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 DBA NETCHOICE, et al.,

Respondents.

NETCHOICE, LLC DBA NETCHOICE, et al.,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth And Eleventh Circuits

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF NETCHOICE, LLC

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QUESTIONS PRESENTED

These cases concern laws enacted by Florida and Texas to regulate major social media platforms like Facebook, YouTube, and X (formerly known as Twitter). The two laws differ in some respects, but both restrict platforms' ability to engage in content moderation by removing, editing, or arranging user-generated content; require platforms to provide individualized explanations for certain forms of content moderation; and require general disclosures about platforms' content-moderation practices. The questions presented are:

1. Whether the laws' content-moderation restrictions comply with the First Amendment.

2. Whether the laws' individualized-explanation requirements comply with the First Amendment.

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INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. Among GI's priorities is the degree to which states can protect individual rights more broadly than does the federal government. GI has often appeared, both as amicus and representing parties, in state and federal courts to address such matters. *See*, *e.g.*, *State v. Beaver*, 887 S.E.2d 610 (W. Va. 2022) (state protection of right to education); *State v. Mixton*, 478 P.3d 1227 (Ariz. 2021), *cert. denied*, 142 S. Ct. 184 (2021) (state protection of privacy rights); *Ladd v. Real Est. Comm'n*, 230 A.3d 1096 (Pa. 2020) (state protection of economic freedom); *Jackson v. Raffensperger*, 843 S.E.2d 576 (Ga. 2020) (state protection of economic freedom); *Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019) (state protection of property rights); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (state protection of free speech).

GI scholars have also published important research on the degree to which state constitutions can

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[1] Pursuant to Rule 37.6, counsel for amicus affirms that no counsel for any party authored this brief in whole or part and no person or entity, other than amicus, their members, or counsel, made a monetary contribution toward its preparation or submission.

protect rights more broadly than does the federal Constitution. *See*, *e.g.*, Christina Sandefur, *Safeguarding the Right to Try*, 49 Ariz. St. L.J. 513 (2017); Timothy Sandefur, *State Powers and the Right to Pursue Happiness*, 21 Tex. Rev. L. & Pol. 323 (2017); Nicholas C. Dranias, *50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government*, Goldwater Inst. Policy Report No. 233 (Sept. 17, 2009).[2]

GI has another, more parochial interest in this case. Like many nonprofit public interest organizations, it uses social media platforms such as Twitter, Facebook, YouTube, and Instagram, to disseminate its messages—and, like many conservative and libertarian organizations, it has suffered from what is sometimes labeled "censorship," notably by Facebook, which has more than once refused to relay messages GI has tried to post. This has proven frustrating to GI and made its mission more difficult.

Nevertheless—as discussed in this brief—GI respects that Facebook is a privately owned business and that its owners have property and speech rights. Facebook and other social media companies therefore have every right to decide how to operate—and neither GI nor any other entity has a legal or moral right to compel Facebook to convey its messages.

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[2] https://www.goldwaterinstitute.org/wp-content/uploads/2014/11/09.17.20092c-50-bright-stars-Report.pdf.

GI believes its legal experience and public expertise will assist this Court in deciding this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on one specific argument often made by advocates of the type of speech restriction at issue here: the idea that such mandates on social media platforms are merely routine instances of states implementing broader protections for individual rights than are accorded by the federal Constitution, and are consequently unobjectionable. This argument is most typically associated with this Court's opinion in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).[3]

The argument is fallacious, and to the degree that *PruneYard* endorses such a theory, that decision should be overruled. Yes, states do have power to provide greater protections for individual rights than are accorded by the federal Constitution. But they may not do so in a way that *violates* the individual rights of others—as, indeed, the California mandate in *PruneYard* itself did. By blessing laws that contradict that principle, *PruneYard* set the stage for confusion and legal inconsistency that has plagued the law ever since. In fact, *PruneYard*'s incoherence led most state courts to reject it, and even in California, where *PruneYard* was

[3] *See*, *e.g.*, the Petition for Certiorari by Florida's Attorney General in No. 22-277 at 19–20 and the Amicus Brief by Ohio, et al., in Support of the Petition in the same case at 18–19.

born, courts have limited it significantly, due to the fact that it authorizes the violation of speech and property rights, and leads to arbitrary and irrational results

Websites such as Twitter are private property, just like the shopping mall in *PruneYard* was, and the owners of these properties have both the moral and constitutional right to decide what messages they will let their property be used to propagate. To deprive property owners of these rights is both wrong and unconstitutional and cannot be rationalized either by labeling such intrusions an "expansion" of "rights"—because there can be no right to trespass on another's property for purposes of self-expression—or by recourse to the "monopoly" or "common carrier" argument endorsed by the Fifth Circuit. If Texas and Florida wish to expand the expressive rights of individuals, they may do so—but only in a manner that respects the property rights of social media website owners.

ARGUMENT

I. State constitutional autonomy does not authorize the violation of individual rights.

It is a commonplace that states may provide greater protections for individual rights (or for different rights) than are provided by the federal Constitution. *See*, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("nothing in our opinion precludes any State from placing further restrictions on its exercise

of the takings power."); *California v. Ramos*, 463 U.S. 992, 1013–14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). What states may not do is violate the rights of some in order to "expand" the rights of others. This is true as a matter both of first principles and constitutional law.

A. First principles: all actual rights are compossible.

One basic axiom of individual rights is that these rights must be "compossible," meaning it must be logically possible for different people to exercise their rights without coming into logical conflict. *See generally* Hillel Steiner, *The Structure of a Set of Compossible Rights*, 74 J. Phil. 767 (1977). The logic is simple: a person can be said to have a right to do *X* only if her *X*-ing is permissible and *inviolable*—which is another way of saying that if someone blocks her from *X*-ing, that obstruction must constitute a violation of her rights. A system of rights whereby her right to do *X* can be abrogated by another at will is not actually a system of rights at all: under those circumstances, she cannot be sensibly described as having a right to *X* in the first place.

Thus if she has a right to *X*—and someone else simultaneously claims to have the right to stop her from *X*-ing, there must be a logical contradiction somewhere—that is, the purported rights are not

compossible. *Id.* at 767–68. That incompatibility means any judge who must decide between them "will, in considering his verdict, be bound to conclude that at least one of these two claimed rights is invalid." *Id.* at 768. This is the logic behind the old saying that one person's right to swing his fist ends where another person's nose begins. Were it otherwise, the entire system of rights would be incoherent.

This compossibility requirement is really just a manifestation of the more fundamental principle that "all men are created equal." Declaration of Independence, 1 Stat. 1 (1776). That basic equality (that is, equality of each person's self-ownership) means no person has a fundamental right to rule others or dictate their actions. And since every person has the same rights (whether to property, free speech, or any other rights), then the rights of each must be compossible *if people have any rights at all*. In the words of philosophers Douglas Den Uyl & Douglas Rasmussen, the fact that "each person [has] a sphere of freedom—a 'moral space' or 'moral territory'—whereby self-directed activities can be exercised without being invaded by others" means the freedom each person enjoys "must be . . . compossible," which is to say the "exercise of self-directed activity by one person must not . . . diminish that of another. . . . [A] theory of individual rights that protects persons' self-direction can be used to create a political/legal order that will not necessarily require that the flourishing of any person or group be sacrificed to any other." *Norms of Liberty* 90 (2010).

This principle of compossibility is "deeply rooted in this Nation's history and tradition." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (citation omitted). In fact, it is nothing more than the age-old principle of *sic utere*, which was ancient even in the Founding Fathers' day. *See*, *e.g.*, *Morgan v. Banta*, 4 Ky. 579, 582 (App. 1809) ("The law holds the property of every one equally sacred, and no reason can be assigned, why the rights of one citizen should be made to yield to those of another. To require it, would be a direct violation of the maxims of social justice, the rule in such case being 'sic utere. . . .' "). Thomas Jefferson even defined the word "liberty" by reference to the compossibility rule when he said it means "unobstructed action according to our will, *within limits drawn around us by the equal rights of others*." Letter to Isaac Tiffany, Apr. 4, 1819, *in Thomas Jefferson: Political Writings* 224 (Joyce Appleby & Terence Ball, eds., 1999) (emphasis added).[4] Indeed, this compossibility rule is the very reason why we *have* the "other" rights to which the Ninth Amendment refers: people can have such unspecified rights because, and only because, they are morally free to act in *whatever* way is compossible with the rights of others. *See* Randy E. Barnett, *The Structure of Liberty* 92 (2d ed. 2014) ("In a perfectly compossible set of rights, every right could

[4] He continued: "I do not add 'within the limits of the law' because law is often but the tyrant's will and always so when it violates the right of an individual." *Id.*

be exercised according to its terms without any right in the set conflicting with any other.").

But the compossibility requirement is not a mere tradition, or a matter of subjective preference, or just "the American way." It is inherent in the logical structure of *any* system of individual rights—meaning that it's "implicit in the concept of ordered liberty." *Dobbs*, 142 S. Ct. at 2242 (citation omitted). Any purported system of individual rights that disregarded the compossibility requirement would collapse, and the individual's right to do *X* would cease to be a right—meaning, it would cease to accomplish what rights are supposed to accomplish, namely, securing the individual against coercive intrusion into her choice to *X*. If the compossibility requirement were abolished, the right to *X* would become a mere *permission* to *X*, revokable at the government's discretion. As philosopher Tom G. Palmer explains:

> If a theory of rights generates incompossible claims to act legitimately . . . that theory generates contradictions as fatal to it as are logical contradictions to a system of mathematics. It is in the nature of "right" that two mutually incompatible actions cannot both be "right"; they may be understandable, or virtuous, or even noble, but both cannot be right and just at the same time and in the same respect. . . . Justice is about which acts are permissible or obligatory and which are not, and rights are the signposts that tell individuals how they may and may not act. Incompossible rights

> give contradictory information; they are like signposts for "North" that point in the opposite direction.

Tom G. Palmer, *Saving Rights Theory from its Friends, in* Tibor R. Machan, ed., *Individual Rights Reconsidered: Are the Truths of the U.S. Declaration of Independence Lasting?* 81–82 (2001).

None of this is to say that rights can be understood without context, or that there are not sophisticated mechanisms whereby people's rights can overlap in ways that might create the illusion of violating the compossibility requirement.[5] But rights cannot *actually* violate the compossibility rule without also violating the law of non-contradiction. Thus it is simply not true—as it is sometimes claimed—that people's rights come into conflict, and that the political or legal process resolves these conflicts by prioritizing one right over the other for society's sake. While people certainly do have competing rights *claims*, they do not, and logically cannot, have conflicting *rights*. And the problem with the notion that the state can give one person a right which contradicts the right of another person—which we will call "the *PruneYard* principle"—is precisely that it results, not in the expansion of rights, but

[5] An easement is a good example of a legal device that might at first look like one person's right overriding another's—but an easement does not violate the compossibility requirement because there's nothing logically contradictory about one person owning the fee, but subject to a rule that she must let another cross the land.

in the violation of rights, and ultimately the undermining of all rights *per se*.

B. The *PruneYard* principle violates the compossibility requirement—which is why most courts have rejected it.

The *PruneYard* principle violates the compossibility rule, and therefore ends up actually violating constitutionally protected individual rights. A rights system that obeys the compossibility rule is not a zero-sum game in which some people acquire rights only at the expense of others. But the *PruneYard* principle rests implicitly on a zero-sum notion of individual rights: that the state can give one class of people (e.g., speakers) a "right" that consists in the violation of others' rights (e.g., property owners). The result of such a view of rights is that it treats rights as the prize in the political game, rather than as preconditions *of* the political game. Yet as this Court has said, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . . [These include] property [and] free speech." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

In *PruneYard*, this Court affirmed a California Supreme Court decision which concerned a privately owned shopping center whose owner sought to bar a group of petition circulators from gathering signatures on a petition relating to a United Nations resolution about Syria. The petitioners sued in state court, and

the California Supreme Court held that that state's constitutional guarantee of free speech, being more broadly worded than the federal First Amendment, entitled the petitioners to enter someone else's land to express themselves against the owners' will. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979). It reached that conclusion on the theory that shopping malls had become the modern equivalent of the public square or the community at large. *Id.* On appeal, this Court found that the ruling did not deprive the owner of his federal property or speech rights. *PruneYard*, 447 U.S. at 82–85, 87–88.

But both opinions in *PruneYard* were deeply flawed, and to the extent that they might apply to this case, the Court should overrule its *PruneYard* decision.

In fact, the California Supreme Court's reasoning was incoherent from the outset, was rejected by most later courts to consider the issue, and has since been drastically narrowed even in California.

Even in the *PruneYard* decision itself, the California Supreme Court, dimly recognizing the unworkability of the idea that one person could have a constitutional right to trespass on another person's constitutionally protected private property, sought to cushion its decision by insisting it was not giving "free rein" to all speakers. 592 P.2d at 347. Instead, it claimed that this purported right-to-trespass was limited to only the "reasonably exercised" right to circulate petitions for ballot initiatives, because initiatives are part of the California political system. *Id.* at 347,

345. Note that this purported distinction is a content-based speech distinction: it grants a trespass right to some speakers and not to others based on the content of the messages being communicated. Nor did the court give any clue what "reasonably exercised" meant.

The court also said that this right-to-trespass would not apply to "modest retail establishment[s]," *id.* at 347, although it gave no guidance as to how to differentiate "modest" from not-so-modest establishments, or why retail should be treated differently from wholesale. *See Bank of Stockton v. Church of Soldiers*, 52 Cal. Rptr.2d 429, 433 (App. 1996) (noting that the state supreme court "has never elaborated on" what this category means). And although the court claimed that its rule would not require mall owners to submit to trespasses that "interfere with normal business operations," 592 P.2d at 347–48, it later said that *PruneYard* requires "a privately owned shopping center [to] permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests." *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 750 (Cal. 2007).[6] That was because the court thought those particular speakers had "a strengthened interest" in their speech. *Id.*

In other words, California courts have struggled ever since *PruneYard* to draw the lines between the rights of property owners and the right-to-trespass

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[6] The *Fashion Valley Mall* case, of course, antedates this Court's decision in *Cedar Point Nursery*.

that *PruneYard* authorized. In *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr.2d 442 (App. 1999), for example, the court was forced to decide whether Trader Joe's—a chain of stores, each of which is relatively small—was a "'behemoth' shopping center," *id.* at 444, as the plaintiffs claimed, or a "modest" establishment. It ultimately chose the latter, after consulting such factors as the square footage of the store, the number of shopping carts in the parking lot, and the fact that it had no cinema, as the mall in *PruneYard* did. Yet other California courts have said that quite large facilities, such as a two-story medical office with a pharmacy and a sizeable parking lot, are also "modest," and thus exempt from the *PuneYard* principle. *See Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr.2d 189 (App. 1995).

The California Supreme Court felt compelled to hedge its *PruneYard* opinion with such (vague and permeable) boundaries precisely because it recognized that, taken to its logical conclusion, the idea that one person has a constitutional right to express himself on another's property would mean the elimination of property rights entirely. But the ambiguity of these purported limits on *PruneYard*'s right-to-trespass obviously rendered such limits inadequate—as witness the constant struggles by California's own courts to decide when property owners do and don't have the right to exclude.[7]

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[7] Recall that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as

This makes it unsurprising that most states rejected the California Supreme Court's attempt to create what the Washington Supreme Court called "*an entirely new kind* of free speech right—one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals." *Southcenter Joint Venture v. Nat'l Democratic Pol'y Comm.*, 780 P.2d 1282, 1286 (Wash. 1989) (emphasis in original).

Indeed, along with Washington, states that have refused to follow California in making constitutional speech rights into a sword against private property owners include Alaska,[8] Arizona,[9] Connecticut,[10] Georgia,[11]

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property." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (citation omitted). The *Cedar Point* ruling, incidentally, reversed a Ninth Circuit ruling which upheld a right-to-trespass based on the *PruneYard* principle. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 531–32 (9th Cir. 2019).

[8] *Fardig v. Mun. of Anchorage*, 785 P.2d 911, 915 (Alaska App. 1990).

[9] *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723 (Ariz. App. 1988).

[10] *Cologne v. Westfarms Assocs*., 469 A.2d 1201, 1208–10 (Conn. 1984); *see also United Food & Com. Workers Union v. Crystal Mall Assoc., L.P*., 852 A.2d 659 (Conn. 2004).

[11] *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., L.P.*, 392 S.E.2d 8, 10 (Ga. 1990).

Hawai'i,[12] Illinois,[13] Iowa,[14] Michigan,[15] Nevada,[16] New York,[17] North Carolina,[18] Pennsylvania,[19] South Carolina,[20] Texas,[21] and Wisconsin.[22] The reasons they have given are precisely the problems that arise from disregarding the compossibility requirement for rights.

The Pennsylvania Supreme Court, for example, remarked that to view free speech as entitling a person to use or enter the property of another for expressive purposes would not only "deprive individuals of important rights of freedom"—specifically, depriving property owners of their right to express themselves by excluding those they disagree with—but would also make "significant governmental intrusion into private individuals' affairs and relations [more] . . . likely to

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[12] *State v. Viglielmo*, 95 P.3d 952 (Haw. 2004).

[13] *People v. DiGuida*, 604 N.E.2d 336, 346–47 (Ill. 1992).

[14] *City of W. Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002).

[15] *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 358 (Mich. 1985).

[16] *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 250–51 (Nev. 2001).

[17] *SHAD All. v. Smith Haven Mall*, 488 N.E.2d 1211, 1215–16 (N.Y. 1985).

[18] *State v. Felmet*, 273 S.E.2d 708 (N.C. 1981).

[19] *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1338 (Pa. 1986).

[20] *Charleston Joint Venture v. McPherson*, 417 S.E.2d 544, 548 n.7 (S.C. 1992).

[21] *Zarsky v. State*, 827 S.W.2d 408, 411–12 (Tex. App. 1992).

[22] *Jacobs v. Major*, 407 N.W.2d 832, 842 (Wis. 1987).

routinely occur." *Conn. Gen. Life Ins. Co.*, 515 A.2d at 1335.

The Connecticut Supreme Court observed that the *PruneYard* principle was so unworkable that it forced courts to distinguish between different kinds of property, such as "modest" stores and "large" ones, and to apply different rules to both—whereas "[w]e are unable . . . to discern any legal basis distinguishing this commercial complex from other places where large numbers of people congregate, affording superior opportunities for political solicitation, such as sport stadiums, convention halls, theatres, country fairs, large office or apartment buildings, factories, supermarkets or department stores." *Cologne*, 469 A.2d at 1209.

It obviously violates the private property rights of a landowner to compel her against her will to let another onto her land to speak. *See*, *e.g, Cedar Point Nursery*, 141 S. Ct. at 2078–80. Labeling such a trespass a "speech right" under the state Constitution does not change this; the purported right to trespass at issue in *Cedar Point* was also granted by state law. Also, when such a trespass goes uncompensated, it constitutes a type of compelled subsidy from the owner to the speaker—in the form of the absent just compensation—which is also unconstitutional. *See*, *e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018).

These problems are, of course, the same that would arise from any effort to employ the *PruneYard* principle in this case. It violates the property rights of social media companies to force them to let people use

their platforms to communicate messages that these property owners do not wish to propagate. It's a kind of trespass, and a kind of compelled subsidy. Were the Court to entertain such an idea, it would be confronted with the same kind of unwieldy line-drawing problems that California courts were forced to deal with in the wake of *PruneYard*: what kinds of messages are worthy of entitling a speaker to override these property rights? What kinds of social media companies are big enough to be stripped of their property rights in this way—and which are the equivalent of "modest retail establishment[s]"? 592 P.2d at 347.

It turns out that these and similar problems are so intractable that California courts have struggled to interpret and to limit *PruneYard*. In *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797 (Cal. 2001), a plurality of the California Supreme Court held that *PruneYard* did *not* entitle a tenants' association to distribute its newsletter in a privately owned apartment complex[23]—and in the process, it criticized and limited the *PruneYard* decision. Noting that *PruneYard* had been "less than clear" about what kinds of speech would entitle a speaker to trespass, or what kinds of property could be trespassed upon, *id.* at 801, it set out to "rectify[]" the errors of *PruneYard*. *Id.* at 809. *See also Fashion Valley Mall*, 172 P.3d at 757

[23] *But see Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n*, 688 A.2d 108 (N.J. App. Div. 1996) (holding, based on *PruneYard* principle, that outside political solicitors have right to express themselves in a residential complex against owner's wishes).

(Chin, J., dissenting) ("*PruneYard* was controversial when decided. In the three decades since then, it has received scant support and overwhelming rejection around the country." (citations omitted)).

Most significantly, *Golden Gateway* recognized that interpreting one person's speech rights as permitting trespass on the land of another undermines "private autonomy" and "'den[ies] to individuals the freedom to make certain choices'"—specifically, the right of property owners to say no to speakers of whose messages or conduct they disapprove. 29 P.3d at 808 (quoting Laurence Tribe, *American Constitutional Law* 1691 (2d ed. 1988)).

The pivotal point in *PruneYard*'s reasoning, said the *Golden Gateway* plurality, lay in its assertion that a shopping mall was the "functional equivalen[t]" of a public area or forum due to "the public's unrestricted access to the privately owned property." *Id*. at 809. Where a property owner "limits access," by contrast, the *PruneYard* principle could not apply. *Id.* at 810.[24]

Consequently, in *Albertson's, Inc. v. Young*, 131 Cal. Rptr.2d 721 (App. 2003), the state court of appeal refused to extend the *PruneYard* principle to a group of

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[24] The court was also careful to reject the *PruneYard* decisions' claim that government involvement in restricting access—through an injunction, for example—could not qualify as the kind of state action triggering the First Amendment or other constitutional provisions: "[that] would effectively eviscerate the state action requirement because private property owners, for the most part, enforce their property rights through court actions." *Id*. at 811.

petition circulators who stood at entrances to a grocery store. In the process, it remarked on the vagueness of the multi-factor "balancing" that the *PruneYard* principle requires: "in balancing the competing interest of the owner and society," it observed, "no single factor is determinative." *Id.* at 731–32. Instead, "[t]he extent to which private property is actually used for expressive purposes by members of the public is relevant, together with all of the surrounding circumstances." *Id*. at 737. But as the number of factors to be considered increases, the subjectivity and unpredictability of the law increases, too. *See* Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989) ("at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law").

In sum, the *PruneYard* principle generates so many problems, particularly of vagueness, that it invites—even requires—judicial policymaking. It requires courts to decide what speech is important enough (in the court's eyes) to entitle speakers to trespass, what kinds of property are valuable enough (in the court's eyes) to entitle owners to exercise the right to exclude, and to weigh these factors in light of the court's own views of public policy. These and other problems arise from the fundamental flaw in the *PruneYard* principle: its violation of the compossibility requirement. As Justice Chin observed in calling for the overruling of that case, "free speech rights and

private property rights can and should coexist." *Fashion Valley Mall*, 172 P.3d at 760 (Chin, J., dissenting).

They *can* coexist by following the compossibility requirement: speakers have a right to speak, but *not* on the property of another. In the case of real property, would-be speakers wishing to express themselves "simply [have] to do so on public property or seek permission from private property owners." *Id.* Or, of course, they can use their own property. **In the case of social media, those wishing to express themselves can do so on their own websites, blogs, etc.—and there is no shortage of those.** Indeed, the political entities who demanded the Texas and Florida legislation at issue here have plenty of alternatives, such as Truth Social, GETTR, Gab, MeWe, YouTube, Substack, Rumble, CloutHub, Frank Social, etc.,[25] not to mention SMS marketing, which enables these entities to fundraise or spread the word by text message. Radio, television, and old-fashioned direct mail also still remain viable options.

The *PruneYard* principle has many other fatal objections. As Gregory Sisk observed in an especially cogent analysis, the result of blurring the state action doctrine by interpreting constitutional rights as applicable to private as well as public actors is typically to

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[25] Until recently, the Parler app also offered an alternative. It shut down earlier this year on the grounds that "a Twitter clone just for conservatives is [not] a viable business." *See* Statement by Starboard, Apr. 14, 2023, https://web.archive.org/web/20230414115057/https://parler.com/. If that's true, then the market—and the marketplace of ideas—has spoken.

dilute the nature of the right. *Uprooting the Prune-Yard*, 38 Rutgers L.J. 1145, 1202 (2007). Because courts will anticipate that the speech doctrines they develop must also apply to private parties, they will tend to shape such doctrines in accordance with the needs of those private parties—yet these differ from the considerations that should apply to the government. For example, courts typically don't "elevate efficiency and order, much less good etiquette, above liberty in the constitutional hierarchy of values," but they might do so if they know that their precedents will govern private as well as public entities. *Id*. at 1203.

The result would be to embed these considerations in speech jurisprudence in ways that "infect judicial evaluation of the *public* sphere," too. *Id*. (emphasis added). That would *weaken* free speech protections *vis-à-vis* the government: if free speech obligations are imposed on property owners, Sisk concludes, courts would begin "to allow regulation of speech on the basis of its content," and it would then "be difficult to securely shut that splintered door when governmental agents later seek to constrain expression based upon its potential for offense and outrage." *Id*. at 1204–05.

C. This Court's *PruneYard* decision was also wrong and should not be followed here.

When the California Supreme Court's *PruneYard* decision was appealed, this Court upheld it, 447 U.S. 74, despite having reached an almost exactly contrary

conclusion eight years earlier, in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Lloyd Corp*. said the First Amendment does not entitle "a trespasser or an uninvited guest [to] exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Id*. at 568. It rejected the argument that a shopping mall is the functional equivalent of the town square, noting that there was no analogy to the "company town" in *Marsh v. Alabama*, 326 U.S. 501 (1946), because there, the private owner "was performing the full spectrum of municipal powers and stood in the shoes of the State," whereas shopping mall owners—and here, social media companies—do nothing of the sort. *Lloyd Corp.*, 407 U.S. at 569. They don't purport to exercise anything like sovereignty, are not organizing an entire community, or regulating land use, or operating social or educational services: they're simply running social media companies—and competing against many other social media companies.

Lloyd Corp. observed that private property doesn't "lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* Just because the public is invited to shop does not make a private store or group of stores into a public park. "Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large." *Id.* And, emphasizing the compossibility rule, the Court concluded that "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens,

must be respected and protected." *Id.* at 570. The Constitution's authors "certainly did not think" that speech and property rights "are incompatible. . . . There may be situations where . . . the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear." *Id*. at 570.

The same is true here: a social media company does not become a public utility simply by virtue of inviting the public to download its app and use it for designated purposes—and size alone cannot transform its essentially private character into the functional equivalent of the government. The compossibility rule must govern—and the Texas and Florida laws viewed as intrusions on these companies' private property rights.

PruneYard did not purport to overrule *Lloyd Corp*., or even limit it. Instead, it said the *Lloyd Corp*. decision did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." 447 U.S. at 81. **This was the full extent of its effort to reconcile its ruling with *Lloyd Corp*.** Instead, it moved on to discuss whether granting speakers a right to take access to the land was a compensable taking. *Id.* at 81–85. It said no, because this right to take access did not "unreasonably impair the value or use of [the] property." *Id*. at 83.

That takings analysis was plainly incorrect, and has since been superseded. When, two years later, the Court held in *Loretto v. Teleprompter Manhattan*

CATV Corp., 458 U.S. 419 (1982), that being forced to install a one-inch cable on an apartment building was a *per se* compensable taking, it tried to distinguish *PruneYard* by saying that *Loretto* involved a permanent taking, and *PruneYard* only a temporary one. But in *Cedar Point Nursery*, this Court made clear that when the state gives a speaker even a temporary "right to take access" to another person's property, it *does* commit a compensable taking. 141 S. Ct. at 2075.[26]

What's more, the expressive rights of the mall's owner went largely ignored in *PruneYard*, as this Court later acknowledged in *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 12 (1986): "Notably absent from *PruneYard* was any concern that access to [the mall] might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets [being distributed]." Here, by contrast, the social media companies obviously do object to the messages the Texas and Florida laws compel them to disseminate.

Just as important, *PruneYard* simply assumed the legitimacy of the proposition that a shopping mall constitutes a public area. Yet as Professor Sisk notes, malls lack virtually *any* of the indicia of public

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[26] To be precise, *PruneYard* erred in applying the *Penn Central* regulatory takings test—when, as *Cedar Point Nursery* observed, a mandated trespass is not a regulatory taking, but a "*physical* taking," *id.* at 2072 (emphasis added), which means the "flexible test developed in *Penn Central*" is not applicable. *Id.*; *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015).

commons. *See supra* at 1190. A mall has no "government-owned and constructed edifice at [its] heart," and is funded by "the patronage of customers," rather than tax dollars. *Id.* Mall owners must pay taxes on their land, hire their own employees to provide security and maintain the premises; must pay for insurance out of their own pockets—and risk liability "if patrons are injured by disruptive activists." *Id.* at 1191. The public is not invited to do what they please on the land; "'[i]ndeed, most shopping malls do not allow people even to walk their dogs there.'" *Id.* (quoting *New Jersey Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 794 (N.J. 1994) (Garibaldi, J., dissenting)). Malls close and exclude the general public at the end of every business day, something public streets don't do. Sisk, *supra* at 1191.

But these points also underscore the disanalogy between the social media companies here and a "public square" or common carrier. These companies don't purport to substitute for public spaces or broadcasters. They are—and are known by consumers to be—entirely private entities, providing their own distinct services and experiences in a highly competitive environment.

In sum, this Court's ruling in *PruneYard* makes no more sense than did the California Supreme Court's decision. It failed to address the central issue—whether private property becomes public just because people shop there—and its takings analysis is obsolete. Most importantly, it disregards the compossibility requirement and the rights of property owners who

should be free to exclude expressive trespassers. It remains in place only because its vagueness makes it malleable enough to be distinguished by subsequent cases. It does not apply here—and if it does, it should be overruled.

II. State power to expand protections for individual rights cannot warrant violating individual rights.

States certainly can provide greater protections for rights than are accorded by the federal Constitution. The framers understood that "[i]n the compound republic of America," power would be divided between the state and federal governments in a way that provided "a double security . . . to the rights of the people." *The Federalist* No. 51 at 351 (J. Cooke, ed., 1961) (James Madison).

This principle of federalism is sometimes confused with the principle of "states rights." The distinction is that federalism is oriented around protecting individual rights—whereas "states rights" is organized around protecting the states' "attributes of sovereignty." *Id.* No. 45 at 309 (James Madison). Genuine *federalism* willingly "sacrifice[s]" the "sovereignty of the States" to the protection of individual rights. *Id.*

That's why arguments such as that made by Amicus Freedom X (in support of Petition for Cert. in No. 22-277) are so misguided. It might be true that "[t]he marketplace of ideas benefits from more vendors rather than fewer," *id.* at 7, but the freedom to speak

includes the freedom *not* to speak or be associated with the speech of others, *Public Utilities Commission of California*, 475 U.S. at 11 (plurality opinion), and the freedom *not* to be forced to subsidize others' speech. *Janus*, 138 S. Ct. at 2464. These cannot be overridden in order to "benefit" the "marketplace of ideas." No doubt the marketplace for goods and services would also "benefit" from more people engaging in commerce, but that doesn't warrant forcing people to engage in commerce, *cf. NFIB v. Sebelius*, 567 U.S. 519, 660 (2012) (joint dissent), or condemning every Motel 6 to build a Ritz-Carlton. *Cf. Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).

Likewise, alleged benefits to the "marketplace of ideas" cannot justify depriving the owners of social media companies of their speech and property rights by forcing them to convey messages they disagree with—especially when those wishing to speak have plenty of alternatives. Simply put, "the State cannot advance some points of view by burdening the expression of others." *Pub. Utilities Comm'n of Cal.*, 475 U.S. at 20 (plurality opinion). Whatever wisdom there may be in seeking "'more speech' over silence," Amicus Br. of Freedom X at 7, it cannot warrant compelling speech, or the subsidization of speech, or imposing an uncompensated "right to take access" such as the Florida and Texas laws do. *Cf. Cedar Point Nursery*, 141 S. Ct. at 2075.

What Freedom X calls "enabling" speech—at the expense of property owners' rights—is not federalism, because it is not the protection of individual rights.

Rather, it's *factionalism*: "a number of citizens . . . actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens," *The Federalist* No. 10, *supra* at 57 (James Madison), have obtained legislation that in effect confiscates the property of the social media companies in a manner analogous to the right-to-trespass at issue in *Cedar Point Nursery*, 141 S. Ct. at 2075, or the compelled access at issue in *Pub. Utilities Comm'n of California*, 475 U.S. at 9 (plurality opinion). The correct constitutional inquiry is not whether some law will or will not "result in less net speech," Amicus Br. of Freedom X at 9 (emphasis removed)—which, after all, is a policy question, not a legal one. It's whether that law deprives the social media companies of their property rights and freedom of speech. These laws do.

CONCLUSION

The Florida and Texas laws are *unconstitutional*.

Respectfully submitted,

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