Nos. 22-277, 22-555

In the Supreme Court of the United States

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

Petitioners,

v.

NETCHOICE, LLC, D/B/A NETCHOICE; AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, D/B/A CCIA,

Respondents.

(FOR CONTINUATION OF CAPTION, SEE INSIDE COVER)

On Writs of Certiorari to the United States Court of Appeals for the Eleventh and Fifth Circuits

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN 22-277 AND IN SUPPORT OF PETITIONERS IN 22-555

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NETCHOICE, LLC, D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, D/B/A CCIA,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

QUESTION PRESENTED

Whether the Texas and Florida laws at issue in these cases violate the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the application of basic First Amendment principles to social media, a critically important issue in the digital age.

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

A private shopping mall is forced to host protesters carrying graphic images of abortions. A photographer is forced to shoot an event whose message she opposes. Private citizens are forced to fund the political donations of strangers. What do all these cases have in common? Each was upheld by a court as a permissible exercise of government power consistent with the First Amendment, and each decision relied on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The decision in the *Paxton* case below joins this ignominious list. Texas has passed a law declaring that large social media services are "common carriers" subject to onerous regulations dictating what speech they must disseminate. The law prohibits services from removing, demonetizing, or blocking a user or a piece of content based on the viewpoint expressed. Services found to violate this requirement face liability for each piece of content they remove.

Yet the Fifth Circuit panel held that this compulsion to disseminate speech does not inflict a First Amendment injury. It did so because websites "are free to say whatever they want to distance themselves from the speech they host." *Paxton* Pet. App. 41a. And it relied on *PruneYard* for the theory that the false appearance of endorsement is the *only* harm that matters when private entities are forced to disseminate or facilitate speech.

As NetChoice and CCIA have made clear, *PruneYard* is not controlling in this case because *PruneYard* did not involve "private parties making editorial choices about what speech to publish." *Paxton* Pet. Br.

29. But the Court should take note of just how inconsistent *PruneYard* is with cases that came before and since. *PruneYard*'s outlier status matters, because when a precedent has "questionable foundations" it should not be extended to a "new situation." *Harris v. Quinn*, 573 U.S. 616, 645–46 (2014). And *PruneYard* is not just questionable—it is flat wrong.

It's uncontroversial that Americans have a First Amendment right not only to speak but also to print, fund, disseminate, stage, sell, or otherwise facilitate or support the speech of others. We have these rights for many reasons; not just because we (sometimes) want to associate ourselves as supporters and adopters of that speech. We also may want to simply spread ideas we think are worth spreading and affect the public discourse in the way we want. That is why we have a right to mail pamphlets and fund speech even when we do so anonymously.

The equivalent is true for compelled speech. That is the best way to make sense of the totality of this Court's compelled-speech cases. Americans have a First Amendment right not only to refrain from speaking but also to refrain from printing, funding, disseminating, staging, selling, or otherwise facilitating or supporting the speech of others. We have these rights for many reasons, not just because we (sometimes) want to avoid associating ourselves as supporters and adopters of that speech. We also may want to simply avoid spreading ideas we don't think are worth spreading, and thus avoid affecting the public discourse in a way we don't want to.

If not for *PruneYard*, this simple symmetry would be much more apparent. But *PruneYard* has forced

lower courts to adopt a more cramped view of compelled speech, one that breaks the symmetry with its mirror-image right of free speech. Whereas courts (rightly) recognize that there are many legitimate reasons to exercise the freedom of speech, lower courts have been led to believe by *PruneYard* that there is only one legitimate reason to exercise the freedom *from* compelled speech: avoiding the appearance of endorsement.

The Court should put an end to this narrow and erroneous view of compelled speech. The Court doesn't have to overrule *PruneYard* for NetChoice and CCIA to win these cases. But the Fifth Circuit panel's opinion shows that *PruneYard* needs to be overruled, sooner or later. At the very least, the Court should note *PruneYard*'s outlier status and decline to extend it to these novel circumstances.

The Court should find that both laws at issue in these cases violate the First Amendment, reversing the Fifth Circuit and affirming the Eleventh Circuit.

ARGUMENT

I. *PRUNEYARD* WAS WRONGLY DECIDED.

One Saturday afternoon in 1975, two high school students set up a table in the outdoor courtyard of the PruneYard, a privately owned shopping center. The students distributed pamphlets and asked passersby to sign petitions opposing a then-recent U.N. resolution. *See* Shane Curtin, *Free Speech in Silicon Valley:* Pruneyard Shopping Center v. Robbins, SJPL BLOG (Aug. 9, 2019).[2] A PruneYard security guard asked the

[2] *Available at* https://www.sjpl.org/blogs/post/free-speech-in-silicon-valley-pruneyard-shopping-center-v-robbins/.

students to leave because their pamphleting violated PruneYard's rules. The students left, but they later sued PruneYard in California state court alleging a violation of their right to freedom of speech. While they lost in the lower state courts, the students won at the California Supreme Court, which held that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

PruneYard then appealed to this Court. Of course, this Court could not overrule the California Supreme Court's interpretation of the California Constitution. Instead, the question was whether the right of access found within California's Constitution violated PruneYard's rights as protected by the First Amendment to the *federal* Constitution. PruneYard argued "that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980). Specifically, PruneYard argued that this right had been established by this Court's decision in *Wooley v. Maynard* three years earlier, which had held that the state of New Hampshire could not force drivers to display the motto "Live Free or Die" on their license plates. 430 U.S. 705, 717 (1977).

This Court ruled against PruneYard, finding that California had not violated PruneYard's First Amendment rights. The Court held that there were "a number of distinguishing factors" between *PruneYard* and *Wooley*. But on close examination, none stands up to scrutiny. *PruneYard* was inconsistent with *Wooley* on

the day it was decided, and the incompatibility of the two decisions has never been resolved.

A. *PruneYard* is incompatible with *Wooley*.

What factors did the Court suggest distinguished *PruneYard* from *Wooley*? First and "[m]ost important," the Court noted that the PruneYard "by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please." *PruneYard*, 447 U.S. at 87. The Court found this fact to be relevant because, the Court suggested, "[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.*

Similarly, the Court insisted that the PruneYard could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.*

Both of these reasons hinged on the lack of what might be called an "appearance of endorsement" of the compelled speech. Because the PruneYard was "a business establishment that is open to the public," the Court thought that the views of the pamphleteers would "not likely be identified with those of the owner." *Id.* The Court emphasized the ways in which the PruneYard could "expressly disavow any connection with the message" of the pamphleteers, such as "by simply posting signs in the area . . . explain[ing] that the persons are communicating their own mes-

sages by virtue of state law." *Id.* Treating the appearance of endorsement as a critical factor, the Court reiterated that the PruneYard's owners were "free to publicly dissociate themselves from the views of the speakers or handbillers." *Id.* at 88.

However, this focus on the appearance of endorsement failed to convincingly distinguish *PruneYard* from *Wooley*. The drivers in *Wooley* were just as unlikely to be publicly identified with their license plates' speech and had equally viable means to disavow any endorsement of that compelled speech. Indeed, notably absent from the *Wooley* opinion is any suggestion that the general public might misconstrue the state motto as expressing the actual views of the drivers. This was never listed as one of the harms to which the drivers objected.

Instead, the Court in *Wooley* described the harm as the forced *distribution* of a message, not the forced *endorsement*. The drivers were "coerced by the State into advertising a slogan" that they found "morally, ethically, religiously and politically abhorrent." *Wooley*, 430 U.S. at 713. The harm, as the Court described it, was "forc[ing] an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 721. The Court described New Hampshire's law as "requir[ing] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. And the Court similarly (and more colorfully) described the law as requiring drivers to "use

their private property as a 'mobile billboard' for the State's ideological message." *Id.* at 715.

The Court ruled for the drivers in *Wooley* because this forced *distribution* was itself a First Amendment violation, even in the absence of any compelled appearance of endorsement. The Court held that there is a First Amendment "right to decline to foster" concepts such as "religious, political, and ideological causes." *Id.* at 714. Or as the Court put it another way, there is a First Amendment "right to avoid becoming the courier for" an ideological message. *Id.* at 717.

In sum, this Court consistently described the harm to the drivers in *Wooley* as their being forced into "advertising," "fostering," "participat[ing] in the dissemination of," "becoming the courier for," and "us[ing] their private property as a 'mobile billboard' for" a message to which they objected. All of these various turns of phrase consistently support one interpretation: The First Amendment harm was forcing the drivers to *spread* a message, not causing them to be falsely identified as *believing* the message.[3]

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[3] Only one portion of the *Wooley* opinion could potentially suggest the Court viewed the drivers as being falsely identified with the state motto by the public. In a concluding footnote, the Court reassured that the motto "In God We Trust" need not necessarily be removed from U.S. currency. The Court noted that "currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto." *Id.* at 717 n.15. The phrase "readily associated with its operator" could be interpreted to mean that the *views* on the car's license plate would be

It makes sense that the *Wooley* Court declined to base its ruling on any false appearance of endorsement. In fact, the Court nowhere even suggested that others on the road would think that drivers endorsed the mandatory slogans that were forced onto their cars. Rather, the Court recognized that few observers would mistakenly believe drivers to endorse their license plates' mandatory mottos. As one scholar explained, "had plaintiff complied with the license plate requirement, it would seem highly unlikely that anyone would have regarded plaintiff's compliance as an expression of plaintiff's views concerning the state motto. . . . [E]veryone else was also required to display similar license plates on their automobiles. Consequently they probably would have paid little or no attention to plaintiff's doing the same." David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1011–12 (1982). After all, "[i]f a certain speech act is required of everyone and it is publicly known that it is required, it would be unwarranted for any reasonable observer to infer that any particular utterance reflected the sincere, genuine thoughts of the particular speaker." Seana Valentine Shiffrin, *What is Really Wrong With Compelled Association?*, 99 NW. U. L. REV. 839, 853 (2005).

This reality was recognized by then-Justice Rehnquist, who wrote the dissent in *Wooley* but would go on to author the majority opinion in *PruneYard* just

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associated by the public as the views of the car's driver. In context, however, the phrase "readily associated with its operator" seems much more likely to refer to the fact that a car cannot be operated by an individual without that individual being forced to display the motto, unlike currency which can be carried with the motto concealed.

three years later. Justice Rehnquist argued in dissent for an "appearance of endorsement" test, but his arguments in *Wooley* did not convince the majority. Rehnquist argued that "[f]or First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually 'asserting as true' the message." *Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting). Under the test that Rehnquist urged (but that the majority pointedly did not adopt), the determinative question would have been whether the drivers "in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views." *Id.* at 720–21.

Justice Rehnquist then laid out, quite accurately, all of the reasons why observers would not have mistaken New Hampshire drivers as endorsers of their license plate motto. And Rehnquist's list of reasons was remarkably similar to the list of reasons he would give in his *PruneYard* majority opinion three years later. Rehnquist's *Wooley* dissent underscores that the circumstances in *Wooley* and *PruneYard* were in fact closely analagous.

First, quoting a New Hampshire Supreme Court opinion, Rehnquist emphasized that the motto was required by law: "membership in a class of persons required to display plates bearing the State motto carries no implication . . . that [drivers] endorse that motto or profess to adopt it as matter of belief." *Id.* at 721–22 (quoting *State v. Hoskin*, 295 A.2d 454, 457 (N.H. 1972)). Rehnquist also pointed out that drivers could "display[] their disagreement with the state motto as long as the methods used do not obscure the

license plates," such as with "a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto." *Id.* at 721.

Rehnquist was entirely correct that the license plate motto did *not* create the appearance of endorsement. By ruling in favor of the drivers nonetheless, the *Wooley* majority simply rejected Rehnquist's position that the appearance of endorsement was the only kind of First Amendment harm that mattered. Put simply, if the appearance of endorsement were the only harm that mattered, then the *Wooley* plaintiffs would not have won. The Court's decision in favor of the drivers "was not rooted in concern that others would perceive the couple as affirmatively endorsing the motto." Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 903 (2011).

Wooley recognized that being forced to platform, distribute, or amplify a message is itself a First Amendment harm, whether or not that amplification creates the false appearance of endorsement. And just as the drivers in *Wooley* were forced to become "mobile billboards" for someone else's message, the PruneYard Shopping Center was forced to become an outdoor stage for someone else's message. To reject the PruneYard's First Amendment claim, the Court had to ignore a core premise of *Wooley*'s holding. *PruneYard* was therefore irreconcilable with *Wooley* on the day it was decided.

B. *PruneYard* is incompatible with *Abood*.

Wooley is not the only decision with which *PruneYard* conflicted. *PruneYard* is also irreconcilable with

Abood v. Detroit Board of Education. In *Abood*, this Court established the foundational principle that the First Amendment prohibits states from requiring someone "to contribute to the support of an ideological cause he may oppose." 431 U.S. 209, 235 (1977). The Court held that a union's political expression may only be funded by dues "paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will." *Id.* at 236.

Abood, just like *Wooley*, contradicts the premise that the appearance of endorsement is the only harm that matters in compelled-platforming cases. Compelling people to fund speech with which they disagree violates the First Amendment, even though the funders are unlikely to be mistakenly viewed as endorsing the speech they are forced to fund. As one scholar has noted, "the general public is unlikely even to be aware of any particular individual's financial support compelled by an agency shop agreement." Gaebler, *supra*, at 1019–20. For this reason, "compelled financial support of one's collective bargaining representative would not seem likely to identify the individual with the union or its views in the minds of others." *Id.* at 1022. *Abood* made clear that "an individual should not be forced to support private speech. That protection is abridged by the very requirement that the individual do so, regardless of any connection to the message that might or might not be apparent to a reasonable listener." Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 205–06 (2002).

In *Abood*, just like in *Wooley*, the Court found a First Amendment violation despite nowhere suggesting that the general public would mistakenly view the

plaintiffs as endorsing the speech they were forced to support. While the *PruneYard* majority opinion's attempts at distinguishing *Wooley* were weak, its approach to *Abood* was even more surprising: It did not mention *Abood* at all. *See* Gaebler, *supra*, at 1002 (noting that although the Court attempted to distinguish *Wooley*, it "did not address the more difficult question of whether *Pruneyard* can be reconciled with *Abood*").

Why did *PruneYard* not even attempt to address *Abood*? Because the PruneYard itself chose not to rely on *Abood* in its briefing. As Justice Powell noted in a concurring opinion, the PruneYard's owners "[did] not argue . . . that *Abood* supports the claimed right to exclude speakers from their property. Nor have they alleged that they disagree with the messages at issue in this case." *PruneYard*, 447 U.S. at 98 n.2 (Powell, J., concurring in part and concurring in the judgment). As this Court reiterated in a later case, "the [PruneYard] owner did not even allege that he objected to the content of the pamphlets." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 12 (1986).

PruneYard's counsel may have made a strategic error in declining to invoke *Abood* or assert an objection to the speech of the pamphleteers. But a party's "improvident concession" or "mistaken argument should not be permitted to alter the meaning of the law." *United States v. Taylor*, 142 S. Ct. 2015, 2036 (2022) (Alito, J., dissenting). As Justice Powell noted, the outcome of *PruneYard* very well might have been different if the PruneYard's counsel had pressed this argument: "In [*Abood*], we held that a State may not require a person 'to contribute to the support of an ideological cause he may oppose. . . .' To require a land-

owner to supply a forum for causes he finds objectionable also might be an unacceptable 'compelled subsidization' in some circumstances." *PruneYard*, 447 U.S. at 98 n.2. (Powell, J., concurring in part and concurring in the judgment).

Justice Powell was right. *Abood* established that compelled *subsidization* of speech is a First Amendment injury even in the absence of any false appearance of endorsement. And having one's property commandeered as a platform for the speech of others works a similar harm. As one scholar explained, "requiring the shopping center owners in *Pruneyard* to permit use of their property as a forum for speech by others constitutes a similar compulsion to subsidiz[ing] ideological activity." Gaebler, *supra*, at 1002. *See also* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 374 (2018) ("If having to turn over your money to speakers who will then use it to speak is an impermissible compulsion, why should it be constitutional to have to turn over (even temporarily) your real estate to speakers who will then use it to speak?").

California's rule forced the PruneYard to serve as a physical stage for the ideological speech of others. California's rule thus worked the same fundamental harm as forcing people to use their property as mobile billboards for others' speech or use their money as amplifiers of others' speech. In all three cases, the plaintiffs were forced to support speech they did not want to support. In two of the three cases, that was enough for the plaintiffs to win. Only in *PruneYard* did this Court require that the compelled support must *also* create the false appearance of endorsement.

The Court rejected this requirement in *Wooley* and *Abood*, and it should have rejected it in *PruneYard*. As Justice Powell recognized, "the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner." *PruneYard*, 447 U.S. at 100 (Powell, J., concurring in part and concurring in the judgment).

C. *PruneYard* Cannot Be Reconciled With This Court's Subsequent Compelled-Subsidy Cases.

PruneYard was incompatible with two foundational compelled-speech precedents on the day it was decided. But that's not the end of its problems. This Court has decided many compelled-speech-subsidization cases since *PruneYard*. And those cases only further reinforce *PruneYard*'s outlier status in First Amendment doctrine.

In cases decided after *PruneYard*, this Court has repeatedly reaffirmed that forcing someone "to support financially an organization with whose principles and demands he may disagree. . . . constitute[s] a form of compelled speech and association that imposes a significant impingement on First Amendment rights." *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310–11 (2012) (cleaned up). The Court has explained that "being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 565 n.8 (2005). The Court has stated definitively that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656. And the

Court reaffirmed just five years ago that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns" to directly compelling speech itself. *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (emphasis in original).

As the Court once summed up, the consistent element in all of these compelled-subsidy cases is that "an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." *Johanns*, 544 U.S. at 557. The Court has never required such individuals to show that they were falsely identified as endorsing the speech they were forced to subsidize. The forced subsidization itself was enough to work a First Amendment injury.

Further, these compelled-subsidy cases undermine yet another aspect of *PruneYard*'s reasoning: the supposedly meaningful distinction between compelled support for messages chosen by the *government* versus messages chosen by *private citizens*. The *PruneYard* majority opinion noted that "no specific message is dictated by the State to be displayed on [PruneYard's] property" and that "[t]here consequently is no danger of governmental discrimination for or against a particular message." *PruneYard*, 447 U.S. at 87. While that was true, the compelled-subsidy cases show that it could not have been meaningful to the First Amendment question.

To be sure, the government did dictate the content of the compelled speech at issue in some compelled-speech cases, including both *Wooley* and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943). Those cases concerned a state motto and the U.S. Pledge of Allegiance, respectively. But the compelled-subsidy cases have all involved compelled

funding of speech made by *private* third parties. In all of these cases, the First Amendment harm has been described as the funding of *objectionable* speech, not the funding of a particular government-mandated viewpoint.

The First Amendment injury in the compelled-funding cases has been variously described by this Court as being "compelled to subsidize speech by a third party that [one] does not wish to support," *Harris*, 573 U.S. at 656, being forced "to support financially an organization with whose principles and demands [one] may disagree," *Knox*, 567 U.S. at 310, and being forced "to contribute to the support of an ideological cause [one] may oppose." *Abood*, 431 U.S. at 235. Indeed, a consistent characteristic of the Court's compelled-funding cases has been a requirement "to subsidize a message [one] disagrees with, *expressed by a private entity*." *Johanns*, 544 U.S. at 557 (emphasis added). That requirement to subsidize private speech is a First Amendment harm even when the government plays no part in choosing the content of the speech to be subsidized. Compelled subsidization works a harm even when the funds are distributed widely to many speakers on a viewpoint-neutral basis, such as student activity fees at a public university. *See Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 231 (2000).[4]

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[4] Although this Court ultimately upheld the funding scheme at issue in *Southworth*, that was only because the Court found that the state had a compelling interest in supporting university activities and that the scheme was narrowly tailored to that goal. *Southworth*, 529 U.S. 232. But for present purposes, the key point is that the Court held that the funding scheme "infringes on the speech and beliefs of the individual" who was forced to contribute

In sum, the *PruneYard* opinion is a clear jurisprudential outlier among the Court's compelled-speech cases. It is inconsistent with both *Wooley* and the Court's many compelled-funding cases. And those cases, not *PruneYard*, have it right. Individuals suffer First Amendment injuries when they are forced to "foster . . . concepts" by facilitating the spread of ideas. *Wooley*, 430 U.S. at 714. "Liberty interests are infringed where the speech uttered, presented, or funded is not the freely chosen expression of the speaker or funder." Wasserman, *supra*, at 192. This principle holds true regardless of whether such compulsory facilitation of speech is enforced through a mandate on an individual's tongue, car, wallet, or real estate. As one scholar has put it, the right to refrain from speaking rings "hollow if a landowner must make his property a platform for expression he finds offensive." Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J. L. & PUB. POL'Y 389, 397 (2009).

Justice Rehnquist's views in *Wooley* and *PruneYard* were consistent. But the Court's views were not. Justice Rehnquist's narrow view of compelled speech was no more persuasive in *PruneYard* than it was in *Wooley*. The only difference between his opinions in the two cases is that one garnered a majority. It is time to recognize *PruneYard*'s incompatibility with many of

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funds. *Id.* at 231. The Court thus held that the scheme triggered heightened scrutiny, in sharp contrast to the *PruneYard* Court which found that California's rule of mandatory access did not infringe on First Amendment rights at all.

this Court's other foundational compelled-speech decisions.

II. *PRUNEYARD* SHOULD BE OVERRULED.

A. *PruneYard* Has Led to Other Harmful and Wrong Decisions.

In the years since *PruneYard* was decided, several courts have relied on *PruneYard* to uphold mandates forcing private property owners to disseminate speech they opposed. These mandates have imposed serious First Amendment harms, yet they have been upheld because of *PruneYard*'s narrow view that the false appearance of endorsement is the only harm that matters. In addition, *PruneYard*'s reasoning has led courts to reach erroneous decisions in cases not even controlled by *PruneYard*'s holding. The Fifth Circuit panel's decision below in *Paxton* is just the latest example of such a harmful decision. Unfortunately, those decisions will continue until *PruneYard* is overruled.

The pamphleteers in *PruneYard* itself may not have seemed particularly disruptive. But inevitably, the speech that states have forced upon private property owners has since extended well beyond quiet pamphleteers in a corner of a plaza. Since *PruneYard*, the California Supreme Court has held that the California Constitution guarantees "the right to urge customers in a shopping mall to boycott one of the stores in the mall." *Fashion Valley Mall v. NLRB*, 172 P.3d 742, 743 (Cal. 2007). The court held that "a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests." *Id.* at 750. Indeed, the court went so far as to hold that "citizens have a strengthened interest, not a

diminished interest, in speech that presents a grievance against a particular business in a privately owned shopping center, including speech that advocates a boycott." *Id.* Thus, the Court held that the state constitution required a mall to allow union members on its private property to "distribute[] leaflets to customers entering and leaving" a department store urging a boycott of the store. *Id.* at 744.

In another remarkable California state-court decision, a shopping mall was even forced to host an anti-abortion protest featuring signs displaying a "[d]ead 8 week human embryo moments after abortion," because the mall's ban on "grisly or gruesome" protests was found to be content-based and thus in violation of the state constitution. *Ctr. for Bio-Ethical Reform, Inc. v. Irvine Co., LLC*, 249 Cal. Rptr. 3d 391, 396, 399 (App. 2019). And state courts have, under the license given in *PruneYard*, created similar rights to speak on others' private property in New Jersey, Massachusetts, and Pennsylvania. *See N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 590 (Mass. 1983); *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981).

Further, *PruneYard*'s faulty reasoning has led courts to uphold speech compulsions solely on the grounds that they did not create the false appearance of endorsement. One such case is *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). That case concerned a New Mexico wedding photographer who opposed same-sex unions and declined to photograph a same-sex commitment ceremony. The New Mexico Supreme Court found, first, that this refusal violated New Mexico's public accommodation law. *Id.* at 63.

The court then held that this application of New Mexico's public accommodation law did not violate the photographer's First Amendment rights.

The court reached this holding using reasoning lifted directly from *PruneYard*. First, the court noted that New Mexico's law did not compel the photographer "to speak the *government's* message." *Id.* (emphasis added). Just like this Court's opinion in *PruneYard*, the New Mexico Supreme Court rejected any comparison to *Barnette* or *Wooley* by narrowly construing those decisions as limited to "situations in which the speakers were compelled to publicly speak the government's message," rather than compelled to speak messages requested by the general public. *Id.* at 64 (cleaned up).

Further, also following *PruneYard*'s lead, the court asserted that there is no compelled-speech violation "where observers are unlikely to mistake a person's compliance with the law for endorsement of third-party messages." *Id.* at 69. Explicitly relying on *PruneYard*, the court found no First Amendment violation because "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events" and "Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey." *Id.* at 69–70. Just as in *PruneYard*, the court found it sufficient that photographers could "post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws." *Id.* at 70.

Another case that relied on *PruneYard*'s faulty reasoning was *Elster v. Seattle*. In 2015, Seattle established a "Democracy Voucher Program," which used

property tax dollars to give registered voters "democracy vouchers," that they could use as a donation to the political candidate of their choice. *Elster v. City of Seattle*, 444 P.3d 590, 592 (Wash. 2019). A group of property owners sued, arguing that the program unconstitutionally forced them to fund the political contributions of others.

But the Washington Supreme Court upheld the program, finding no First Amendment injury. Citing *PruneYard*'s "appearance of endorsement" test, the court held that the taxpayers could not "show the tax individually associated them with any message conveyed by the Democracy Voucher Program." *Id.* at 594 (footnote omitted). The court held that "[w]ithout such a showing, . . . the program is not subject to heightened scrutiny." *Id.* Remarkably, *PruneYard*'s flawed reasoning was adapted to a speech-*funding* case, despite this Court never having applied the *PruneYard* test in any of its own speech-funding cases.

Most recent, of course, is the Fifth Circuit panel's decision below in *Paxton*. The panel relied heavily on *PruneYard* in erroneously upholding the Texas law. Specifically, the panel relied on *PruneYard* to presume that the false appearance of endorsement is the only potential harm from compelled platforming (apart from interference with a service's own speech). And the panel found that such an injury was not present here because websites "are free to say whatever they want to distance themselves from the speech they host." *Paxton* Pet. App. 41a.

Elane Photography, *Elster*, and the *Paxton* decision below demonstrate the wide-ranging harm that *PruneYard* has caused. Private businesses have been commandeered to spread and facilitate messages their

owners oppose. They have been forced "to participate in the dissemination of an ideological message." *Wooley*, 430 U.S. at 713. But because of *PruneYard*, courts have required not only forced dissemination but also the false appearance of endorsement. Real First Amendment harms have thus gone unchecked, and the erroneous legacy of *PruneYard* has continued to spread.

B. Overruling *PruneYard* Would Bring Symmetry and Clarity to First Amendment Doctrine.

If *PruneYard* were overruled, what would be the rule for determining when the government has impermissibly compelled the facilitation of speech? The answer can be found in *Wooley*: symmetry with the doctrine of speech *prohibitions*. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. These rights are two sides of the same coin. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.*

This symmetry between the right to speak and the right not to speak answers the doctrinal question. Put simply, if it would inflict a First Amendment harm to *forbid* an act, it would also inflict a First Amendment harm to *compel* that same act.

It is well established that the First Amendment protects the act of fostering and disseminating speech, even when no credit or attribution is taken by the person fostering the speech. This Court has recognized

that Americans have many reasons for wishing to support and foster speech. While sometimes we wish to take credit for that speech and associate ourselves with it, other times we wish to remain anonymous. And that anonymous speech is protected all the same. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Likewise, the First Amendment protects the right not just to write a book but also to disseminate the books that we wish to support and foster. *See, e.g.*, *Ex Parte Jackson*, 96 U.S. 727, 733 (1877) ("Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 65 n.6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication.").

The sweep of this Court's First Amendment cases recognize that there are many legitimate reasons why individuals may wish to foster speech, including the desires to associate, to influence, and to simply exercise personal liberty. Any one of these reasons is legitimate, and the Court has never isolated just one as the sole legitimate justification for freedom of speech. Yet *PruneYard* unfairly isolated just one interest (the interest in avoiding the false appearance of endorsement) and declared that interest to be the *only* legitimate justification for the freedom from compelled support of speech. *PruneYard* broke the symmetry, and it was wrong. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of

mind.'" *Wooley*, 430 U.S. at 714. The Court should recognize that any justification for one applies just as much to the other.

Recognizing compelled facilitation of speech in any form to be a First Amendment harm would not open the floodgates of litigation or undermine truly necessary government regulations. Just as with speech restrictions, the government could potentially justify compelled facilitation as necessary to achieve a compelling interest. Indeed, it has already successfully done so at least once in this Court. *See Southworth*, 529 U.S. 232. And it is possible that the compelled hosting of military recruiters at issue in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), would have met that standard as well given the government's compelling interest in military recruitment. Where the Fifth Circuit panel erred below, and where *PruneYard* and too many other cases have erred, is in holding that the compelled facilitation of speech did not work a First Amendment injury *at all* and thus did not need to pass *any* level of First Amendment scrutiny.

The Court doesn't need to overrule *PruneYard* in this case. But it should do so, sooner or later.

CONCLUSION

For the foregoing reasons, and those presented by NetChoice and CCIA, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the

decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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