Nos. 22-277 and 22-555

In the Supreme Court of the United States

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

v.

NETCHOICE LLC, ET AL.,
Respondents,

NETCHOICE LLC, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals
For the Fifth and Eleventh Circuits

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF NETCHOICE, LLC ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce and the Internet. *See*, *e.g.*, Angel Aguirre, *Biden Administration Should Do No Harm to Section 230*, NTUF (Sep. 29, 2022), https://tinyurl.com/4mt6txwr; Josh Withrow, *Klobuchar's "Self Preferencing" Assault on Big Tech Ignores Economics and Consumer Welfare*, NTUF (Jan. 18, 2022), https://tinyurl.com/ybhmtxpt. Accordingly, *Amicus* has an institutional interest in this case.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court and inferior courts have called the Internet the "new town square" due to the democratization of information cyberspace affords. But that is not to say any particular website is "a town square." For each website is private property, and the owners of that property have a right to curate the experience of visitors as any other business owner may. Protecting this right is essential: for the First Amendment not only protects the freedom of speech, but the freedom to associate—or to *not* associate.

These cases arise out of Texas's and Florida's attempts to regulate certain social media platforms and provide a variety of viewpoints. In short, Twitter, Facebook, and others are perceived as limiting the reach of some political views. Even if they are, it is far more dangerous to permit government regulation of speech in the name of fairness. Generally, many of the decisions of this Court would agree. But *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) stands for the proposition that a state may compel a business to host speech it does not wish to, simply because it is a place where a lot of people gather. In the 1980s it was shopping malls. Today it is social media websites. But it is time to release businesses from *PruneYard*'s inartful analysis.

Instead, this Court should recognize that the social media companies have First Amendment rights under the Press Clause to curate their collection of information and opinion as they see fit. The NetChoice challengers have consistently asserted First Amendment claims to curate the information on their

websites. This Court should recognize the First Amendment protects that right to curate.

ARGUMENT

Moody v. NetChoice and *NetChoice v. Paxton* both ask whether a state may regulate the activity of social media websites under the First and Fourteenth Amendments. In each case, the governments frame their ability to regulate social media websites because social media operates as the modern "town square." *See*, *e.g.*, Pet. for Writ of Cert., *Moody v. NetChoice*, at 3 (U.S. No. 22-277 Sep. 21, 2022) ("Under the Eleventh Circuit's reasoning, social-media behemoths have a First Amendment right to cut any person out of the modern town square"); Resp. to Pet. for Writ of Cert., *NetChoice v. Paxton,* at 1 (U.S. No. 22-555, Dec. 20, 2022) (asserting that Texas "agrees the cases present fundamentally important questions: whether those who gatekeep Americans' ability to communicate in the 'modern public square,'" must "provide equal access to the public regardless of viewpoint").

Both Florida and Texas rely on the soaring language of this Court in *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), which called social media "the modern public square." There, the Court stated that a "person with an Internet connection [has] 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). Lower courts have picked up on the democratization effects of the Internet. *See*, *e.g.*, *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014) ("It must be remembered…that the

[I]nternet is the new soapbox; it is the new town square.””).

But the Internet as a whole is distinct from a website. A website is the private property of an individual or corporation. Just because the Internet provides a new, cheap avenue of mass communication does not mean that the government may compel private websites to allow others to speak. But standing in the way of this idea is this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

I. THIS CASE PRESENTS AN OPPORTUNITY TO OVERRULE *PRUNEYARD*.

It is a bedrock principle that the First Amendment creates "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U. S. 464, 476 (2014) (citation omitted). Yet in an ever-narrowing line of cases, this Court has compelled others to open up private property for the sake of third-party speech based on *PruneYard*, 447 U.S. at 81. It is time to overrule *PruneYard*.

In *PruneYard*, this Court examined a California law that required shopping centers to allow solicitors to circulate petitions. *See id.* at 77. PruneYard was a privately owned shopping center that had a policy to not permit expressive activity, including circulating petitions. *See id.* When high school students sought to circulate petitions protesting anti-Israel resolutions before the United Nations, a PruneYard security officer told the students to leave for the public sidewalk outside the shopping center. *See id.* The students left, then sued the shopping center under

state law for denying them access for circulating the petitions. *See id*.

The *PruneYard* Court held that California did not create a "taking" when it mandated the shopping center be open for First Amendment Activity. *See id*. at 82. While recognizing "that property does not 'lose its private character merely because the public is generally invited to use it for designated purposes.'" *Id*. at 81 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)), the Court nevertheless upheld the California law because of the public nature of the shopping center that covered "several city blocks, [and] contain[ed] numerous separate business establishments." The Court reasoned that there was "nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." *Id* at 83. So long as the high schoolers were orderly, the reasoning went, then they were merely a part of the public that otherwise could access the mall. *See id.* Therefore, despite state law mandating that the circulators could be on the mall, there was no "taking" under the Fifth Amendment. *See id*.

In the Takings context, it is difficult to square *PruneYard* with this Court's recent decision in *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063 (2021). The *Cedar Point* Court applied a Takings Clause analysis when California demanded that farms provide a "right to take access" of a property for the purpose of soliciting union membership for 120 days per year. *See id*. at 2069; *see id*. at 2072.

The *Cedar Point* Court found this to be a taking. *See id*. at 2072 (holding that "[t]he access regulation

appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking"); *see also id.* at 2071 ("The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."); *id.* ("As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'") (bracket in original). Debate about union membership is core First Amendment activity, to be sure. *See*, *e.g.*, *Thomas v. Collins*, 323 U.S. 516 (1945). But nonetheless the *Cedar Point* Court held that California could not simply command that a farm allow speech without considering it a taking under the Fifth Amendment. *Cedar Point*, 141 S. Ct. at 2072 ("Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.").

Cedar Point calls into question the remaining usefulness of the Fifth Amendment analysis of *PruneYard*. This leaves the First Amendment analysis of *PruneYard*, which rejected the shopping mall's policy to not host any speech at all. (The owner of the shopping center did not claim any First Amendment rights in operating the mall, only the right "not to be forced by the State to use [its] property as a forum for the speech of others." *PruneYard*, 447 U.S. at 85.) The Court found that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." *Id.* at 87. Furthermore, the Court said, the shopping mall could put up signs that "disclaim any sponsorship of the message and could explain that the persons are

communicating their own messages by virtue of state law." *Id.*

This misses the mark, however, in that part of the experience of going to a shopping mall is that it is curated. Rather than the commotion of a central business district, a mall provides a controlled environment, welcoming to certain shoppers to get them to go into more stores (and thus spend more money). That the mall is set off from the street is a feature. And people often wish to avoid the very solicitations that California compelled the mall tolerate in *PruneYard*. The movie *Airplane!* famously featured, for comedic effect, the hassle of so many handbills and solicitations in a scene at the terminal of an airport. *See* AIRPLANE! (PARAMOUNT PICTURES 1980) at 54:35 (clip available on YouTube: https://www.youtube.com/watch?v=E3GGKF6CsjY).

More importantly, subsequent case law has shown that the First Amendment protects editorial control on what *not* to say just as much as what is said, and on whom not to associate with just as much as who to identify with. The Press Clause allows for greater freedom for the websites than *PruneYard*'s rationale would permit.

II. THE FIRST AMENDMENT PROTECTS THE RIGHT TO EDITORIAL CONTROL.

This Court has held that "[t]he text and original meaning of [the First and Fourteenth] Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of

speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. ___, 139 S. Ct. 1921, 1928 (2019) (emphasis in original) (collecting cases). Private actors can do what the government cannot: curate experiences and hold editorial control. But Florida and Texas seek to compel private websites to change their platforms, removing the social media companies' opportunity to curate information for its users.

A. Social Media Companies Have Press Rights.

The parties focus their attention on this Court's landmark decision in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). *See,* e.g.*,* Brief of Petitioners, *NetChoice v. Paxton*, 18–34 (No. 22-555, Nov. 30, 2023); Pet. For Writ of Cert., *Moody v. NetChoice*, 21 (U.S. No. 22-277 Sep. 21, 2022); Resp. to Pet. For Writ of Cert., *NetChoice v. Paxton,* 24–26 (U.S. No. 22-555, Dec. 20, 2022). *Amicus* agrees with the applicability of *Miami Herald* to this case and agrees with NetChoice's reliance on that case to combat the states' attempts to regulate the platforms.

That Twitter (now X.com) or Facebook are not traditional newspapers does not impact the press rights of social media companies. The press "includes not only newspapers, books, and magazines," but other forms of media as well. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). That's because "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938) (collecting federal and state cases). And this Court continues to resist calls that "press" is

limited to only certain speakers or certain industries like broadcasting and newspapers. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010).

The First Amendment protects the technology of mass media production, not just the institutional press like the *Miami Herald*. *See generally* Eugene Volokh, *Freedom for the Press As an Industry, or for the Press As A Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012). That is because the "First Amendment "protects more than just the individual on a soapbox and the lonely pamphleteer." *Citizens United*, 558 U.S. at 373 (Roberts, C.J., concurring) (rejecting argument that the institutional press has special status that other speakers do not). Instead, the First Amendment protects all sorts of expression, including a rejection of amplifying one message over another.

B. Editorial Control Is Not Lost Even if One Hosts a Wide Array of Viewpoints.

Choosing one's message—what to say or not to say, or with whom to associate—are at the core of the First Amendment. To be sure, the business model of social media platforms is to host a wide array of speech. But opening one's doors ought not compel a private entity to host all speech.

The concept that "the government may not compel a person to speak its own preferred messages… or to force an individual to include other ideas with his own speech that he would prefer not to include" was reaffirmed just this year. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 586–87 (2023) (collecting cases from 1969 to 2018). People have the right "to present

their message undiluted by views they did not share." *Id*. at 586. But this concept is a long-standing one. As this Court has held, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995). Indeed, editing content—choosing what to include or exclude when hosting speech—has long been recognized as a core First Amendment right. *Id*. at 570 (collecting cases). Making a parade organizer "alter the expressive content of their parade" to accommodate a wide range of viewpoints violates the First Amendment. *Id*. at 572–73.

Some commentators argue that fairness should override these First Amendment concerns. After all, the shopping mall in *PruneYard* allowed people to gather, just not solicitors, and the newspaper in *Miami Herald* was about a politician being able to rebut printed claims against him. *See PruneYard*, 447 U.S. at 76; *Miami Herald*, 418 U.S. at 243.

Indeed, the Federal Communications Commission had the Fairness Doctrine for decades, requiring equal time for controversial topics. The policy justification was that it allowed for the dissemination of a wide range of views. *See, e.g.*, *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."). Additionally, it was noted that broadcast spectrum is scarce and should be conditioned on being used for the public good. *See, e.g.*,

F.C.C. v. League of Women Voters of California, 468 U.S. 364, 375–76 (1984).

In theory, "fostering fair, balanced and diverse coverage of controversial issues [was] a good thing," but the Fairness Doctrine had a "chilling effect" as it "interject[ed] the government" into deciding which views were broadcast. *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 660–61 (D.C. Cir. 1989). As a result, the Commission abandoned the rule. *In Re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C. Rcd. 5043 (F.C.C. 1987) ("[W]e conclude that the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest"). The Doctrine "inhibited innovation, technological development, and true competition" in the market while granting government officials the power to "determine[]—directly or indirectly—what the public should hear, contrary to our most basic First Amendment principles." Statement by Mark Fowler, Chairman, Federal Communications Commission on the 50th Anniversary of the Communications Act, 37 FED. COMM. L.J. 71, 71-72 (1984).

As with the Fairness Doctrine, granting government control of the content of media harms First Amendment principles in the long term. This Court should heed Justice Brandeis' warning that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding" and therefore we should guard the most "when the government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Running a press shop is always about editorial control. After all, not everything can be included in a run of a newspaper, nor could the government demand equal access for all viewpoints. It would be wrong to require Mrs. McIntyre to distribute her flyers in opposition to raising property taxes only if she gives space on them to the school board to rebut her ideas. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). It would be wrong to require Citizens United to run its movie about Hillary Clinton only if they give her a chance at rebuttal on the Citizens United's webpage. *Citizens United*, 558 U.S. at 319–20. It would be wrong to require the parade planners to include every group that seeks to join the festivities. *Hurley*, 515 U.S. at 559. And it would be wrong to require social media companies to alter their curation of content on their websites. This Court should strike down the states' attempts to commandeer private property and violate First Amendment rights.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court rule for the NetChoice litigants.

Respectfully submitted,

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