No. _____

In the Supreme Court of the United States

ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.,
Petitioners,
v.
NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Florida has enacted a law that attempts to prevent social-media companies from abusing their enormous power to censor speech.

The questions presented are:

1. Whether the First Amendment prohibits a State from requiring that social-media companies host third-party communications, and from regulating the time, place, and manner in which they do so.

2. Whether the First Amendment prohibits a State from requiring social-media companies to notify and provide an explanation to their users when they censor the user's speech.

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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PETITION FOR WRIT OF CERTIORARI

Petitioners, Florida officials sued in their official capacities, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

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 pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App.96a–108a.

INTRODUCTION

This petition raises "issues of great importance that" several members of this Court have concluded "plainly merit this Court's review." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting). Social media has become "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). That status has given social-media behemoths like Twitter and Facebook "enormous control over speech." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

Historically, States regulated entities that transmitted large amounts of third-party speech by demanding that such entities provide equal access to the public. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2320–21 (2021); *NetChoice, LLC v. Paxton*, --- F. 4th ---, No. 21-51178, 2022 WL 4285917, at *24–29 (5th Cir. Sept. 16, 2022). Consistent with that history, many States have considered using their traditional regulatory authority to prevent large platforms from abusing their massive control over the channels of speech.

Florida was among the first to act. It enacted S.B. 7072—the law at issue here—to combat censorship by large social-media companies. The law does that in two main ways. *First*, it requires disclosure about how and when the platforms censor speech. And *second*, it requires that the platforms host some speech that they might otherwise prefer not to host.

The social-media companies challenged Florida's law, and the Eleventh Circuit mostly upheld a preliminary injunction that was entered before the law even took effect. Under the Eleventh Circuit's reasoning, social-media behemoths have a First Amendment right to cut any person out of the modern town square, for any reason, even when they do not follow their own rules or otherwise act in bad faith. That ruling strips States of their historic power to protect their citizens' access to information, implicating questions of nationwide importance. *See NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting).

The Eleventh Circuit's decision also conflicts with a Fifth Circuit decision that reversed an injunction against a Texas law much like S.B. 7072. *See Paxton*, 2022 WL 4285917. That irreconcilable divide warrants this Court's review.

The petition for certiorari should be granted.

STATEMENT

1. Social-media use has boomed in the last 20 years. "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. In the United States, 240 million people (out of about 330 million) use social media. *See* Social Media Statistics Details, University of Maine (Sept. 2, 2021), https://tinyurl.com/ypmx7f7d.

Those 240 million people use social media for a range of purposes. Almost half of American adults use social media to get their news. *See* Mason Walker &

Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, Pew Research Center (Sept. 20, 2021), https://tinyurl.com/28b53saw. Social media is also where Americans engage about politics—about one-third of the posts on Twitter are "political in nature." Sam Bestvater et al., *Politics on Twitter: One-Third of Tweets from U.S. Adults are Political*, Pew Research Center (June 16, 2022), https://tinyurl.com/ynu3ptuu.

Yet social-media companies have developed a censorial streak. Of late, "Silicon Valley's commitment to free speech" appears to have "eroded." *See* Danielle Keats Citron, *What to Do about the Emerging Threat of Censorship Creep on the Internet*, CATO Institute (Nov. 28, 2017), https://tinyurl.com/2p8jb3ka. When they censor, social-media companies manipulate "a critical forum in our marketplace of ideas." *See* Kate Ruane et al., *The Oversight Board's Trump Decision Highlights Problems with Facebook's Practices*, ACLU (May 6, 2021), https://tinyurl.com/2mcby5r4.

2. In S.B. 7072, Florida took point in preventing social-media platforms from abusing their power over the public square. The Act, as relevant here, requires disclosure about how and when the platforms censor speech and requires the platforms to host some speech that they would otherwise prefer not to host.

As to disclosure, the Act requires covered platforms[1] to "publish the standards . . . used for determining how to censor, deplatform, and shadow ban."

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[1] Broadly, S.B. 7072 covers platforms that do business in Florida and have over $100 million in annual revenue or over 100 million users. Fla. Stat. § 501.2041(1)(g).

Fla. Stat. § 501.2041(2)(a).[2] Platforms must notify users when censoring, deplatforming, or shadow banning users or their posts, and provide a basis for the platform's action. *Id.* § 501.2041(2)(d)(1). Platforms must also inform users of forthcoming changes to "user rules, terms, and agreements," which may not be made more than once every 30 days. *Id.* § 501.2041(2)(c). And platforms must allow users to see how many other users have viewed their posts, so that users can determine for themselves whether they have been censored or shadow banned. *Id.* § 501.2041(2)(e).

The Act also establishes hosting rules. In general, the "hosting" function of social-media platforms entails storing posts on a digital platform and distributing those posts to other users who seek them out. Thus, when a social-media platform provides users the ability to have their own pages or own feeds, the platform is serving as a host to users' posts. For instance, a user can post speeches, photos, and videos to

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[2] The Act defines "censor" as "any action taken by a social media platform 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. The term also includes actions 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). Deplatform "means the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c). And shadow ban "means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." *Id.* § 501.2041(1)(f).

her Facebook page, and other users can visit that page.

In the main, the Act regulates hosting by requiring that platforms adhere to their own rules. Platforms must apply their own content-moderation rules consistently. That rule leaves a platform generally free to adopt content- and viewpoint-discriminatory standards. It simply requires the platform to apply whatever censorship, deplatforming, and shadow banning standards it adopts "in a consistent manner among its users." *Id.* § 501.2041(2)(b).

The Act also restricts platforms' control over these "hosting" functions for users likely to have important contributions to the public square. In particular, the Act provides that platforms "may not willfully deplatform" users who are qualified candidates for political office in Florida. *Id.* § 106.072(2). Platforms also may not deplatform a "journalistic enterprise based on the content of its publication or broadcast," with "journalistic enterprise" defined based on, among other things, the number of words or other content the entity publishes and the number of viewers or subscribers it receives. *Id.* § 501.2041(1)(d), (2)(j).

Finally, to prevent silencing and to make these "hosting" provisions effective, the Act prohibits censorship and shadow banning of journalistic enterprises based on what they say, *id.* § 501.2041(1)(d), (2)(j), and prohibits the use of algorithms to shadow ban material posted by or about candidates during the campaign, *id.* § 501.2041(2)(h).

3. Respondents—two associations of internet companies—challenged S.B. 7072 in the Northern District

of Florida days after it was enacted. They sought a preliminary injunction, arguing that they were likely to succeed on three claims, namely that S.B. 7072 is preempted by 47 U.S.C. § 230, that it violates the First Amendment on its face, and that it is unconstitutionally vague. Pointing to First Amendment and § 230 concerns, the district court enjoined Florida from enforcing any of S.B. 7072's disclosure or hosting rules before the law even took effect.

4. The Eleventh Circuit affirmed in part and reversed in part—affirming the preliminary injunction as to the hosting rules but reversing as to all the disclosure rules save one.

At the gate, the court found that the First Amendment robustly protects social-media platforms' decisions to host speech. App.18a, 28a. Although the court recognized that this Court has upheld requirements for one speaker to host another's speech, it distinguished those "'hosting' cases." App.31a; *see also* App.31a–40a. On the court's view, the social-media platforms act much like a newspaper editor in curating the speech that they will publish and, therefore, merit substantial First Amendment protection. App.25a–28a. The court also held that platform censorship decisions—even if not speech—were inherently expressive. App.28a–30a.

Turning to scrutiny, the Eleventh Circuit held that some provisions of S.B. 7072 should be subject to strict scrutiny, while others only demanded intermediate scrutiny. App.55a ("At the other end of the spectrum, the candidate-deplatforming (§ 106.072(2)) and user-opt-out (§ 501.2041(2)(f), (g)) provisions are pretty obviously content-neutral."). Yet the court believed that

S.B. 7072's hosting rules could not survive either form of heightened judicial review. App.56a–62a. It dismissed the States' interest in combating censorship as either illegitimate or insubstantial. App.58a. But with one exception, it upheld the disclosure rules under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which asks whether the rules are reasonably related to the State's interest in preventing consumer deception and whether they are overly burdensome. App.62a–65a. The only disclosure rule that the court rejected as overly burdensome was the requirement that social-media companies provide notice and an explanation to the affected user of a censorship decision. App.64a–65a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE.

Three members of this Court have already explained that the issues raised in this petition are ones "of great importance that . . . plainly merit this Court's review." *NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting). They are right. Social media has become a dominant method of communication. That dominance, however, comes at a price. When social-media companies abuse their market dominance to silence speech, they distort the marketplace of ideas. The question whether the First Amendment essentially disables the States—and presumably the federal government too—from meaningfully addressing those distortions should be answered by this Court, and it should be answered now.

The importance of the questions presented starts with the sheer scope of social-media use in this country. As this Court has recognized, social-media platforms have become the gatekeepers of a digital "modern public square." *Packingham*, 137 S. Ct. at 1737. This Court is not alone in reaching that conclusion. The Department of Justice, for example, has concluded that the "biggest platforms" "effectively own and operate digital public squares." Dep't of Justice, *Section 230 – Nurturing Innovation or Fostering Unaccountability? Key Takeaways & Recommendations* at 21 (June 2020). As modern town commons, the platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737.

With that power, "[s]ocial media platforms have transformed the way people communicate with each other and obtain news." *NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting). More than half of people "say they get news from social media." Elisa Shearer, *More Than Eight-in-Ten Americans Get News From Digital Devices*, Pew Research Center (Jan. 12, 2021), https://tinyurl.com/48muh3rp. And for other sources of information, the number is likely much higher. *See* Peter Suciu, *Americans Spent on Average More Than 1,300 Hours on Social Media Last Year*, Forbes (June 24, 2021), https://tinyurl.com/2p8za3x7.

All that has given social-media companies "enormous influence over the distribution of news" and other speech. *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting in part). Companies like "Facebook and Twitter" can now "greatly narrow a person's information flow"

by "deindexing or downlisting a search result or by steering users away from certain content." *Knight First Amend. Inst.*, 141 S. Ct. at 1224–25 (Thomas, J., concurring).

"Troubling, therefore, has been a series of recent moves by Big Tech that has, intentionally or not, undermined Americans' ability to communicate their ideas." Gregory M. Dickinson, *Big Tech's Tightening Grip on Internet Speech*, 55 Ind. L. Rev. 101, 109 (2022). Today, "users of social media are subject to a regime of private censorship that was only recently unimaginable." Kyle Langvardt, *Regulating Online Content Moderation*, 106 Geo. L.J. 1353, 1355 (2018). In this censorship regime, "social media giants' using their enormous power to suppress particular views is reality." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 394 (2021).

For example, in February 2021, Facebook announced that it would expand its content moderation on COVID-19 to include "false" and "debunked" claims such as that "COVID-19 is man-made or manufactured." App.122a–123a. It blocked the *New York Post*'s article written that month suggesting that the virus could have leaked from a Chinese virology lab. App.118a. But then, given "ongoing investigations into the origin of COVID-19 and in consultation with public health experts," Facebook decided that it would no longer "remove the claim that COVID-19 is man-made or manufactured." App.123a. Similarly, in the fall of 2020, Twitter locked the *New York Post*'s account and demanded that it delete six tweets that linked to the *Post*'s exposé on Hunter Biden.

App.126a. Meanwhile, Facebook reduced the distribution of the story on its site. App.128a, 131a. Twitter CEO Jack Dorsey later called the move a "total mistake," describing it as the result of a "process error." App.118a, 125a. That same year, Facebook censored the satirical news site *Babylon Bee*'s page for posting a story titled "Senator Hirono Demands ACB Be Weighed Against a Duck to See If She Is a Witch." App.110a. Facebook apparently determined that the story "incited violence" because of its reference to witch burning. App.110a.

Normally, the answer to this type of censorship would be competition. Given the "astronomical profit margins" of the social-media platforms, a "new entrant[]" would usually be expected to enter the market promoting a freer platform. *Knight First Amend. Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). But "network effects," whereby the presence of some users on the network attracts ever more users, "entrench" the current platforms' hegemony. *Id.*

With no market-based solution forthcoming, government has sought to defend the free exchange of ideas. Federal officials, for example, have expressed concerns about the platforms' efforts to control private-party speech. The platforms' representatives have been asked to testify before both the House and Senate—under Republican and Democratic control—about their practices.[3] As recently as this month, the

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[3] *E.g.*, *Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (July 17, 2018); *Stifling Free Speech: Technological Censorship and the Public Discourse: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the*

Biden Administration acknowledged that the "rise of tech platforms has introduced new and difficult challenges," and endorsed "legislative reforms" to "[i]ncrease transparency about platform's algorithms and content moderation decisions" and to "[s]top discriminatory algorithmic decision-making." *See* Readout of White House Listening Session on Tech Platform Accountability, The White House (Sept. 8, 2022), https://tinyurl.com/mrvh9cvz.

States have become concerned about online censorship as well. Along with Florida, Texas has passed a law aimed at protecting its citizens from unfair online censorship. *See Paxton*, 2022 WL 4285917. Many other States are considering similar legislation.[4] By

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Constitution, 116th Cong. (Apr. 10, 2019); *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 116th Cong. (Oct. 28, 2020); *Breaking the News: Censorship, Suppression, and the 2020 Election: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Nov. 17, 2020); *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation: Hearing Before the H. Comm. on Energy & Commerce, Subcomms. on Communications & Technology*, 117th Cong. (Mar. 25, 2021).

[4] *See, e.g.*, Jake Zuckerman, *Committee Passes Bill to Block Social Media from "Censoring" Users*, Ohio Capital J. (May 9, 2022) (describing a proposed law in Ohio), https://tinyurl.com/2p89fjdx; Jeff Amy, *Georgia Senate Panel Advances Ban on Social Media Censorship*, U.S. News (Feb. 15, 2022), https://tinyurl.com/2p8whx2m; Agenda, *Bus. & Labor Interim Comm.*, 2021 Leg. (Utah Sept. 15, 2021), https://tinyurl.com/3zavhy9m; *Hearing*, *H. Comm. on Sci. & Tech.*, 2021 Leg. (Ga. May 20, 2021), https://tinyurl.com/muxjpyyn; *Social Media Censorship Complaint Form*, Ala. Att'y Gen. Office, https://tinyurl.com/nb8rpz3j; *Social Media Complaint Form*, Att'y Gen., La. Dep't of Justice, https://tinyurl.com/338meu8h;

one count, "lawmakers in 34 states" are considering laws that would regulate social media platforms to prevent unfair censorship. *See Rebecca Kern, Push to Rein in Social Media Sweeps the States*, Politico (July 1, 2022), https://tinyurl.com/57zh8y8b.

Yet the Eleventh Circuit concluded that Florida's effort to regulate social media violated the First Amendment. On the Eleventh Circuit's view, social-media platforms themselves speak—or at least engage in expressive conduct—when they censor third-party users on their sites. App.25a–30a. Thus, the Eleventh Circuit concluded that the First Amendment demands that any law that seeks to prevent silencing on social-media sites must satisfy heightened scrutiny. App.55a–62a. In applying heightened scrutiny, the Eleventh Circuit gave short shrift to the States' interests, concluding that the States have no "substantial governmental interest" in this area. App.58a. The court thus dealt a mortal blow to the power of governments, state and federal, to protect their citizens' access to information in the modern public square.

II. THE DECISION BELOW CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *NETCHOICE V. PAXTON*.

The decision below squarely conflicts with the Fifth Circuit's recent decision to uphold Texas's similar social-media law.

Idaho House Bill No. 323 (2021), https://tinyurl.com/ys6ua9c8; Illinois House Bill 4145 (2022), https://tinyurl.com/5n73hd2n.

1. The Fifth Circuit split with the decision below on the threshold question of whether the platforms are speaking at all when they censor a user's speech.

The Eleventh Circuit below said "yes." It reasoned that "[w]hen a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in 'speech' within the meaning of the First Amendment." App.19a–20a. And it reached that conclusion because it thought that "editorial judgments" are protected by the First Amendment. App.20a.

The Fifth Circuit said "no." In rejecting the Eleventh Circuit's reasoning, it explained that the Eleventh Circuit's "'editorial-judgment principle' conflicts with" this Court's cases. *Paxton*, 2022 WL 4285917, at *39. As the Fifth Circuit pointed out, this Court has held that some hosts can be denied the "right to decide whether to disseminate or accommodate a" speaker's message. *Id.* (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 (2006) ("*FAIR*")). That is because hosting (at least generally) is not speech—it does not limit what the host may say, nor does it require the host to say anything. *Id.*; *see also id.* at *42 (Jones, J., concurring) ("It is ludicrous to assert, as NetChoice does, that in forbidding the covered platforms from exercising viewpoint-based 'censorship,' the platforms' 'own speech' is curtailed."). In sum, platforms "cannot invoke 'editorial discretion' as if uttering some sort of First Amendment talisman to protect their censorship." *Id.* at *16.

2. The Fifth and Eleventh Circuits also parted ways on whether the platforms make "editorial judgments" at all.

The Eleventh Circuit held that they do. It thought that the "platforms' content-moderation decisions are . . . closely analogous to the editorial judgments" made by a newspaper editor. App.26a. In explaining that view, the Eleventh Circuit emphasized that "[p]latforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups." *Id.* For example, YouTube seeks to create "a welcoming community" and Facebook seeks to foster "authenticity." App.26a–27a.

The Fifth Circuit begged to differ. It reasoned that the platforms' "editorial judgments" differ markedly from the type of editorial speech—most prominently newspaper editors' selection of pieces—that this Court has protected. *Paxton*, 2022 WL 4285917, at *40. After all, newspapers "publish a narrow 'choice of material' that's been reviewed and edited beforehand, and they are subject to legal and reputational responsibility for that material." *Id.* The platforms do not do that—they screen out some spam and obscenity with algorithms and then "virtually everything else is just posted to the Platform with *zero* editorial control or judgment." *Id.* at *13. That is why the platforms have repeatedly told Congress, courts, and the public that they are "not editors" and do not exercise "editorial judgment over the content" in a user's feed. *Id.*

3. The Fifth and Eleventh Circuits also disagreed on whether the platforms' censorship decisions are inherently expressive.

In the Eleventh Circuit's view, a "reasonable person would likely infer 'some sort of message' from, say, Facebook removing hate speech or Twitter banning a politician." App.28a. And it thought that "unless posts and users are removed randomly," platform censorship "necessarily convey[s] some sort of message—most obviously, the platforms' disagreement with or disapproval of certain content, viewpoints, or users." App.29a (emphasis omitted).

The Fifth Circuit was "perplexed" by that reasoning. *Paxton*, 2022 WL 4285917, at *38 n.41. In *FAIR*, this Court held that a law school's decision to eject a military recruiter was not "inherently expressive" conduct because "[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, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." 547 U.S. at 66. The Fifth Circuit thought the same was true of the platforms: "An observer who merely sees a post on 'The Democratic Hub,' could not know *why* the post appeared there. Maybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason." *Paxton*, 2022 WL 4285917, at *38 n.41. 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." *Id.*

4. Underscoring the doctrinal disagreement in this area, Judge Oldham parted ways with the Eleventh

Circuit's views on whether the platforms could be regulated as common carriers.

The Eleventh Circuit panel thought not. On its view, "social-media platforms are not . . . common carriers" because the platforms make "individualized" decisions about "whether to publish particular messages." App.41a–42a. Nor could Florida choose to treat the platforms as common carriers because, on the Eleventh Circuit's view, "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier." App.43a–44a.

Judge Oldham, writing for himself on the common-carrier points, disagreed. As he noted, the Eleventh Circuit's analysis is "circular"—"a firm 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*, 2022 WL 4285917, at * 41. Worse, the Eleventh Circuit's analysis is "inconsistent with the common-law history and tradition" of common carriage. *Id.* At common law, "private enterprises providing essential public services must serve the public, do so without discrimination, and charge a reasonable rate." *Id.* at *21. Those public services came to include communications enterprises like the telegraph and telephone. *Id.* at *22–23. Social-media companies stand in no different position. *Id.* at *24–29.

5. Finally, the Fifth and Eleventh Circuits starkly broke on the States' interest in regulating the censorship of speech.

The Eleventh Circuit dismissed Florida's interest in regulating the censorship of speech as either illegitimate or insubstantial. App.58a. By contrast, the Fifth Circuit recognized "'a governmental purpose of the highest order,'" namely the State's interest in assuring "the widespread dissemination of information from a multiplicity of sources." *Paxton*, 2022 WL 4285917, at * 32 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

* * *

All in all, the Fifth and Eleventh Circuits fundamentally disagreed about the First Amendment principles applicable to social-media censorship. That disagreement centers not on some fact-bound disagreement about how scrutiny plays out, but on whether the platforms are speaking at all, whether the platforms' conduct is inherently expressive, whether the platforms can be treated as common carriers, and whether States have a substantial interest in regulating the platforms. This Court should settle these disputes.

III. THE DECISION BELOW IS WRONG.

Review is also warranted because the decision below is wrong in multiple, significant ways.

1. The Eleventh Circuit erred at the outset when it concluded that the hosting regulations in Florida's social-media law triggered heightened First Amendment scrutiny. App.18a, 19a–24a, 25a–30a. At its core, Florida's law requires platforms to host certain speech that they might otherwise prefer not to host. But, as the Fifth Circuit concluded, mandatory hosting regulates conduct, not speech, and therefore "does

not violate [the] freedom of speech." *FAIR*, 547 U.S. at 68; *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

The Fifth Circuit supported that rule with first principles. *See Paxton*, 2022 WL 4285917, at *8. The First Amendment says that "Congress shall make no law" "abridging the freedom of speech." U.S. Const. amend. I. "At the Founding and '[f]or most of our history, speech and press freedoms entailed two common-law rules—first, a prohibition on prior restraints and, second, a privilege of speaking in good faith on matters of public concern.'" *Paxton*, 2022 WL 4285917, at *8 (quoting Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861, 874–75 (2022)). But hosting rules do not implicate those restrictions—a hosting rule permits the host to say whatever they like; they just cannot remove protected third-party speech. *Id.* at *9. And hosting rules were commonplace around the time of the ratification of the Fourteenth Amendment. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–22.

This Court's cases support the view that hosting regulations do not trigger close First Amendment scrutiny. In *PruneYard*, the Court held that the First Amendment permitted California to require that the owner of a shopping center allow handbillers to collect signatures and distribute handbills on shopping center property. 447 U.S. at 86–88. The Court explained that holding by pointing to three facts. *First*, the shopping center was "open to the public to come and go as they please," which mattered because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will

not likely be identified with those of the owner." *Id.* at 87. *Second*, the California law did not "dictate[]" a "specific message." *Id.* And *third*, the mall owners could "expressly disavow any connection with the message by simply posting signs." *Id.*

The Court extended *PruneYard* in *FAIR*. There, the Court held that a speech-hosting requirement regulated the host's "conduct, not speech." 547 U.S. at 60. In *FAIR*, the Court examined the Solomon Amendment, which required that universities host military recruiters on the same terms that they hosted other potential employers. *Id.* at 55–58. This Court rejected the law schools' First Amendment claim because the Solomon Amendment "d[id] not sufficiently interfere with any message of [a] school" to trigger First Amendment scrutiny. *Id.* at 64. The law schools' hosting obligation instead "affect[ed]" only "what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60.

S.B. 7072 is of a piece with the laws upheld in *PruneYard* and *FAIR*. As in *PruneYard*, there is little likelihood that the public will misattribute a user's speech to the platform. Platforms are designed with usernames, pages, and the like so that user's speech is identified with the user. To reduce any minimal risk of misattribution, platforms can—and do—make clear that they do not endorse their users' speech. *See Paxton*, 2022 WL 4285917, at *15. Nor does S.B. 7072 require that platforms host any particular message; it requires that all candidates and journalists are hosted—regardless of message. *See* Fla. Stat.

§ 106.072(2); *id.* § 501.2041(2)(h), (j). And for other users, it demands merely that they be treated consistently. Fla. Stat. § 501.2041(2)(b).

In that way, S.B. 7072 is less intrusive than the law upheld in *FAIR*. There, the Solomon Amendment required law schools to affirmatively speak—law schools could be required to "send e-mails or post notices on bulletin boards on an employer's behalf." *FAIR*, 547 U.S. at 61. The same is not true of S.B. 7072's hosting regulations, which merely require that platforms refrain from affirmatively squelching user posts under limited circumstances.[5]

In finding a First Amendment violation, the Eleventh Circuit relied on another line of cases exemplified by *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). In *Tornillo*, this Court held that the First Amendment prohibited laws requiring newspapers to print editorials that the paper otherwise did not want to print. 418 U.S. at 258. Building on that precedent, *Hurley* held that parade organizers had First Amendment rights to exclude "marchers . . . imparting a message the organizers d[id] not wish to convey." 515 U.S. at 559.

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[5] The addendum provision—which says that platforms censor when they add an addendum to a user's speech, Fla. Stat. § 501.2041(1)(b)—works in much the same way as the Solomon Amendment. Just as it would have violated the equal-access requirement for a law school dean to enter a military recruiting session and shout down the recruiter, it is also censorship for a platform to bury a user's speech in a wall of addenda.

Those cases are inapposite. As this Court held in *FAIR*, cases like *Tornillo* and *Hurley* are better categorized as "compelled-speech" cases because the hosting rules examined there "interfere[d] with a speaker's desired message." *FAIR*, 547 U.S. at 64. That feature is absent here. Hosting others' speech does not interfere with the platforms' own message because the platforms have no message. *See, e.g.*, Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. at 426.

2. The Eleventh Circuit also erred in its alternative holding that the platforms' hosting decisions were inherently expressive. App.28a–30a. The court reached that conclusion because it thought that "[a] reasonable person would likely infer 'some sort of message' from, say, Facebook removing hate speech or Twitter banning a politician." App.28a.

But in *FAIR*, this Court rejected the argument that refusing access to a military recruiter is expressive, explaining that "[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." 547 U.S. at 66. Same for social-media sites: An observer who sees a post removed has no way to know the site's message unless the "conduct"—removing the post—is accompanied by explanatory "speech." *Id.* As the Fifth Circuit observed, there are many reasons a post could be removed, maybe it was "banned," but maybe it was "some other reason," like the user deleting his own post. *See Paxton*, 2022 WL 4285917, at *38 n.41. An observer has no way to

know the platform's message unless it is joined by additional speech.

3. Next, the Eleventh Circuit erroneously concluded that Florida could not regulate social-media platforms as common carriers, and in doing so, require the platforms to openly accept users. App.41a.

As Justice Thomas has explained, there are strong reasons why social-media companies can be treated as common carriers—meaning that they can be required by law to generally "serve all comers." *Knight First Amend. Inst.*, 141 S. Ct. at 1222 (Thomas, J., concurring). This Court "long ago suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when 'a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.'" *Id.* at 1223 (quoting *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914)). Defining the "public concern" may be nebulous in some cases, but "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers." *Id.* Social-media companies easily fall into this historical understanding because "they are at bottom communications networks, and they 'carry' information from one user to another." *Id.* at 1224.

The Eleventh Circuit rejected this view by observing that common carriers "make a public offering" and reasoned that social-media companies are not common carriers because they "make individualized decisions" about what speech to host. App.41a–42a. That view misunderstands what the common law meant by "mak[ing] a public offering." App.41a.

At common law, making a public offering did not preclude some individualized decision making. An innkeeper could, for example, remove a prospective patron who "c[ame] to injure his house, or if his business operates directly as an injury." *Markham v. Brown*, 8 N.H. 523, 530 (1837). But that individualized decision making did not relieve an innkeeper of his general obligation not "to discriminate." *Id.* at 529. Likewise, although telephone companies had a duty to provide "impartial service," they were still permitted to establish "reasonable conditions [with] which applicants must comply." Herbert H. Kellogg, *The Law of the Telephone*, 4 Yale L.J. 223, 226–27 (1895). Thus, the common law required not a complete lack of individualization, but rather a general openness for business. *See Paxton*, 2022 WL 4285917, at *25. And social-media platforms meet that metric in spades. By their own admission, they provide "widely available services" like "telephone companies providing run-of-the-mill telecommunications services." Pet. for Cert., *Twitter, Inc. v. Taamneh*, No. 21-1496, at 4 (May 26, 2022).

The Eleventh Circuit also reasoned that social-media companies are not regulated as common carriers under federal law and concluded that the State cannot label them as such. App.43a–44a. But that view ignores the long history of States doing just that. For instance, when early telegraph operators distorted the flow of information, States treated them as common carriers. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–21. The Eleventh Circuit rejected this history because it thought that the social-media platforms were "engaging in speech" whereas the "telegraph companies"

were not. App.45a. But if the social-media platforms are speaking when they choose not to carry a message because they dislike the speaker, then so was Western Union when it declined to carry pro-union messages. *See* Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. at 2320–22. States nonetheless treated telegraph companies as akin to common carriers, and this Court approved those decisions. *E.g.*, *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894).

4. Having erroneously concluded that S.B. 7072's hosting rules triggered First Amendment scrutiny, the Eleventh Circuit then compounded the error by misapplying the scrutiny analysis.

At the outset, the Eleventh Circuit erred in characterizing the journalistic and candidate provisions in S.B. 7072 as content-based merely because they prohibit a platform from censoring certain kinds of content or speakers. App.55a. In asking whether a regulation is content based, the question is not whether the regulation requires "any examination of speech or expression." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022). Rather, the question is whether the regulation targets a "particular message spoken by" the regulated speaker. *Turner*, 512 U.S. at 655. Prohibiting *social-media companies* from censoring the speech of *others* does not do that.

Next, in applying intermediate scrutiny to the Act's remaining hosting requirements, the Eleventh Circuit wrongly concluded that the Act "do[es] not further any substantial governmental interest—much less any compelling one." App.58a. But ensuring that

"public has access to a multiplicity of information sources is a government purpose of the highest order," which "promotes values central to the First Amendment." *Turner*, 512 U.S. at 663.

The Eleventh Circuit recognized *Turner*'s holding but reasoned that it did not apply because "political candidates and large journalistic enterprises have numerous ways to communicate with the public besides any particular social-media platform." App.60a. The evidence shows the opposite. About half of Americans are getting their news from the largest social-media sites. *Supra* Part I. And thus, cutting off certain speakers from those key platforms definitionally will ensure that the public does not have access to "a multiplicity of information sources." *Turner*, 512 U.S. at 663.

Nor did the Eleventh Circuit properly analyze the State's interests in the consistency provision. It posited that the State had no legitimate interest. App.60a–61a. But the State has an interest in ensuring that citizens hear from each other just as it does in ensuring that citizens hear from politicians and journalists. *See Turner*, 512 U.S. at 663. And even apart from *Turner*'s rationale, the State has a consumer-protection interest in ensuring that platforms moderate in conformity with their disclosed terms. (The same interest supports the 30-day rule change requirement—users cannot truly know a platforms' rules when they are ever-changing). The consistency provision also serves to prevent discrimination. *See Fulton v. City of Phila.,* 141 S. Ct. 1868, 1882 (2021) (describing state interest in non-discrimination rules as "weighty").

The Eleventh Circuit erred on the other side of the scrutiny analysis too. It held that S.B. 7072 was not narrowly tailored, assuming that S.B. 7072 would allow "journalistic enterprises" to host "soft-core pornography." App.62a. But the Act expressly permits any content moderation allowed under federal law, *see* Fla. Stat. § 501.2041(9), and under federal law, platforms can generally remove "obscene, lewd, lascivious, [or] filthy" material, as long as they do so in "good faith." 47 U.S.C. § 230(c)(2).

5. One final error. Although the Eleventh Circuit correctly recognized that S.B. 7072's disclosure provisions should be tested under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), it erred in concluding that notifying users when they are censored is too burdensome. App.64a–65a. The platforms themselves, after all, have called for notice to "each user whose content is removed [or] whose or account is suspended" "about the reason for the removal [or] suspension" and to offer "detailed guidance and examples of permissible and impermissible content." *See* The Santa Clara Principles on Transparency and Accountability in Content Moderation, https://tinyurl.com/mtd3u49n; Gennie Gebhart, *Who Has Your Back? Censorship Edition 2019*, Electronic Frontier Foundation (June 12, 2019), https://tinyurl.com/t27vv89m.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR CONSIDERING THESE QUESTIONS.

This case is also an ideal vehicle. For one thing, the issue of whether social-media platforms are "speaking" when they host third-party speech is a legal ques-

tion and arises in a pre-enforcement posture. This posture allows the Court to decide the standard that applies to social-media hosting without having to decide potentially fact-intensive application questions about how a scrutiny analysis should come out on more idiosyncratic facts.

Additionally, the legal questions raised have been thoroughly aired. The applicability of the First Amendment to the platforms' hosting took up substantial chunks of the opinions below. App.18a–49a; 82a–88a. And the courts below received extensive briefing from both the parties and several amici.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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September 21, 2022