No. 22-277

In the
# Supreme Court of the United States

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

*Petitioners*,

v.

NETCHOICE, LLC, and the COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR RESPONDENTS

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October 24, 2022

## QUESTION PRESENTED

Florida's Senate Bill 7072 imposes unprecedented restrictions on the rights of private Internet companies to exercise editorial judgment over the content on their services. Responding to an alleged conspiracy by "'big tech' oligarchs in Silicon Valley" to silence "conservative" content, S.B. 7072 singles out a select group of private companies and saddles them—and only them—with a slew of content-based and discriminatory requirements. The law openly abridges the targeted companies' First Amendment right to exercise editorial judgment over what content to disseminate on their websites via requirements that are speaker-based, content-based, and viewpoint-discriminatory. Those mandates are designed to work hand-in-glove with burdensome compelled disclosure obligations. In a detailed opinion that explained the law's many flaws, the Eleventh Circuit correctly recognized that most of S.B. 7072 cannot be reconciled with the First Amendment. Although respondents disagree with Florida's attack on the merits of that decision, they agree that the constitutionality of S.B. 7072 warrants this Court's plenary review. S.B. 7072 does not stand alone, but is an exemplar of laws and proposed laws reflecting improper government efforts to stifle private speech and override editorial discretion. Those laws have already generated a circuit split and are fundamentally incompatible with the First Amendment. The time for this Court's review is now.

The question presented is:

Whether S.B. 7072 complies with the First Amendment.

## CORPORATE DISCLOSURE STATEMENT

NetChoice has no parent corporation, and no publicly held corporation owns ten percent or more of its stock. The Computer & Communications Industry Association (CCIA) has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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## BRIEF FOR RESPONDENTS

The Internet has created unprecedented opportunities for free expression, and online services have enabled countless speakers to reach broader audiences. Yet the anonymity and pseudonymity enabled by the Internet, coupled with the virtually cost-free ability to broadcast all manner of content, has given rise to spam, trolling, and hecklers' vetoes. In response, websites have long exercised editorial discretion in creating and enforcing policies directed at speech that is offensive, objectionable, or otherwise contrary to the norms they seek to curate for their particular online communities. To be safe and welcoming to wide audiences, such websites aim to avoid having their services used to disseminate incitement to violence, promotion of dangerous pranks, crank medical cures, and harassing statements. Users and advertisers alike demand as much.

As the Eleventh Circuit correctly recognized, companies that operate social media websites and apps vary in how they exercise their editorial discretion. Some exercise a relatively light touch, while others exclude more content to preserve a desired set of community values or focus. All of them, however, exercise editorial discretion, as no viable website can adopt an approach of "anything goes." Instead, websites have established policies to regulate offensive content that would violate their community norms and make their services less attractive. Lawmakers in Florida perceived a bias in the way the largest and most popular websites exercised their editorial discretion. But those lawmakers were not

content to criticize editorial judgments with which they disagree, and thus remedy speech with more speech. Instead, they enacted Senate Bill 7072, a first-of-its-kind law that endeavors to punish select private companies for exercising editorial discretion in ways the state disfavors.

S.B. 7072 violates the First Amendment several times over. The First Amendment protects the right of private companies to exercise editorial discretion over what speech to disseminate and how. That protection applies to a private website's decisions about what speech to disseminate just as it does to a private newspaper's decision about what editorials to publish or what stories to make front-page news, or to a private bookstore's choice of which books to sell and how to display them. Yet S.B. 7072 compels privately owned and operated websites to disseminate speech that they do not wish to publish. Worse still, the statute draws blatantly content-based distinctions, compelling websites to disseminate some types of speech but not others and to make editorial judgments according to an undefined state-mandated "consistent manner" standard, one virtually impossible to meet across the millions of pieces of content uploaded every day. And on top of that, Florida has unabashedly singled out certain companies for these onerous restrictions based on unconcealed hostility to how they exercised their editorial discretion, thus adding speaker and viewpoint discrimination to the list of the law's constitutional infirmities. The law thus triggers strict scrutiny, which the state has not even tried to satisfy.

It is little surprise, then, that a unanimous panel of the Eleventh Circuit correctly recognized that most of S.B. 7072 is unconstitutional. That decision followed a district court decision broadly condemning *all* of S.B. 7072, including its compelled disclosure obligations, which work hand-in-glove with the law's efforts to control editorial discretion. Thus, all four federal judges to consider S.B. 7072 have found it unconstitutional in the main. Undeterred, Florida seeks this Court's review.

While the Eleventh Circuit was eminently correct to find the principal provisions of S.B. 7072 unconstitutional, respondents agree with the state that the decision below merits this Court's plenary review. Indeed, the Court should take up the constitutionality of S.B.7072 as a whole, both the parts that the Eleventh Circuit enjoined and the parts that it has left standing for now. This Court already recognized that these profoundly important issues merit review when it vacated the Fifth Circuit's stay of a district court order preliminarily enjoining enforcement of a similar Texas law. *See NetChoice, LLC v. Paxton*, 142 S.Ct. 1715, 1715-16 (2022); *id.* at 1716 (Alito, J., dissenting). And the case for plenary review has only strengthened since then, as there is now an acknowledged circuit split over the constitutionality of laws like these. Given the proliferation of proposals in other states that also abridge editorial discretion, the best course for all is for this Court to grant review now and establish clear bulwarks against state efforts that are antithetical to the First Amendment, which guards against government censorship, and vests private parties with

control over what speech and speakers to allow on the forums they create.

## STATEMENT OF THE CASE

### A. Legal Background

1. The First Amendment "prohibits the government from telling people what they must say," *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013), as it protects "both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Just as the government may not compel private parties to disseminate its own preferred message, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), it may not compel one private speaker to disseminate the message of another, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) ("*PG&E*"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Those core First Amendment principles prohibit the government from interfering with the right of private parties to exercise "editorial control over speech and speakers on their properties or platforms." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1932 (2019). In *Tornillo*, for example, the Court struck down a Florida law that required newspapers to give political candidates space in the paper to respond to negative coverage. Although the response would have been the candidate's speech in the first instance and clearly labeled as such, the Court concluded that forcing a newspaper to run it would violate the First Amendment. As the Court explained, the "choice of material to go into a newspaper, and the

decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment," which is itself protected speech. *Tornillo*, 418 U.S. at 258. The law's "intrusion into the function of editors" thus failed to "clear the barriers of the First Amendment." *Id.*

While *Tornillo* concerned newspapers, its core insight—that "the editorial function itself is an aspect of 'speech,'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.)—is not "restricted to the press." *Hurley*, 515 U.S. at 574. It applies equally to "business corporations generally," as well as to "ordinary people engaged in unsophisticated expression." *Id.* And it applies to the "dissemination of information," which is "speech within the meaning of the First Amendment" as well. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Thus, just as the government cannot compel a newspaper to run content, it cannot compel a private utility to include third-party speech in its billing envelopes, *PG&E*, 475 U.S. at 20-21, or compel a private parade organizer to include a group whose values it does not share, *Hurley*, 515 U.S. at 574-76.

Those principles equally apply to a private social media company's editorial judgment about what content to disseminate (or not to disseminate) via its website, applications, and online services. As then-Judge Kavanaugh put it, the government may not "tell Twitter or YouTube what videos to post" or "tell Facebook or Google what content to favor" any more than it may "tell *The Washington Post* or the *Drudge*

*Report* what columns to carry." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

2. NetChoice and the Computer & Communications Industry Association (CCIA) are Internet trade associations. Their members operate a variety of popular websites, apps, and online services, including Facebook.com, Twitter.com, YouTube.com, and Etsy.com.[1] Users can share content on those services and interact with it and each other. That content is generated by billions of users located throughout the world, it is uploaded in different formats and languages, and it spans the entire range of human thought—from the creative, humorous, and political to the offensive, dangerous, and illegal.

Given the sheer volume and breadth of material available through their websites, NetChoice's and CCIA's members have invested extensive resources into developing rules and standards to edit, curate, and display content in ways that reflect their unique values and the distinctive communities they hope to foster. Facebook, for example, "wants people to be able to talk openly about the issues that matter to them." *Facebook*, https://bit.ly/3tdKbtn (last visited Oct. 21, 2022). But it also recognizes that "the internet creates new and increased opportunities for abuse." *Id.* It therefore restricts several categories of content that it finds objectionable, such as hate speech, bullying, and harassment. *Id.* YouTube likewise prohibits "harmful, offensive, and/or unlawful material" like

[1] While most members operate websites, apps, and other online services, this brief collectively refers to all of the services that respondents' members offer as "websites."

"pornography, terrorist incitement, [and] false propaganda spread by hostile foreign governments." CA.Supp.App.25-1 ¶¶3, 9. Twitter, for its part, allows a wider range of violent and adult content. *Twitter*, https://bit.ly/3wuaxsb (last visited Oct. 21, 2022). Other members target a more limited audience and exercise editorial discretion accordingly. For example, Etsy, in its effort to "keep human connection at the heart of commerce," has adopted policies requiring any item "listed as handmade" be "made and/or designed by … the seller." *Etsy*, https://etsy.me/3wsbNMe (last visited Oct. 21, 2022). Moreover, virtually all member companies have advertising clients who are critical to their business models and do not wish to pay to have their advertisements disseminated alongside offensive material.

Collectively, respondents' members make billions of editorial decisions each day. Those decisions include choices to block or remove content or users, display content with additional context, and a wide range of other nuanced judgments about how to arrange, rank, or prioritize the material published on their websites. Given the expressive nature of those decisions, it is inevitable that some will disagree with and criticize them. Others will agree with and praise them. Some will say too much speech is disseminated, and others will say too little. That is all to be expected in a nation that values the First Amendment and its commitment to more speech as the remedy for speech with which people disagree. But in May 2021, Florida lawmakers took their criticism of respondents' members' editorial judgments in a different and more dangerous direction: They enacted S.B. 7072, which

aims to punish select companies for exercising their editorial discretion in ways the state disfavors.

Florida made no secret of the law's motivation and its aim. Upon signing the bill, the governor announced in his official public statement: "If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable." CA.App.38. That same official statement quotes the lieutenant governor touting the law as "tak[ing] back the virtual public square" from "the leftist media and big corporations," whom she perceived to "censor … views that run contrary to their radical leftist narrative." CA.App.1352. Another lawmaker added: "[O]ur freedom of speech as conservatives is under attack by the 'big tech' oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated." CA.App.24.

The text of S.B. 7072 confirms that Florida passed the law to target certain entities "because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The formal legislative findings declare that "[s]ocial media platforms" have "unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms," and that the state has a "substantial interest in protecting its residents from inconsistent and unfair actions" by those "social media platforms." S.B. 7072 §§1(9)-(10). The state's beef did not extend to all "social media platforms"—only the largest ones with a perceived "leftist" bent. Thus, the law defines "social media platform" as services with at least 100 million monthly users or $100 million in gross annual

revenue and singles out those websites for disfavored treatment. Fla. Stat. §501.2041(1)(g)(4). That definition captures services like Facebook.com and Twitter.com but excludes services like Parler.com and Gab.com—*i.e.*, websites that are perceived to have an ideology that the state prefers.

Late in the drafting process, the state realized that its definition of "social media platform" captured companies with a large Florida presence, namely Disney and Universal Studios. To protect those then-favored companies, legislators gerrymandered a carve-out for any entity that "owns and operates a theme park or entertainment complex." Fla. Stat. §501.2041(1)(g) (2021). The state later discovered, however, that the viewpoints it wished to punish are not limited to Silicon Valley but reach Hollywood too. After Disney executives criticized another Florida law, Florida repealed the theme-park carve-out and eliminated similarly targeted tax benefits. *See* S.B. 6-C (2022). Before signing that bill, the governor stated: "You're a corporation based in Burbank, California, and you're going to marshal your economic might to attack the parents of my state? We view that as a provocation and we're going to fight back." *Florida Gov. DeSantis Signs Bill Stripping Disney of Special Tax Status*, Wall St. J. (Apr. 22, 2022), https://on.wsj.com/3k811Wp.

S.B. 7072 imposes a series of interrelated restrictions and requirements both prohibiting and compelling speech. Section 2 of the Act addresses "[s]ocial media deplatforming of political candidates." Fla. Stat. §106.072. The section prohibits a "social media platform" from "willfully deplatform[ing] a

candidate for office." Fla. Stat. §106.072(2). The law defines "deplatform" to mean "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). Section 2 combines that prohibition with a requirement that a covered "platform" must notify a candidate if it "willfully provide[s] free advertising for a candidate." *Id.* §106.072(4). S.B. 7072 does not define "free advertising," but it specifies that "[p]osts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' posts, content, material, and comments are not considered free advertising." *Id.*

Section 4 addresses "[u]nlawful acts and practices by social media platforms" and includes a series of interlocking substantive mandates and disclosure requirements. Fla. Stat. §106.072. In particular, Section 4 imposes many requirements that countermand how covered companies exercise editorial discretion over what content to disseminate on their websites and imposes several burdensome compelled-disclosure requirements to facilitate enforcement of those restrictions.

- ***Consistency.*** Section 4 requires a "social media platform" to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." *Id.* §501.2041(2)(b). The term "censor" is defined broadly to include not only actions taken to "delete," "edit," or "inhibit the publication of" content. It also bans websites

from including their own affirmative speech by restricting any effort to "post an addendum to any content or material." *Id.* §501.2041(1)(b). "Shadow banning" refers to any action to "limit or eliminate the exposure of a user or content or material posted by a user to other users of [a] … platform." *Id.* §501.2041(1)(f). The law does not define the phrase "consistent manner."

- ***Standards.*** To help facilitate that requirement, 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.* §501.2041(2)(a).
- ***Rule changes.*** Likewise, a "social media platform" must inform its users "about any changes to" its "rules, terms, and agreements before implementing the changes." *Id.* §501.2041(2)(c).
- ***30-day restriction.*** A "social media platform" may not change "user rules, terms, and agreements … more than once every 30 days." *Id.* §501.2041(2)(c).
- ***Detailed justifications.*** Before a "social media platform" "deplatforms," "censors," or "shadow bans" any user, it must provide the user with a detailed notice. *Id.* §501.2041(2)(d). The notice must be in writing, be delivered within seven days, and 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.* §501.2041(3).

- ***View counts***. A "social media platform" must provide a user with the number of others who viewed that user's content or posts on request. *Id.* §501.2041(2)(e).
- ***User opt-out***. A "social media platform" must allow users to opt out of its "post-prioritization" and "shadow-banning" algorithms. For users who opt out, the platform must display material in "sequential or chronological" order. *Id.* §501.2041(2)(f). "Post prioritization" refers to the practice of arranging certain content in a more or less prominent position in a user's feed or search results. *Id.* §501.2041(1)(e). The "social media platform" must offer users the opportunity to opt out annually. *Id.* §501.2041(2)(g).
- ***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.* §501.2041(2)(h).
- ***User data***. 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.* §501.2041(2)(i).
- ***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.* §501.2041(2)(j). The term "journalistic enterprise" is defined broadly to include any entity doing business in Florida that (1) publishes in excess of 100,000 words online and has at least 50,000 paid subscribers or 100,000 monthly users, (2) publishes 100 hours of audio or video online and has at least 100 million annual viewers, (3) operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable subscribers, or (4) operates under an FCC broadcast license. *Id.* §501.2041(1)(d).

The penalties for violating S.B. 7072 are steep. On top of exposing violators to civil and administrative actions by the state attorney general, *id.* §501.2041(5), the law creates a private cause of action that allows individual users to sue to enforce the "consistency" and "notice" mandates and authorizes awards of up to $100,000 in statutory damages for each claim, as well as actual damages, equitable relief, punitive damages, and in some cases attorneys' fees. *Id.* §501.2041(6). The law also authorizes the state elections commission to impose significant fines for violating the candidate "deplatforming" provision ($250,000 per day for "deplatforming" candidates for state office, $25,000 per day for "deplatforming" candidates for other office). *Id.* §106.072(3).

### B. District Court Proceedings

Soon after Florida passed S.B. 7072 and weeks before its effective date, NetChoice and CCIA challenged the law in federal court. The district court entered a preliminary injunction barring Florida from

enforcing all the principal provisions of the law, including both its mandates and its compelled disclosure requirements, holding that (among other things) S.B. 7072 likely violates the First Amendment.[2] Under Supreme Court precedent, the court explained, "a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner." Pet.App.86a. And the district court readily concluded that websites use "editorial judgment" when they "manage" content posted by users, "much as more traditional media providers use editorial judgment when choosing what to put in or leave out of a publication or broadcast." Pet.App.82a. Indeed, the court found the legislative record "chock full of statements by state officials" recognizing that websites exercise editorial judgment and characterizing those judgments as "ideologically biased." *Id.* The law thus implicates the First Amendment: The "targets of the statutes at issue are the editorial judgments themselves," and the "State's announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*, *Hurley*, and *PG&E*." *Id.*

The district court also concluded that S.B. 7072 discriminates based on content, viewpoint, and speaker. The court noted that several provisions, such as restrictions on statements "about" a political candidate, are "about as content-based as it gets."

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[2] The district court enjoined all of the law's operative provisions except for certain antitrust provisions, as to which it found no threat of imminent, irreparable injury. Pet.App.79a.

Pet.App.89a. And it found "substantial factual support"—including the gerrymandered definition of "social media platform," the legislative findings complaining of "unfair" editorial judgments, and statements by the law's proponents—for the conclusion that "the actual motivation for this legislation was hostility to the social media platforms' perceived liberal viewpoint." Pet.App.89a. That viewpoint discrimination, the court explained, "subjects the legislation to strict scrutiny, root and branch." Pet.App.90a.

The district court concluded that S.B. 7072 comes "nowhere close" to surviving strict scrutiny. States have no legitimate interest in "leveling the playing field" by "promoting speech on one side of an issue or restricting speech on the other." Pet.App.91a-92a. And the law is not remotely narrowly tailored; it represents "an instance of burning the house to roast a pig," and thus would fail even intermediate scrutiny. Pet.App.92a. The court thus enjoined Sections 2 and 4 in their entirety. Pet.App.94a-95a.

### C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed most of the district court's preliminary injunction, concluding that S.B. 7072's candidate, journalistic-enterprise, consistency, 30-day restriction, and user opt-out provisions likely violate the First Amendment. It likewise concluded that the provision requiring websites to give users a detailed explanation of their editorial decisions likely violates the First Amendment. But in a brief discussion at the end of its opinion, the court found the other disclosure provisions—those requiring websites to disclose standards, rule changes, view counts, free

advertising, and user data—likely constitutional, and thus vacated the injunction as to those.

Invoking longstanding precedent from this Court, the panel first rejected Florida's contention that S.B. 7072 should not be subject to any First Amendment scrutiny. The court explained "that a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment." Pet.App.23a. "Social-media platforms," the court continued, "exercise editorial judgment that is inherently expressive." Pet.App.26a. A platform's decision to remove content "necessarily convey[s] *some* sort of message—most obviously, the platform['s] disagreement with or disapproval of certain content, viewpoints, or users." Pet.App.28a-29a. And "the driving force behind S.B. 7072 seems to have been a perception (right or wrong) that some platforms' content-moderation decisions reflected a 'left-ist' bias against 'conservative' views—which, for better or worse, surely counts as expressing a message." Pet.App.29a. "That observers perceive bias in platforms' content-moderation decisions is compelling evidence that those decisions are indeed expressive." *Id.*

In so holding, the Eleventh Circuit rejected Florida's argument that "social media platforms" are common carriers entitled to lesser First Amendment protection. Unlike telephone companies, railroads, and postal services, the court explained, "social media platforms" do not open their websites to the public on an indiscriminate and neutral basis—which is the hallmark of common-carrier status. Pet.App.41a-43a.

Rather, like newspapers and cable networks, they make individualized content- and viewpoint-based decisions about which content to disseminate and how. *Id.* The court also rejected Florida's reliance on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), explaining that those cases did not involve the central problem with the law here: government restrictions on private parties' expressive editorial judgments. Pet.App.31a-36a.

The panel then concluded that, with one exception, each of the challenged provisions triggers First Amendment scrutiny. The provisions that prohibit "deplatforming" candidates; deprioritizing and "shadow banning" content by or about candidates; and "censoring," "deplatforming," or "shadow banning" "journalistic enterprises" "all clearly restrict platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable." Pet.App.46a. The consistency requirement, 30-day restriction on changes to standards, and user opt-out requirement likewise interfere with expressive editorial judgments by preventing "social media platforms" from removing or arranging content as they see fit. Pet.App.47a-48a.

The panel next concluded that S.B. 7072's disclosure obligations—the provisions requiring "social media platforms" to provide detailed explanations for their editorial decisions and to disclose their standards, rule changes, view counts, and advertising policies—implicate the First

Amendment as well. *Id.* While the court did not think that those provisions "directly restrict editorial or expressive conduct," it recognized that they compel websites to disclose information they otherwise would not. *Id.* The court concluded, however, that the user-data-access requirement, which requires allowing a "deplatformed" user to "access or retrieve all of the user's information, content, material, and data for at least 60 days," Pet.App.12a, after "deplatforming," does not trigger First Amendment scrutiny, positing that it "doesn't … compel any disclosure." Pet.App.48a.

Turning to the proper level of scrutiny, the panel acknowledged that this Court is "deeply skeptical of laws that distinguish among different speakers," and it further acknowledged that S.B. 7072 "applies only to a subset of speakers consisting of the largest social-media platforms" and that the law's proponents wanted "to combat what they perceived to be the 'leftist' bias of the 'big tech oligarchs' against 'conservative' ideas." Pet.App.50a, 53a. But the court nevertheless declined to subject the entire law to strict scrutiny as viewpoint discriminatory, largely because it read this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968), as foreclosing it from "look[ing] to a law's legislative history to find an illegitimate motivation" in the speech context. Pet.App.51a.

Ultimately, the court found that the appropriate level of scrutiny did not matter for many of the law's provisions, as most "do not further any substantial government interest—much less a compelling one." Pet.App.58a. The state has no legitimate interest in

"leveling the expressive playing field," as the concept that the government can "restrict the speech of some elements of our society in order to enhance the relative voice of others" is "wholly foreign to the First Amendment." Pet.App.59a (alteration omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). And even if Florida could establish that interfering with the editorial judgment of covered websites serves a substantial governmental interest, most of its chosen means are "the opposite of narrow tailoring." Pet.App.62a.

But the court reached a different conclusion as to most of S.B. 7072's disclosure requirements. In the court's view, those provisions are subject only to the more relaxed scrutiny for compelled disclosures in the misleading advertising context set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Under *Zauderer*, laws that require disclosure of "purely factual and uncontroversial information about the terms under which … services will be available" are permissible unless they are "unjustified or unduly burdensome." *Id.* at 651. The court acknowledged that *Zauderer* "is typically applied in the context of advertising and to the government's interest in preventing consumer deception," but it concluded that *Zauderer* "is broad enough to cover S.B. 7072's disclosure requirements." Pet.App.57a.

The panel concluded that requiring websites to provide notice and a detailed explanation for every one of their millions of daily editorial decisions is unduly burdensome and therefore unconstitutional. Pet.App.64a-65a. But it held that the rest of the

disclosure obligations are likely constitutional, reasoning that Florida has a legitimate interest in ensuring that users "are fully informed … and aren't misled about platforms' content-moderation policies." Pet.App.63a. The panel did not point to any evidence that users are likely to be misled, even though this Court's cases expressly "require disclosures to remedy a harm that is 'potentially real and not purely hypothetical.'" *Nat'l Inst. of Family Life Advocates v. Becerra*, 138 S.Ct. 2361, 2377 (2018) ("*NIFLA*"). And though this Court's precedents require *the state* to prove that its disclosure requirements are "neither unjustified nor unduly burdensome," *id.*, the panel faulted *respondents* for failing to establish that the disclosure obligations are unduly burdensome. Pet.App.63a. The court accordingly vacated the preliminary injunction as to those provisions. The court subsequently granted the parties' joint motion to stay the mandate, thus leaving the district court's broader preliminary injunction in place pending resolution of Florida's petition for certiorari. Order, *NetChoice LLC v. Attorney Gen.*, No. 21-12355 (11th Cir. June 22, 2022).

## ARGUMENT

The Eleventh Circuit correctly concluded that S.B. 7072 involves an unconstitutional effort to compel speech and override private editorial discretion. S.B. 7072 is a compendium of First Amendment problems and triggers strict scrutiny several times over. The law abridges the editorial judgments of private social media websites and overrides their decisions about what content to disseminate and how to disseminate it. Several of its principal provisions draw express

distinctions based on content. And the entire law impermissibly discriminates among viewpoints and speakers. Moreover, S.B. 7072 cannot survive any level of heightened scrutiny, let alone strict scrutiny. The entire point of the statute is, by the state's own telling, to ensure that "leftist media and big corporations" disseminate the speech of "conservatives." But countless precedents confirm that government efforts to level the playing field are strictly forbidden under the First Amendment. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Attaching partisan labels to the side of the debate that is to be leveled up only makes matters worse.

Although the Eleventh Circuit correctly condemned S.B. 7072's core provisions, respondents nonetheless agree with Florida that this Court should grant review. The issues at stake are profoundly important, as this Court already recognized in vacating a stay of a preliminary injunction with respect to a similar Texas law. And the Fifth Circuit recently upheld that Texas law (over a vigorous dissent), thus creating a square and acknowledged circuit split. Other states, moreover, are waiting in the wings, ready to enact comparable laws that would fundamentally reshape social media websites by fiat if this Court does not step in now. The best way to put an end to this grave threat to First Amendment values is to grant both this petition and respondents' cross-petition to consider the constitutionality of S.B. 7072 in its entirety and to bring a swift nationwide resolution to this debate.

## I. The Eleventh Circuit Correctly Held That S.B. 7072's Core Provisions Violate The First Amendment.

1. The First Amendment prohibits government from interfering with the right of private parties to exercise "editorial discretion in the selection and presentation" of speech on their platforms or property. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). That much follows from two basic First Amendment principles. First, the "dissemination of information" is "speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570. After all, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994). Second, "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. Since "*all* speech inherently involves choices of what to say and what to leave unsaid," "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.*

Thus, when a private party disseminates information, the First Amendment fully protects its editorial decisions about what content to include and how to arrange it. That is so even if the private party does not "generate, as an original matter, each item featured in the communication" or "isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. A private speaker "does not forfeit constitutional protection simply by

combining multifarious voices" or exercising editorial discretion in a relatively lax manner. *Id.* The "compilation of the speech of third parties" is itself a "communicative act[]" fully protected by the First Amendment. *Forbes*, 523 U.S. at 674; *see also Denver Area*, 518 U.S. at 737-38. This Court has therefore held that the government cannot compel a newspaper to run content it does not want to run, *Tornillo*, 417 U.S. at 258, make a private utility disseminate speech it does not want to disseminate, *PG&E*, 475 U.S. at 20-21, or require a private parade organizer to include a group it does not want to include, *Hurley*, 515 U.S. at 574-76.

The same First Amendment principles protect a private social media website's editorial "decisions about whether, to what extent, and in what manner to disseminate third-party-created content." Pet.App.23a. As the Eleventh Circuit correctly recognized, social media websites "are in the business of disseminating curated collections of speech," Pet.App.34a, as they "invest significant time and resources into editing and organizing … users' posts into collections of content that they then disseminate to others," Pet.App.6a-7a. Just as a newspaper or a parade organizer engages in speech when it publishes a column or includes a third-party float in its parade, a social media website engages in speech when it disseminates content created by others. *Sorrell*, 564 U.S. at 570; *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997).

Websites exercise editorial discretion not only by deciding what content to disseminate, but also in deciding how to display and prioritize certain

information for users. Just as the First Amendment protects the right of newspapers and parade organizers to determine the content of their own speech by deciding what constitutes front-page news and how to order and array various floats, the First Amendment protects the right of websites to determine the content of their own speech by deciding which content to give pride of place and what material to recommend to users who have already expressed an interest in a topic. *Hurley*, 515 U.S. at 573. Such judgments not only are protected by the First Amendment but go to the heart of websites' business models, as those decisions can enhance or detract from the user's experience. As then-Judge Kavanaugh put it, the government may not "tell Twitter or YouTube what videos to post" or "tell Facebook or Google what content to favor" any more than it may "tell *The Washington Post* or the *Drudge Report* what columns to carry." *U.S. Telecom*, 855 F.3d at 435 (Kavanaugh, J., dissenting from denial of rehearing en banc).

Applying those principles, this is a straightforward case. S.B. 7072 interferes with the editorial discretion of websites in multiple ways. The prohibition on "deplatforming" political candidates and "journalistic entities" compels privately owned and operated websites to disseminate speech they do not wish to disseminate. The restriction on "deprioritizing" posts "by or about" political candidates and the user opt-out provision directly abridge covered websites' ability to decide for themselves how to prioritize content and recommend it to users. The consistency requirement and the 30-day restriction on changing terms likewise compel websites to disseminate speech they do not wish to

disseminate and arrange speech in ways they otherwise would not. S.B. 7072 thus forces private websites to "alter[] the content of [their] speech." *NIFLA*, 138 S.Ct. at 2371; *see also Hurley*, 515 U.S. at 572-73. That flouts the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

That alone suffices to trigger strict scrutiny, as laws that compel speakers to "alter[] the content of [their] speech" are necessarily "content-based" and subject to strict scrutiny. *NIFLA*, 138 S.Ct. at 2371; *see also Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). But that is far from the only problem with the law; S.B. 7072 is shot through with other content-based distinctions too. The political-candidate provision prohibits companies from deprioritizing posts "about" political candidates, but not other topics, Fla. Stat. §501.2041(2)(h), which is "about as content-based as it gets," *Barr v. Am. Ass'n of Political Consultants*, 140 S.Ct. 2335, 2346 (2020) (plurality op.); Pet.App.55a. The journalistic-enterprise provision prohibits the exercise of editorial judgment over posts by a so-called journalistic enterprise "based on" its "content." Fla. Stat. §501.2041(2)(j). Those provisions thus trigger strict scrutiny twice over.

Worse still, the law "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). On its face, the law discriminates against disfavored speakers, singling out a subset of "social media platforms" and saddling them—and only

them—with a slew of onerous burdens. Its size and revenue requirements are carefully crafted to target "Big Tech," while exempting smaller companies with a different perceived ideological bent. This Court has been deeply skeptical of laws that "distinguish[] among different speakers," as "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). It has therefore emphasized that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015).

Here, S.B. 7072's speaker preference reflects not just a content preference, but a viewpoint preference. S.B. 7072's formal legislative findings leave no doubt that Florida enacted the law because it disliked how certain social media websites have exercised their editorial judgment. *See Sorrell*, 564 U.S. at 564-65 (relying on law's "stated purposes" and "record" in litigation to find viewpoint discrimination). The findings explain that the state singled out large companies because it thought they were exercising their editorial discretion in an "inconsistent and unfair" manner—in other words, in ways the state does not like. S.B. 7072 §§1(9)-(10). Official statements accompanying the law's signing eliminate any remaining doubt. Both the governor and individual legislators candidly admitted that the law targets "Silicon Valley elites" in an effort to prevent them from favoring "the dominant Silicon Valley ideology." And Florida's petition confirms as much by listing a slew of editorial decisions with which the state disagrees—from Facebook's decision to remove

posts about the origins of the coronavirus to Twitter's decision to block stories about Hunter Biden's laptop. Pet.10-11. Viewpoint discrimination does not get clearer than that. And it infects S.B. 7072 as a whole, as all its provisions target only select speakers who were singled out by virtue of their perceived viewpoint.

As the Eleventh Circuit correctly concluded, S.B. 7072 cannot survive any level of heightened scrutiny, let alone strict scrutiny. Whatever interest Florida may have in "ensur[ing] that a wide variety of views reach the public," that interest cannot justify compelling private parties to publish speech they do not want to publish or disseminate content with which they disagree. *Tornillo*, 418 U.S. at 247-48. After all, the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Put another way, the "State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-79.[3]

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[3] Florida points out (at 25-26) that the Court stated in *Turner* that ensuring "the widespread dissemination of information from a multiplicity of sources" is "a governmental purpose of the highest order." 512 U.S. at 663. But the problem is not that the state lacks an interest in promoting a diversity of views. It is that that interest generally cannot justify forcing some to speak or stay silent so that other messages are amplified. *See, e.g.*, *Tornillo*, 418 U.S. at 249, 251. *Turner* recognized a rare exception to that rule based on "special physical characteristics" of the broadcast medium, 512 U.S. at 660-61, that this Court has since made clear "are not applicable to other speakers," *Reno*, 521

S.B. 7072 is likewise not remotely narrowly tailored. *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2384 (2021). The law is both over and underinclusive. It is overinclusive because the definition of "social media platform" sweeps in all covered entities regardless of whether they are tools for disseminating information and viewpoints or e-commerce websites like Etsy. The law is also hopelessly underinclusive. Florida has no explanation for the arbitrary size and revenue requirements that effectively exempt social media websites with a different perceived ideological bent, like Parler and Gab. "Such underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 138 S.Ct. at 2376. In short, the law burdens too much and furthers too little, and thus fails any level of heightened scrutiny.

2. Florida does not deny that S.B. 7072 overrides the judgments of private companies about what speech to disseminate. Nor did it even try to argue below that its law could survive heightened scrutiny on this record. Instead, the state spent the bulk of its efforts arguing that S.B. 7072's core provisions do not implicate the First Amendment at all. The Eleventh Circuit correctly rejected that remarkable claim.

Florida's principal contention is that requiring websites to "host" third-party speech "regulates conduct, not speech." Pet.18. That is just a word

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U.S. at 868. Indeed, when it comes to the Internet, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* at 870.

game. All manner of First Amendment protected activity—from burning a flag to organizing or marching in a parade—involves conduct. But because that conduct is expressive, it is protected by the First Amendment. Exercising editorial discretion over which speech to disseminate is no different.

Re-labeling that protected activity as "hosting" changes nothing. This Court has repeatedly held that the dissemination of information—including the hosting of "speech of third parties"—is itself "speech activity" protected by the First Amendment. *Forbes*, 523 U.S. at 674; *see also Sorrell*, 564 U.S. at 570; *Brown*, 564 U.S. at 792 n.1; *Bartnicki*, 532 U.S. at 527. That is why the Miami Herald did not have to "host" an opinion piece it disagreed with and the parade organizers in *Hurley* did not need to "host" a group they preferred to exclude.

Florida's insistence that a website's editorial decisions are not "inherently expressive" misses the mark legally and factually. The whole point of cases like *Tornillo* and *Hurley* and *Sorrell* is that deciding what speech to disseminate and how to do so *is* inherently expressive activity, thus obviating the need to "isolate an exact message" or examine the precise degree of expressiveness. *Hurley*, 515 U.S. at 569-70. In all events, Florida is plainly wrong to assert that a website's editorial choices—and especially the choices that S.B. 7072 targets—are not expressive. Indeed, as the court of appeals correctly pointed out, the expressive content of respondents' members' editorial decisions is precisely what prompted S.B. 7072. Pet.App.29a. If those choices were not expressive, then there would be no sense in denouncing them as

expressing "the dominant Silicon Valley ideology" or advancing a "radical leftist narrative." CA.App.1352.

All of that readily distinguishes *PruneYard*, as the shopping mall there did not claim to be engaged in any expressive activity, let alone object to the messages that third parties wanted to speak on its premises. 447 U.S. at 85; *see also PG&E*, 475 U.S. at 12; *Hurley*, 515 U.S. at 580. Florida's reliance on *FAIR* is similarly misplaced. That case had nothing to do with editorial judgments or the compelled display of third-party speech. The law school in *FAIR* was plainly not in the business of disseminating speech when hosting interviewers on campus, and nothing in the Solomon Amendment required it to disseminate information or otherwise "say anything." 547 U.S. at 60. Had the Amendment imposed restrictions at all like those here—for example, prohibiting law schools from exercising editorial control over their own speech or student message boards—the First Amendment problems would have been obvious.

Florida's attempt to convert "social media platforms" into common carriers is equally meritless. As the court of appeals correctly explained, "social media platforms" do not provide their services to the public on an indiscriminate and neutral basis—the hallmark of common carrier status. *See, e.g.*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Rather, like newspapers and cable networks, they make content- and viewpoint-based decisions about which content to disseminate and how. Moreover, S.B. 7072 does not look anything like a traditional common-carrier law. Its definition of "social media platform" sweeps in companies like Etsy and Reddit—

no one's idea of common carriers. And far from requiring nondiscrimination, the law expressly favors certain content (posts about political candidates) and speakers (political candidates and journalistic enterprises).

3. Finally, the court of appeals correctly held that requiring websites to provide advance notice and an explanation for each of their editorial decisions violates the First Amendment. As NetChoice and CCIA explain in their conditional cross-petition, the Eleventh Circuit should have subjected that requirement to strict scrutiny. But the court of appeals correctly held that provision fails to survive even more relaxed scrutiny under *Zauderer* because it is unduly burdensome. Social media websites remove millions of posts per day. Florida's law would require them to provide a "precise and thorough" explanation for each and every one of those decisions. Not only would that impose significant implementation costs, but S.B. 7072 exposes websites to up to $100,000 in penalties any time content is removed without the requisite notice or in an "inconsistent" manner—which plainly chills protected speech.

## II. Review Is Nonetheless Warranted.

Although the Eleventh Circuit correctly held that S.B. 7072's core provisions violate the First Amendment, respondents nonetheless agree with Florida that this Court's review is warranted given the importance of the issues at stake. This Court recognized as much when it vacated the Fifth Circuit's stay of an order preliminarily enjoining Texas from enforcing its very similar H.B. 20. *See Paxton*, 142 S.Ct. at 1715-16. And even three of the Justices who

dissented from that order acknowledged that the issues these burgeoning laws pose are "of great importance" and "will plainly merit this Court's review." *Id.* at 1716 (Alito, J., dissenting).

The need for review has only escalated since then. The Fifth Circuit recently issued an opinion upholding the Texas law, concluding that the First Amendment does not provide *any* protection to a private social media website's editorial judgments about what content to disseminate through its services and how to disseminate it. *NetChoice, LLC v. Paxton*, No. 21-51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022). In doing so, the Fifth Circuit acknowledged that it was "part[ing] ways with the Eleventh Circuit," *id.* at *38, thus adding a clear circuit split to the many reasons why this Court's review is warranted.

Review now is particularly important because several other states are primed to follow Florida's lead. The temptation to tinker with private editorial discretion is not the exclusive province of any one side of the political spectrum. In addition to Florida and Texas, New York and California recently enacted bills to address "hateful conduct" and "hate speech" on social media. A.B. A7865A (N.Y. 2022); A.B. 587 (Cal. 2022). New York has several other bills in the works that purport to address election- and vaccine-related misinformation. *See* Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, Politico (July 1, 2022), https://tinyurl.com/57zh8y8b. By one count, 34 states have introduced bills to regulate social media websites from one side of the political spectrum or the other. *Id.* In addition to the obvious and irreparable First Amendment injuries that it would cause, the

impending proliferation of these laws threatens to balkanize the Internet and impose significant compliance (and litigation) costs on the companies that operate social media websites nationwide.

On top of that, these laws pose a grave threat to how social media websites provide their services to users. Billions of people across the world use social media to search for information, read news, connect with friends, and more. People use social media websites, and companies advertise on them, precisely because websites spend significant time and resources organizing, presenting, and sorting the vast amount of information on their services. Social media websites would hardly be as useful if they could not curate content and were forced to disseminate all manner of objectionable material that violates their standards, from videos glorifying ISIS to content supporting Nazis.

In sum, while the Eleventh Circuit correctly recognized most of S.B. 7072 for the grave threat to the First Amendment that it is, this Court's review is nonetheless warranted given the critical importance of the issues at stake and the clear circuit split that they have produced. Moreover, as explained in respondents' conditional cross-petition, this Court should not limit its review to a subset of S.B. 7072's restrictions. All of S.B. 7072's provisions are part of a comprehensive effort to regulate websites and rectify their perceived bias. The compelled disclosure provisions were designed to work hand-in-glove with provisions that compel speech directly and override editorial discretion. The viewpoint and speaker-based discrimination that pervades the law equally infect its

compelled disclosure provisions. And the compelled disclosure requirements independently violate the First Amendment. This Court should grant both the state's petition and respondents' cross-petition to ensure that it can grant complete relief.

## CONCLUSION

The Court should grant Florida's petition and respondents' conditional cross-petition.

Respectfully submitted,

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October 24, 2022