No. 22-393

In the Supreme Court of the United States

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

Cross-Petitioners,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual Cato Supreme Court Review.

This petition interests Cato because it concerns the application of fundamental First Amendment principles to online speech—an increasingly urgent issue for civil liberties in the digital age.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. 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

The First Amendment explicitly prohibits the government from censoring private speech and media. U.S. Const. amend. I. That this fundamental guarantee cannot be tossed aside for short-term, partisan ends "would be too obvious to mention if it weren't so often lost or obscured in political rhetoric." *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1204 (11th Cir. 2022). However, it seems that the First Amendment's longstanding protections have gone out of style in some circles. From Florida to California, politicians of all stripes have introduced over 100 bills in the last year to control what content gets shared on the internet. Rebecca Kern, *Push to rein in social media sweeps the states*, Politico (July 1, 2022).[2] Though these efforts differ in form, their shared goal is to make the state the arbiter of private editorial standards—even the arbiter of truth itself. The political right wants the state to have power to combat alleged "censorship" of conservatives, while the left wants to prevent private platforms from hosting whatever the state considers "hate speech" or "misinformation" at a given time. evelyn douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. Chi. L. Rev. Online (June 6, 2022) [hereinafter douek & Lakier, *First Amendment Politics Gets Weird*].[3] But giving the government power to compel, suppress, or evaluate speech does not combat censorship: it is the very *definition* of censorship—and

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[2] Available at https://politi.co/3DO2VXg.

[3] Available at https://bit.ly/3dBW2gV.

precisely what the First Amendment was written to prevent.

As the Eleventh Circuit noted, no one could have predicted the meteoric rise of social media platforms. *NetChoice,* 34 F.4th at 1203. Equally surprising is Florida's resurrection of communications collectivism—a discredited, politically progressive theory of the First Amendment—ostensibly to protect the "free speech rights" of conservatives on social media platforms. News Release, Ron DeSantis, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021) [hereinafter May 24, 2021 News Release].[4] The First Amendment explicitly prohibits the government from censoring private speech and press. Turning that guarantee on its head, the communications collectivist movement of the 1960s tried to convert the First Amendment from a shield designed to protect private actors from government abuse into a sword for the government to wield against privately owned media platforms.

In defending the law at issue here, SB 7072, Florida recycles the communications collectivist theory to argue that it may force platforms to host certain content, prohibit them from hosting other content, and grant itself unprecedented power to demand data about protected editorial activity. Like the collectivists' efforts that preceded it—from the Fairness Doctrine to right-of-reply mandates—SB 7072 would chill platforms' protected speech, undermine their right to exclude, and violate the privacy interest that social-media platforms have in their editorial source data.

[4] Available at https://bit.ly/3Rymdmz.

And again like the collectivists' efforts that preceded it, SB 7072 violates platforms' editorial rights.

The collateral damage from Florida's misguided efforts to promote transparency (along with at least 28 currently pending bills like it) will be users' own safety and enjoyment of the platforms. Avi Asher-Schapiro, *Analysis: U.S. states take center stage in battles for control over social media,* Reuters (June 16, 2022).[5] Websites that host user-generated content of any kind face a constant battle against malicious actors. Platforms use content moderation tools, in significant part, as security measures. SB 7072's disclosure requirements will hand malicious actors a blueprint to abuse the system, inviting an influx of spam and vile content.

Likewise, SB 7072's must-carry requirements give journalistic enterprises and registered political candidates carte blanche to post threats, racial slurs, and other vile content—content that would surely fall beyond Florida's understanding of suppressed "conservative" viewpoints. Pet. Br. 10. If sabotaging platforms' ability to keep their services secure and safe for users is not "unduly burdensome," it is hard to imagine what could be. *NetChoice,* 34 F.4th at 1230 (explaining that SB 7072's disclosure provisions might violate the First Amendment if NetChoice can demonstrate they are unduly burdensome).

The Eleventh Circuit correctly held that "no one has a vested right to force a platform to allow her to contribute to or consume social-media content" when it struck down SB 7072's content moderation requirements. *Id.* at 1204. However, without clarification from this Court that the First Amendment prohibits

[5] Available at https://reut.rs/3r6tuiw.

the entirety of SB 7072, political efforts to transfer editorial control to the state will continue to proliferate.

The stakes could not be higher, as illustrated by the Fifth Circuit's recent decision upholding the entirety of a Texas law regulating social media similarly to the Florida law at issue here. *Netchoice, L.L.C. v. Paxton*, No. 21-51178, 2022 U.S. App. LEXIS 26062, at *93 (5th Cir. Sep. 16, 2022). Without guidance from this Court, states will usher in a new era of overweening regulation where government control of speech is no longer considered speech suppression, but instead speech "promotion"—unraveling decades of case law supporting editorial freedom. This will create a domestic "splinternet," where information available to users—on platforms of all sizes and ideological leanings—will become regionally divided based on which content local politicians prefer. To prevent the First Amendment from becoming a hollow guarantee in the digital age, this Court should grant certiorari.

ARGUMENT

I. FLORIDA RECYCLES A COLLECTIVIST MEDIA THEORY THAT DISTORTS THE FIRST AMENDMENT

Florida passed S.B. 7072 ostensibly to "preserv[e] First Amendment protections for Floridians" whose "conservative viewpoints" are purportedly being censored by social media companies' "far-left agenda." May 24, 2021 News Release, *supra*. Yet in its efforts to protect conservatives from "biased silencing," Florida adopts a warped conception of the First Amendment championed by the politically progressive communications-collectivist movement in the 1960s, which argued that the government may control private

communications platforms to ensure (the government's idea of) equality of access. *See generally* Robert McChesney & John Nichols, *Our Media, Not Theirs: The Democratic Struggle Against Corporate Media*, Open Media Series (2002) (explaining collectivists' efforts to assert public control over the media to control what they host). By forcing platforms to include speakers and speech they would otherwise exclude, Florida, like the communications collectivists, violates platforms' First Amendment rights.

Providing that "Congress shall make no law . . . abridging the freedom of speech," the First Amendment explicitly prohibits the government from censoring private speech and media. U.S. Const. amend. I; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) ("[T]he First Amendment constrains governmental actors and protects private actors."). Turning that guarantee on its head, the communications collectivists converted the First Amendment from a shield to protect private actors from government abuse into a sword for the government to wield against privately-owned media platforms.

In an influential 1967 article, Jerome Barron attacked the supposed "banality" of a First Amendment jurisprudence that only limits the *government's* interference with speech. Barron urged that the First Amendment should also address "nongovernmental obstructions to the spread of political truth" in a capitalist system, where the private media's pecuniary interests would invariably obstruct that "truth." Jerome Barron, *Access to the Press: A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1643 (1967) (supporting a right for the public to access private, for-profit mass media on terms set by the government). To this end,

Barron argued that "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view." *Id.* at 1656; *see generally* Owen Fiss, *The Irony of Free Speech* (1998) (arguing that the state must adopt a "democratic," rather than "libertarian," conception of the First Amendment so that it can police the private speech arena for the public interest).

Then as now, communications collectivists advocated for viewpoint-neutrality requirements, right-of-reply mandates, and expansive applications of common carriage doctrine (using "public forum" or "public square" rhetoric). Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment — The "Dial-A-Porn" Precedent*, 19 Rutgers Computer & Tech. L.J. 371, 405 (1993) (urging the rejection of editorial rights claims to ensure private communications firms do not "shed the non-discriminatory access obligations" of common carriers).

Borrowing directly, if unconsciously, from the communications collectivists' playbook, Florida now attempts to apply common carriage doctrine to social media platforms and dispense with platforms' own editorial rights. Pet. Br. 23; S.B. 7072, 2021 Leg. Sess. (Fla. 2021) ("Social media platforms have transformed into the new public town square . . . Social media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers."). Then, to thwart supposed "censorship" of conservatives, S.B. 7072 creates thirty-day cycles of censorship. The law's requirement that platforms moderate "consistently," in conjunction with its ban on changing moderation rules more than

once every thirty days, forces platforms to remove (or retain) all content that is similar to material that they have previously removed (or retained) in the last thirty days under penalty of up to $100,000 per "inconsistently" removed post. Fla. Stat. § 501.2041(2)(b), (c), (6)(a) (2021).

Until Florida—and a growing number of other states with similar efforts—resurrected it, communications collectivism had fallen sharply out of favor with courts and self-identified conservatives alike, and for good reasons. *See generally* douek & Lakier, *supra* (explaining the change in conservative views on free speech after the "great deplatforming" of President Donald Trump); Adam Thierer, *The Surprising Ideological Origins of Trump's Communications Collectivism,* The Tech. Liberation Front Blog (May 20, 2020) (explaining the irony of conservatives embracing "media Marxist" mandates to control social media).

Communications collectivist efforts like Florida's are incompatible with the First Amendment for several reasons. First, these efforts violate private media's First Amendment right to choose what content they host. The First Amendment is "[p]remised on mistrust of governmental power." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The First Amendment thus "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1926. And when private media companies "disclos[e]," "publish[]," or "disseminat[e]" information, they engage in "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (quotation marks omitted). Indeed, "[t]he 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." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (rejecting a right-of-reply for print media because it violates newspapers' own free speech rights); *see also Columbia Broad. System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (finding that there is no constitutional right of access to broadcast outlets for political advertising). Yet "rather than understanding the First Amendment to be a guardian of the private sphere of communication," as this Court has consistently interpreted it, collectivists misinterpret it to be a "guarantee of a preferred mix of ideological viewpoints." Jonathan Emord, *Freedom, Technology and the First Amendment* 24–25 (1991).

Second, in an effort to advance First Amendment "values," communications collectivism chills speech. Pet. Br. 26; *Tornillo*, 418 U.S. at 256–58 (finding that newspaper editors avoided printing controversial stories under the "right of reply" mandate and thus had their speech chilled). The Federal Communications Commission recognized this when it unanimously voted to repeal the Fairness Doctrine. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 (D.C. Cir. 1989) ("[The Fairness Doctrine] disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.").

Likewise, SB 7072's disclosure obligations will chill and distort platforms' exercise of protected editorial freedom. The law requires a platform to publish "the

standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban," and to inform its users about any changes to those rules "before implementing the changes" Fla. Stat. § 501.2041(2)(a), (c). Though sunlight can sometimes be "the best of disinfectants," this Court has acknowledged that disclosures about protected First Amendment activity are different. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976); *see generally* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203 (2022) [hereinafter Goldman, *Mandating Editorial Transparency*] (explaining how mandatory *editorial* transparency requires higher First Amendment scrutiny than mandatory nutritional labels, because public disclosures will change platforms' editorial decisions).

When internal editorial decisions are exposed, the threat of public scrutiny and legal action coerces private media to make editorial choices they otherwise wouldn't. *Id.* For this reason, this Court has said that discovery requests for newspapers' editorial source data—unlike requests about non-First Amendment protected activity—must be narrowly tailored, rare, and made only under judicial supervision. *Id.*; *Herbert v. Lando,* 441 U.S. 153, 177–78 (1979). SB 7072 has none of those limitations. The law requires that a platform share with the general public rules and "detailed definitions" for how it exercises its editorial judgment. The law also empowers the Florida Department of Legal Affairs to conduct a far-reaching investigation of platforms' editorial data if the department "suspects" inaccurate disclosure or inconsistent moderation "is imminent, occurring, or has occurred." *Lando*, 441 U.S. at 177; Fla. Stat. § 501.2041(5) (2021).

To avoid intrusive investigations and liability for unlawful moderation under SB 7072, platforms will be coerced into making disclosures and moderating content in ways more likely to avoid Florida regulators' ire. Disclosure requirements like those in SB 7072 distort and chill platforms' exercise of editorial speech. Indeed, "without clear limits, the specter of a broad inspection authority, coupled with an expanded disclosure obligation, can chill speech and is a form of state power the Supreme Court would not countenance." *Washington Post v. McManus,* 944 F.3d 506, 511–12 (4th Cir. 2019).

II. DISCLOSURE REQUIREMENTS SABOTAGE PLATFORM SECURITY

Websites that host user-generated content of any kind face a constant battle against malicious actors, including spammers, scammers, political operatives seeking to spread propaganda, and users peddling vile content. Mike Masnick, *Very, Very Little of 'Content Moderation' Has Anything To Do With Politics,* Techdirt (May 25, 2022) (explaining that the vast majority of content moderation is to combat spam, fake accounts, and pornography, not to "censor" conservative political views).[6] Collectively, these bad actors make hundreds of thousands of attempts per year from thousands of accounts to post content including terrorist recruitment material, videos of mass shootings, or child sexual abuse material. *Id.*; Robert Gorwa, Reuben Binns, & Christian Katzenbach, *Algorithmic content moderation: Technical and political challenges in the automation of platform governance*, Big Data & Soc'y, Jan.–Jun. 2020 [hereinafter Gorwa et al.] (explaining that Twitter alone has removed hundreds of

[6] Available at https://bit.ly/3S9tdaB.

thousands of accounts that try to spread terrorist propaganda).[7]

SB 7072 cripples a platform's ability to identify and block this content with three mutually reinforcing provisions. First, the requirement to disclose "the standards, including detailed definitions" that platforms use to identify and remove objectionable content will give bad actors a blueprint to bypass platform security. Fla. Stat. § 501.2041(2)(a). Second, a thirty-day limitation on changes to platform content moderation rules will make it impossible to address breaches—caused by the disclosure requirement—in a timeframe appropriate to protect a platform's users. § 501.2041(2)(c). Third, the private right of action awarding aggrieved users up to $100,000 for each instance of "inconsistent" moderation will attract a gold rush of self-interested Floridians attempting to breach platform security, inundating Florida's courts with frivolous claims. § 501.2041(6)(a). Together, these provisions burden social media companies' exercise of editorial freedom by impeding their ability to curate a safe experience for users. *NetChoice,* 34 F.4th at 1209.

To combat the deluge of spam and other malicious content, platforms invest heavily in AI content moderation tools, in significant part, as security systems. Aabroo Saeed, *Microsoft's LinkedIn Is Curbing Inappropriate Profiles and Content from The Platform Via AI Technology,* Digital Info. World (Jan. 24, 2020) (explaining that LinkedIn has turned to machine learning tools to better address the accelerating problem of inappropriate profiles and spam);[8] *see also* Praveen Paramasivam, *Facebook says it has spent $13 billion*

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[7] Available at https://bit.ly/3Cdepm1.

[8] Available at https://bit.ly/3UzyVEs.

on safety and security efforts since 2016, Reuters (Sep. 21, 2021).[9] However, bad actors always adapt to existing security measures. This forces platforms into an interminable cat and mouse game to identify and respond to innovative new means to evade detection.

For the same reason that banks do not disclose details of fraud detection, platforms do not disclose the detailed definitions and rubrics for moderation that apply to public-facing content. This includes the frequency with which a user must post to be designated as spam and the methods for identification of child sexual abuse material. Sapna Maheshwari, *On YouTube Kids, Startling Videos Slip Past Filters*, N.Y. Times (Nov. 4, 2017) (explaining how bad actors found ways to "fool" content moderation algorithms to post disturbing variations of popular children's cartoons).[10]

Florida's perception that "we must stand up to these technological oligarchs and demand transparency" misses the point. News Release, Ron DeSantis, Governor Ron DeSantis, Florida House Speaker Chris Sprowls and Senate President Wilton Simpson Highlight Proposed Legislation to Increase Technology Transparency in Florida (Feb. 2, 2021) [hereinafter Feb. 2, 2021 News Release] (comment by Florida House Speaker Sprowls).[11] Though some bad actors will always find ways to game the system, SB 7072's transparency provisions make it much easier to breach security. Transparency requirements "assume that all users (and all consumers of the transparency reports and readers of the terms of service) are there in good faith. But they're not." Mike Masnick, *How*

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[9] Available at https://reut.rs/3fcVONL.

[10] Available at https://nyti.ms/3dEp7bA.

[11] Available at https://bit.ly/3dzMUcO.

California's 'Transparency' Bills Will Only Make It Impossible To Deal With Bad Actors: Propagandists, Disinfo Peddlers, Rejoice, Techdirt (Aug. 1, 2022) [hereinafter Masnick, *Transparency Bills*].[12] And without effective, confidential screening systems, platforms reliably become overrun with offensive content that does little to advance the civic value of free speech for self-identified conservatives or otherwise. *See, e.g.*, Mark Scott & Tina Nguyen, *Jihadists flood pro-Trump social network with propaganda*, Politico (Aug. 2, 2021);[13] Kevin Randall, *Social app Parler is cracking down on hate speech—but only on iPhones*, Wash. Post (May 17, 2021).[14]

To prevent reposting of material that has already been identified by content moderation policies as offensive or illegal, platforms store unique identifiers known as hash codes. Gorwa et al., *supra*, at 4. Hashes are generated by a mathematical process which allows platforms to quickly compare the content of a new post to a repository of hashes of previously flagged content. *Id.* The nature of the process to create hashes causes even changes that are imperceptible to humans to generate very different hash codes. *Id.* As a result, bad actors try to evade detection by making modifications to offensive images or videos—including watermarks or cartoon images—and posting them again. *Id.* at 8 (explaining that hashes of about 800 different versions of the Christchurch shooter's video had to be uploaded before Facebook, YouTube, and Twitter could effectively block most of the footage before it was posted).

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[12] Available at https://bit.ly/3C0xurl.
[13] Available at https://politi.co/3K6apVB.
[14] Available at https://wapo.st/3LygFG4.

Instead of protecting good faith users of the platforms from capricious moderators, the transparency requirements in SB 7072 will sabotage security measures that most users greatly benefit from. Digital hash technology has thus far been widely adopted by internet platforms to identify child sexual abuse material, copyright infringement, extremist content, and terror propaganda-related images, video, and audio online. Spandana Singh, *Everything in Moderation* at 12–16, New Am.: Open Tech. Inst. (July 22, 2019).[15] The requirement in SB 7072 to disclose "the standards, including detailed definitions" used for platform moderation is such broad language that it can encompass these unique hashes or other classifiers that trigger removal. Masnick, *Transparency Bills*, *supra*. Fla. Stat. § 501.2041(2)(a). Such disclosure would allow malicious actors to immediately determine if they will elude detection with a particular piece of content. Alexandra S. Levine, *From Camping To Cheese Pizza, 'Algospeak' Is Taking Over Social Media*, Forbes (Sep. 19, 2022) (explaining how social media users are increasingly using codewords and deliberate typos to avoid detection by natural language processing AI);[16] Singh, *supra*, at 20 (explaining how platforms have refrained from disclosing certain information about their automated moderation tools to prevent bad actors from gaming their systems).

Further, the requirement to disclose "a thorough explanation of the algorithms used" undermines platform security in the same way that exposing intelligence gathering "sources and methods" may undermine future intelligence gathering efforts. Fla. Stat.

[15] Available at https://bit.ly/3EmZHKz.
[16] Available at https://bit.ly/3DNYFqO.

§ 501.2041(2)(d). By learning how unwanted content is identified and actioned, sophisticated bad actors may circumvent detection and removal entirely.

Transparency requirements are not the only tool that SB 7072 gives to malicious posters. Providing that a platform must "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban," "inform each user about any changes to its user rules . . . before implementing the changes" and, critically, refrain from making changes more than once every thirty days, SB 7072 effectively gives malicious actors a blueprint to circumvent platform security measures. § 501.2041(2)(h), (c). "Thanks to these publicly revealed policies, malicious actors now have more ability to figure out how to game the rules" that trigger removal. Masnick, *Transparency Bills*, *supra.* Because SB 7072 prohibits platforms from changing their rules—which includes modifications to content moderation algorithms—more than once every thirty days, platforms are faced with an absurd choice between improving the security they use to detect offensive content within a reasonable time frame or facing massive liability.

SB 7072's private right of action provides a hefty financial incentive for entrepreneurial Floridians to use the blueprint the law provides to find content moderation loopholes—up to $100,000 in statutory damages per post that a platform moderated "inconsistently." Fla. Stat. § 501.2041(2)(b), (6)(a). Even the best available content moderation tools are imperfect and inconsistent, not by human error or intentional design, but because of the inherent, unavoidable imperfections of the technology. *See, e.g.*, Copia Inst., *Content*

Moderation Case Study: Detecting Sarcasm Is Not Easy, Techdirt (Sep. 10, 2020) (explaining the difficulty AI has in distinguishing between serious and jocular references to self-harm, thus creating absurd and inconsistent results);[17] Deepa Seetharaman, Jeff Horwitz & Justin Scheck, *Facebook Says AI Will Clean Up the Platform. Its Own Engineers Have Doubts,* Wall St. J. (Oct. 17, 2021) (describing how still-crude Facebook AI mistook cockfights for car crashes and mistook videos live streamed by perpetrators of mass shootings as paintball games or trips through a carwash).[18] Transparency reports will only make it easier to get around moderation tools, and to manufacture hundreds of lawsuits for Florida courts.

The Eleventh Circuit upheld SB 7072's disclosure requirements after finding that they aren't "substantially likely to be unconstitutional" because they are not "unduly burdensome." *NetChoice,* 34 F.4th at 1209. But unlike the commercial disclosure requirements in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which were "purely factual and uncontroversial" and did not impose an undue burden on advertisers, disclosures of how platforms moderate are highly controversial—so controversial, in fact, that they have become one of the most hotly-contested issues in politics today. Complying with SB 7072 opens the platforms up to significant security risks and deprives them of their ability to provide a safe, enjoyable experience for their users and advertisers. If this is not an undue burden, it is hard to imagine what could be.

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[17] Available at https://bit.ly/3yg4cm7.

[18] Available at https://on.wsj.com/3gEhClU.

III. SB 7072 WILL FORCE PLATFORMS TO CARRY DISTURBING AND HARMFUL SPEECH

A platform where users cannot avoid disturbing content is likely not the free speech oasis Florida envisioned when it passed SB 7072. Pet. Br. 4, 6. Yet that is what will happen if platforms are required to host and display virtually all lawful speech made by "registered political candidates" and "journalistic enterprises," which are loosely defined to include, for example, popular online content creators who operate far outside the news media. Fla. Stat. §§ 106.072 (2022); 501.2041(2)(j). As one Republican state representative warned during floor debate on SB 7072, what "about potential candidates, about crazy people, Nazis and child molesters and pedophiles who realize they can say anything they want . . . if all they do is fill out those two pieces of paper?" David Rothschild, @DaveMicRot, Twitter, (May 24, 2021, 5:11 PM).[19] Indeed, the prospect of people registering as candidates just to be able to have carte blanche to share vile content online is not a wild hypothetical. Keith A. Spencer, *Why unmoderated online forums always degenerate into fascism*, Salon (Aug. 5, 2019) (explaining that selection bias and online psychology always lead unmoderated or lightly moderated "free speech" sites to become overrun with vile content);[20] Aristos Georgiou, *YouTube, TikTok Videos Showing Animals Tortured, Buried, Eaten Alive Viewed 5bn Times*, Newsweek (Aug. 25, 2021) (describing requests by animal rights groups for social media companies to develop more aggressive

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[19] Available at https://bit.ly/3fcX2IR.
[20] Available at https://bit.ly/3NdgZuA.

algorithmic moderation to prevent continuing dissemination of animal torture footage).[21]

To receive content moderation privilege under Florida election laws, candidates need only submit a notarized document indicating that they have lived in Florida for two years, are a resident of the district where they are running, and are at least 21 years old. Fla. Dep't St. Division of Elections, 2022 State Qualifying Handbook 20 (2021).[22] Had SB 7072 been in effect over the last several years, social media networks would have been powerless to remove many instances of offensive or deceptive posts by political candidates. Cristiano Lima, *Twitter forces Democratic candidate to delete post flouting voter suppression rules,* Politico (Sep. 1, 2020) (explaining that Twitter forced a Democratic House candidate to delete a tweet that misled Donald Trump supporters to vote the day after the actual election date);[23] Russell Brandom, *Twitter bans Florida Republican for encouraging the killing of federal agents*, The Verge (Aug. 19, 2022) (explaining that Twitter banned a Florida state House candidate after he advocated murdering federal agents);[24] Aiden Pink, *Even the Alt-Right is Sick of Paul Nehlen*, Forward (April 05, 2018) (explaining both Twitter's and "free speech absolutist" platform Gab's decisions to deplatform House candidate Paul Nehlen for violating community guidelines).[25]

Additionally, platforms must carry any and all content from any personality popular enough to meet SB

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[21] Available at https://bit.ly/3Cwiy4F.
[22] Available at https://bit.ly/3UvzXkP.
[23] Available at https://politi.co/3StcVck.
[24] Available at https://bit.ly/3DLEuJM.
[25] Available at https://bit.ly/3Sucxdw.

7072's definition of a "journalistic enterprise," including those far outside news media. Fla. Stat. § 501.2041(2)(j). The journalistic enterprise privilege would be extended to YouTubers such as PewDiePie, Mr. Beast, and podcast host Joe Rogan, each of whom "[p]ublishes 100 hours of audio or video available online with at least 100 million viewers annually." Alex J. Rouhandeh, *Joe Rogan Gets More Listeners in One Episode Than Neil Young, Joni Mitchell Get a Month*, Newsweek (Jan. 31, 2022). Further, extremist groups styling their work as journalism would also be able to post with impunity if they have enough readers. Rukmini Callimachi, *A News Agency With Scoops Directly From ISIS and a Veneer of Objectivity*, N.Y. Times (Jan. 14, 2016).[26]

SB 7072's must-carry provisions create two content-moderation-free zones for political candidates and "journalistic enterprises." Fla. Stat. § 501.204(1)(d), (2)(j). Case studies from recent attempts to create "free speech" alternatives to Facebook and Twitter show that without robust content moderation tools in place, vile material reliably proliferates. For example, conservative social media sites Parler and GETTR initially promised to only moderate speech that violated United States law. Mike Masnick, *Parler Speedruns The Content Moderation Learning Curve; Goes From 'We Allow Everything' To 'We're The Good Censors' In Days*, Techdirt (July 1, 2020).[27] Both platforms were promptly overrun by obscene, violent, and racist content. *Id.* Trivial requirements for political candidates and low thresholds for journalistic enterprises ensure

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[26] Available at https://nyti.ms/3C1dzIG.
[27] Available at https://bit.ly/3CtpJdD.

that platforms subject to SB 7072 will follow a similar trajectory.

Though some users like being able to post extremely offensive content, the vast majority will be put off by it, limiting the exercise of free speech on those platforms to a small minority. *See, e.g.*, Rachel DeSantis, *Parler, an App That's Becoming a Hit with Trump Supporters, Is Compared to an 'Echo Chamber'*, People (Nov. 17, 2020) (explaining that politically moderate users were dissuaded from using "free speech" social media platforms). The same happened with "free speech absolutist" website 8chan, which was eventually removed from the internet by its host for refusing to remove content that celebrated the 2019 El Paso shooting. *See generally* Diana Rieger, et al., *Assessing the Extent and Types of Hate Speech in Fringe Communities*, Soc. Media + Soc'y, Oct.–Dec. 2021 (explaining how 8chan, which practiced very little content moderation, became rife with right-wing extremist, misanthropic, and white-supremacist content). Under SB 7072, users would face a choice between ceasing the use of platforms like Facebook, Twitter, and TikTok or risking exposure to disturbing content.

Implementing SB 7072 would require the platforms to host all the disturbing content that falls within the First Amendment's broad ambit of protection if that content is posted by "registered political candidates" or "journalistic enterprises." §§ 106.072(2); 501.2041(1)(d), (2)(j). This includes posts depicting torture and mutilation of animals, which sites already receive thousands of per day. Casey Newton, *Bodies in Seats*, The Verge (Jun. 19,

2019).[28] It also includes terrorist recruitment material, racial slurs, and harassment.

SB 7072 aims to combat the purported "discriminatory dystopia" of social media companies' "censorship" of conservative voices. But prohibiting companies from shielding users from animal torture videos is likely not the free speech utopia many users want. Instead, SB 7072's loophole for privileged speakers may make dominant social media platforms functionally unusable for many Floridians.

IV. CERTIORARI IS NECESSARY TO HALT CONTINUING POLITICAL EFFORTS TO CONTROL ONLINE DISCOURSE

In a 2020 Senate Commerce Committee hearing, Senator Ted Cruz challenged Twitter's then-CEO Jack Dorsey to explain "Who the hell elected you and put you in charge of what the media are allowed to report and what the American people are allowed to hear?" Caitlin Oprysko, '*Who the hell elected you?': Cruz blasts Twitter CEO,* Politico (Oct. 28, 2020).[29] Implicit in this rhetorical question is the idea that elected officials *should* be in charge of media freedom and the information made available to the public. Unfortunately, the political right and left now share that instinct, and a sense of urgency to make the state the arbiter of editorial standards on social media. *See, e.g.*, *Twitter, Facebook may need license to operate: US senator*, The Econ. Times (Sep. 14, 2022) (discussing "measure" in the works from one Democratic and two Republican senators to create a regulatory agency that would license social media platforms and potentially revoke

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[28] Available at https://bit.ly/2XWJBPC.
[29] Available at https://politi.co/3LBhpeK.

their licenses for moderating in certain ways);[30] *Biden vows to end social media immunity over 'spreading hate'*, Al Jazeera (Sep. 16, 2022) (explaining that President Biden will ask Congress to "hold social media companies accountable" for hosting racist content);[31] Exec. Order No. 13925, 85 C.F.R. § 34079 (2020) (President Trump's Executive Order intending to end Section 230 immunity for platforms after they, among other things, put a warning label on President Trump's tweets but not Rep. Adam Schiff's).[32] In the last year, over 100 bills have been introduced at the federal and state levels to expand state control over content moderation. Kern, *supra*. And in the wake of the Fifth Circuit's erroneous decision completely rejecting the longstanding First Amendment right to editorial freedom, political forces seeking to subvert the First Amendment may win. *See, e.g.,* Press Release, Gavin Newsom, Governor Newsom Signs Nation-Leading Social Media Transparency Measure (Sep. 13, 2022) (new California law, AB 587, passed in effort to curb "hate and disinformation" online);[33] Jake Zuckerman, *Committee passes bill to block social media from 'censoring' users*, Ohio Cap. J. (May 9, 2022) (describing Ohio's "anti-censorship" social media bill which bans "viewpoint discrimination").[34]

Without clarification from this Court that the First Amendment prohibits the entirety of SB 7072, political efforts to transfer editorial control to the state will continue to proliferate. This will usher in a new era of dangerous regulation where government control of speech

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[30] Available at https://bit.ly/3DsGvKl.
[31] Available at https://bit.ly/3LzlUql.
[32] Available at https://bit.ly/3dxswsN.
[33] Available at https://bit.ly/3fOWSHQ.
[34] Available at https://bit.ly/3xIvjpK.

is no longer considered speech suppression, but instead speech "promotion"—unraveling decades of case law supporting editorial freedom. *Netchoice,* 2022 U.S. App. LEXIS 26062 at *93 (holding that editorial discretion is not its own right but merely "one relevant consideration when deciding whether a challenged regulation impermissibly compels or restricts protected speech."). And this will create a domestic "splinternet," where information available to users—on platforms of all sizes and ideological leanings—are regionally divided on the basis of which content local politicians prefer.

This Court's precedent—and the text of the First Amendment—strongly supports a finding that social media platforms are private entities with First Amendment editorial rights. "The choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. 241; *see also United States Telecom Ass'n v. FCC*, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("[T]he choice of whether and how to exercise that editorial discretion is up to them, not up to the Government."). And "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 786 (2011). Yet widespread confusion remains about whether government compulsion to publish or remove certain content is censorship.

SB 7072 and the growing number of efforts like it "fundamentally shifts the marketplace of ideas from

its private, unregulated, and interactive context to one within the compass of state control, making the marketplace ultimately responsible to government for determinations as to the choice of content expressed." Emord, *supra*, at 46. Giving the state this power, and the implied power to investigate and punish private companies whenever it thinks their editorial speech is "unfair" or "inconsistent," can and will be abused.

In *Reno v. ACLU*, 521 U.S. 844, 849 (1997), this Court emphasized that the First Amendment applies with full force to internet media. That case is the last time this Court directly addressed whether online services can be regulated as to the speech they choose to display and the manner in which they choose to display it. Certiorari is necessary again to preserve the First Amendment's role as a bulwark against government actors interfering with private media to advance political ends.

CONCLUSION

For the foregoing reasons, this Court should grant review.

Respectfully submitted,

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