255. Just like the market in *PruneYard* and the law

schools in *FAIR,* social media platforms merely host and distribute speech. In characterizing content moderation as an expressive editorial judgment, respondents have "attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR,* 547 U.S. at 70. No message is present in the content moderation of social media companies, and so it can only be understood as inexpressive conduct which Florida has the power to regulate.

Furthermore, the individualized-explanation rule is well within the boundaries set by *Zauderer* for the compulsion of disclosures. Although respondents claim the requirement forces companies to speak, they are only obligated to give a factual statement about their operations. This disclosure is completely consistent with this Court's standards, and afflicts the rights of the companies minimally.

Nothing in S.B. 7072 stands against the First Amendment or infringes upon its guarantee of free speech. Rather, S.B. 7072 seeks to expand this guarantee into the modern public square, a practice affirmed by this Court in *PruneYard.* This Court's precedents make clear that censorship is not protected expression, and social media companies have no First Amendment right to their content moderation schemes. S.B. 7072 adheres to the demands of the Constitution and precedent, and therefore it must be upheld by the Court.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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