No. 22-277

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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INTRODUCTION

The rise of internet platforms as "the modern public square," *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), has brought with it new challenges. Americans increasingly discuss the issues of the day, buy and sell their goods, communicate with their friends, and debate with their elected representatives online. But that has given internet platforms enormous power over public discourse.

In 2021, Florida adopted a first-in-the-nation law aimed at preventing the platforms from misusing that power. The law, Senate Bill 7072, requires them to notify users of their content-moderation standards and apply them consistently; restricts them from silencing the voices of journalistic enterprises and candidates for public office; and requires them to disclose and explain their reasons for censoring a user.

Respondents are trade associations who represent internet platforms. They bring a facial constitutional challenge to those provisions. But their submission is not aimed only at Florida's law. They contend that any government regulation of the presentation of user speech on their websites is a direct regulation of their own speech and thus is presumptively unconstitutional. That argument, if accepted, threatens to neuter the authority of the people's representatives to prevent the platforms from abusing their power over the channels of discourse.

The platforms' argument rests on a false premise: that what appears on the platforms is their expression. The platforms make their money not from speaking themselves, but from attracting billions to their platforms to speak. Almost anyone can log onto them

and post virtually any content they want. So the content the platforms host is of unimaginable vastness and variety. The experience on the platforms is also user-driven. Users choose what to post, what to view, whom to "follow," and what to "like." For instance, weightlifting enthusiasts, but few others, seek out and follow other such enthusiasts and weightlifting content; and the platforms' algorithms will deliver them more of the same. The result is a crazy-quilt mass of material that is worlds apart from what a newspaper does when it develops its own top-down unified speech product and publishes it.

In hosting billions of speakers and petabytes of content, the platforms are engaged in business activity—conduct—that may be regulated in the public interest. The First Amendment does not afford those who host third-party speech a right to silence the hosted speakers or to treat them arbitrarily. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980); *Rumsfeld v. F. for Acad. & Institutional Rts.* ("*FAIR*"), 547 U.S. 47, 62–65 (2006). The telephone company, internet service provider, and delivery company can all be prevented from squelching or discriminating against the speech they carry. And so can the platforms.

The essential function of Florida's law is no different. The Court should reverse.

STATEMENT

I. The platforms

Respondents are trade associations who represent internet platforms that host user-generated content. Some are social-networking platforms, such as Facebook, X, and YouTube, but they include other

platforms as well, like the e-commerce platforms Etsy and eBay, and the ride-sharing companies Uber and Lyft. JA 66, 96.

"[A]lmost anyone can create an account and post content" on social-networking platforms. JA 72. That posting occurs "free of charge and without much (if any) advance screening" by the platforms. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023). Users choose the content they wish to communicate through posting messages, photos, and videos. *Id.* Besides posting, they can directly message and, on some platforms, make audio or video calls to other users.[1] Users may also arrange what they see on the platforms through, for example, searching for content or "following" other users. JA 129. Some platforms use algorithms—sets of rules—that organize the content users see. The results of that process, sometimes called "recommendations" or "post-prioritization," tend to be unique to each user, as they are based on each user's revealed preferences. The algorithms "match[] any content . . . with any user who is more likely to view that content." *Twitter*, 598 U.S. at 499. That is because many platforms make their money selling advertisements. *Id.* at 480.

Because the platforms generally hold themselves out as open to all and host vast amounts of content, they caution that they do not endorse and are not responsible for that content. JA 171, 186, 196–97. YouTube tells users: "Content is the responsibility of

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[1] *See, e.g.*, About Direct Messages, X, http://tinyurl.com/2cy7sc89 (last visited Jan. 15, 2024); Audio and Video Calls, Facebook, http://tinyurl.com/48kzuj9c (last visited Jan. 15, 2024).

the person or entity that" posts it.[2] X tells them: "All Content is the sole responsibility of the person who originated such Content. [X] may not monitor or control the Content posted via [X]."[3] And so on.

Internet platforms have become a dominant forum for public discourse on everything from politics to art, cooking to pop culture, and sports to product reviews. Around 302 million Americans use social-networking platforms,[4] averaging 2 hours and 24 minutes daily.[5] A significant and growing share of sales transactions also now occur on the platforms.[6]

Some platforms have achieved that power in part by representing that they are neutral forums for speech. As Facebook stated in 2014: "We try to explicitly view ourselves as not editors . . . . We don't want to have editorial judgment over the content [of users]."[7] When it was still named Twitter, X famously proclaimed itself in 2012 to be "the free speech wing

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[2] Terms of Service, YouTube (Dec. 15, 2023), http://tinyurl.com/4zdvu45v.

[3] Terms of Service, X (Sept. 29, 2023), https://twitter.com/en/tos.

[4] *See* Rohit Shewale, *Social Media Users and Statistics in 2024*, DemandSage (Jan. 9, 2024), http://tinyurl.com/mntaxtjc.

[5] *See* Social Media Statistics Details, University of Maine, https://tinyurl.com/ypmx7f7d (last visited Jan. 15, 2024).

[6] *See* Pamela N. Danziger, *Social Commerce is a $1.2 Trillion Opportunity and the Next Global Shopping Revolution*, Forbes (Jan. 27, 2022), tiny.cc/llczvz.

[7] Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. Times (Oct. 26, 2014), https://tinyurl.com/3mcan85z.

of the free speech party."[8] YouTube likewise guarantees that its platform exists for users "to express their ideas and opinions freely" and that it hosts "a broad range of perspectives . . . even if [it] disagree[s] with some."[9] And time and again, the platforms have invoked the immunity afforded by 47 U.S.C. § 230—the legal foundation of their growth in the last two decades—to assure the public and courts that they are mere conduits of their users' speech rather than "the publisher or speaker of any information provided by" users. 47 U.S.C. § 230(c)(1); *see* No. 22-555 Pet. App. 51a–52a & n.20.

The platforms also espouse consistency in applying their content-moderation standards. X promises users that it will remove only content that violates one of X's written standards, which apply equally to all,[10] while Facebook states that its rules apply "to everyone, all around the world, and to all types of content."[11]

The platforms have not lived up to those promises. An internal review at Meta, which owns Facebook, revealed that the company engaged in "pervasive" "favoritism," applying its community standards to some

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[8] Josh Halliday, *Twitter's Tony Wang: 'We are the free speech wing of the free speech party'*, Guardian (Mar. 22, 2012), https://tinyurl.com/57hduf2r.

[9] Rules and Policies, YouTube, http://tinyurl.com/2xbmpa87 (last visited Jan. 15, 2024).

[10] Debunking X Myths, X Help Center, http://tinyurl.com/2329vjaz (last visited Jan. 15, 2024).

[11] Facebook Community Standards, Meta, http://tinyurl.com/4jtkxpdm (last visited Jan. 15, 2024).

users while exempting others.[12] For example, it secretly exempted many elected officials from its content policies while enforcing the policies against their political opponents, "effectively granting incumbents in elections an advantage over challengers."[13] In August 2020, Facebook shut down the pages of "numerous antifascist, anti-capitalist news, organizing, and information sites." 11th Cir. Doc. 26-5, App. 944. Throughout the COVID-19 pandemic, platforms limited access to information about the origin of the virus. 11th Cir. Doc. 26-4, App. 904; 11th Cir. Doc. 26-7, App. 1451. Less than a month before the 2020 presidential election, X removed a *New York Post* article about Hunter Biden's abandoned laptop and then barred the *Post* from accessing its account for two weeks. Pet. App. 125a–126a. In May 2020, Facebook censored and demonetized *The Babylon Bee*, a Florida-based media company, for posting a Monty Python joke about a U.S. Senator. Pet. App. 109a–110a.

And as other litigation has revealed, the platforms have colluded with the federal government to limit the reach of viewpoints the government does not like.[14] That included satire about the President's family, content "discussing the choice to vaccinate in terms of personal or civil liberties," and expressions of "mistrust in institutions"—even though, by the platforms'

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[12] Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, Wall St. J. (Sept. 13, 2021), http://tinyurl.com/53x7xsmx.

[13] *Id.*

[14] *Missouri v. Biden*, — F. Supp. 3d —, 2023 WL 4335270, at *8 (W.D. La. 2023), *aff'd in part, rev'd in part*, 83 F.4th 350 (5th Cir. 2023), *cert. granted sub nom. Murthy v. Missouri*, 144 S. Ct. 7 (2023).

own admissions, much of that content adhered to their community standards.[15]

II. S.B. 7072

In 2021, Florida enacted S.B. 7072 to combat those abuses. The law applies to an internet platform that does "business in the state" and has either "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants globally." Fla. Stat. § 501.2041(1)(g).[16] It imposes on such a platform three types of transparency and speech-promoting protections: neutrality provisions, hosting provisions, and disclosure obligations.

Neutrality provisions. The law requires that whatever standards a covered platform uses for taking down content, it must apply them consistently. It provides that a covered platform "must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." *Id.* § 501.2041(2)(b). To protect against evasion of that requirement through constantly shifting standards, the law also prevents a covered platform from changing its "rules, terms, and agreements . . . more than once every 30 days." *Id.* § 501.2041(2)(c). Finally, a covered platform must allow users to "opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content." *Id.* § 501.2041(2)(f).

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[15] *Missouri*, 2023 WL 4335270, at *5, *8, *12.

[16] Covered platforms include not only social-networking platforms, but also any that "enable[] computer access by multiple users to a computer server" and that also satisfy either the user or revenue threshold. Fla. Stat. § 501.2041(1)(g)1.

Hosting provisions. The hosting provisions require a covered platform to host certain speakers. Section 501.2041(2)(h) directs that a platform may not "deplatform a candidate"[17] for public office and may not "shadow-ban"[18] or apply "post-prioritization algorithms"[19] to "content and material posted by or about a user who is known by the [covered] platform to be a candidate." *Id.* §§ 106.072(2), 501.2041(2)(h). And the law provides that a platform may not "censor, deplatform, or shadow ban" a "journalistic enterprise" "based on the content of its publication or broadcast." *Id.* § 501.2041(2)(j); *see id.* § 501.2041(1)(d) (defining "journalistic enterprise").

Disclosure obligations. Finally, the law imposes general-disclosure requirements. Those require a covered platform to, among other things, "publish the standards" it employs "for determining how to censor," "deplatform," and "shadow ban" its users, Fla. Stat. § 501.2041(2)(a), and to "inform each user about any changes to its user rules, terms, and agreements" in advance, *id.* § 501.2041(2)(c).[20]

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[17] The law defines "deplatform" as "delet[ing] or ban[ning]" a user either "permanently" or "for more than 14 days." Fla. Stat. § 501.2041(1)(c).

[18] The law defines "shadow ban" as "limit[ing] or eliminat[ing] the exposure of a user or content or material posted by a user" on the platform. *Id.* § 501.2041(1)(f).

[19] "Post-prioritization" refers to featuring or prioritizing content "in a newsfeed, a feed, a view, or search results." *Id.* § 501.2041(1)(e).

[20] The Eleventh Circuit upheld the constitutionality of the general-disclosure provisions, Pet. App. 62a–64a, and this Court denied respondents' cross-petition to review that conclusion.

The law also mandates more individualized disclosures. Whenever a covered platform "censor[s] or shadow ban[s] a user's content or material or deplatform[s] a user," it must give the user written notice within seven days that includes "a thorough rationale explaining" the action and "a precise and thorough explanation of how the [covered] platform became aware of the censored content or material." Fla. Stat. § 501.2041(2)(d), (3). If the platform deplatformed the user, the platform also must allow the user "to access or retrieve all of the user's information, content, material, and data for at least 60 days." *Id.* § 501.2041(2)(i).

All the provisions "may only be enforced to the extent not inconsistent with . . . 47 U.S.C. § 230(e)(3)." *Id.* § 501.2041(9). Nothing in S.B. 7072, then, imposes liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). S.B. 7072 also has a severability clause. *See* Pet. App. 57a n.22.

III. Procedural history

A. Respondents claim that an unspecified number of their members are among the platforms subject to S.B. 7072. JA 13–14, 66–67, 96–97. Two days after S.B. 7072 was enacted, they brought a facial challenge to the statute, naming various Florida officials (petitioners here) as defendants, and sought a preliminary injunction on an expedited basis. Respondents argued that they were likely to succeed on their claims that the law is preempted by 47 U.S.C. § 230(c), violates the First Amendment, and is unconstitutionally vague. JA 1, 10.

The district court granted the motion the day before the statute was to take effect. Pet. App. 94a–95a. The district court universally enjoined enforcement of the law on preemption and First Amendment grounds.

B. The Eleventh Circuit affirmed in part and reversed in part. The panel characterized the platforms' "decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public" as the platforms' own protected expression. Pet. App. 23a.

Turning to scrutiny, the Eleventh Circuit held that some provisions of the law should be subject to strict scrutiny, while others demanded only intermediate scrutiny. Pet. App. 55a. But it did not resolve the appropriate level of scrutiny for all the law's provisions because the court concluded that they were regulations of "expressive conduct" subject at least to intermediate scrutiny, which they failed to satisfy. Pet. App. 56a–62a.

The court also invalidated the law's requirement that a platform notify its users of and meaningfully explain its censorship decisions. The court credited respondents' untested allegation that the requirement was unduly burdensome and thus invalidated it under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Pet. App. 64a–65a. But the court upheld the law's general-disclosure requirements under *Zauderer*. Pet. App. 62a–64a.

C. Florida petitioned for certiorari. Respondents cross-petitioned, urging the Court to grant review of the Eleventh Circuit's decision to uphold the general-disclosure provisions. The cross-petition argued that

S.B. 7072 is void in its entirety, based on statements from the legislative record that respondents view as reflecting viewpoint-based animus. *See* No. 22-393. This Court granted the certiorari petition here and in *NetChoice v. Paxton*, No. 22-555. It denied the cross-petition.

As a result, before the Court is the Eleventh Circuit's decision to facially invalidate S.B. 7072's neutrality provisions,[21] hosting provisions,[22] and individualized-disclosure requirement.[23]

SUMMARY OF ARGUMENT

Respondents bring a facial free-speech challenge to S.B. 7072. At issue are provisions that require the platforms to apply their censorship and deplatforming standards consistently (neutrality provisions); preclude them from silencing journalistic enterprises and political candidates (hosting provisions); and require them to disclose and explain their censorship decisions to their users (individualized-disclosure requirement). Those measures are in the mold of requirements that for centuries have governed entities—like the platforms—that generally hold themselves open to all comers and content. The Eleventh Circuit's decision invalidating them should be reversed.

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[21] Fla. Stat. § 501.2041(2)(b) (consistency requirement); *id.* § 501.2041(2)(c) (30-day limit for rule changes); *id.* § 501.2041(2)(f)2. (opt-out requirement).

[22] Fla. Stat. § 501.2041(2)(j) (limit on censoring, deplatforming, or shadow-banning journalistic enterprises); *id.* §§ 106.072, 501.2041(2)(h) (limit on deplatforming, shadow-banning, or deprioritizing political candidates or material about them).

[23] Fla. Stat. § 501.2041(2)(d)1., (3).

The neutrality and hosting provisions of S.B. 7072 regulate conduct, not expression. The First Amendment protects the expression of private entities, but it does not give them constitutional license to selectively silence the speech of those they may host. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court upheld a mandate that a shopping mall open to the public host expressive activity on its property. In *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006), the Court held that law schools were engaged in regulable conduct, not expression, when they refused to host military recruiters on their campuses in violation of federal law. Those holdings are of a piece with the history of common-carrier regulation, which has long required a company that holds itself generally open to all comers to refrain from arbitrarily discriminating against its customers' speech. Any other rule would undermine the free marketplace of ideas central to the First Amendment's design.

Respondents' members are internet platforms who, like common carriers, host other speakers in a manner generally open to all. Contrary to respondents' insistence, they express no message in the vast and disparate mass of user-provided content they host. Unlike a newspaper or a bookstore, the platforms are, to say the least, unselective in the people and content they allow on their sites: Virtually anyone may sign up and post almost any content. The content is better described as arranged by the platforms' users, not the platforms. Users post what they want and "follow," "friend," and "like" both the content they wish to see and the people with whom they wish to connect.

S.B. 7072 does little more than require the platforms to adhere to their general business practice of holding themselves open to all comers and content, which is how common-carrier regulation has functioned for centuries. The law interferes with no message merely by holding the platforms to their representations to consumers about what their censorship rules require. The platforms also have no message in cutting off certain speakers from the modern public square, any more than the law schools did in *FAIR* when they booted military recruiters off campus.

Even if the neutrality and hosting provisions regulate expression, they are subject at most to intermediate scrutiny, and pass it under *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994). First, the provisions are content-neutral: None targets any message of the platforms. The neutrality provisions are agnostic about content, and the hosting provisions simply require the platforms to refrain from silencing certain users. *Turner I* involved similar requirements: It applied intermediate scrutiny to rules mandating that cable companies carry certain broadcasters. Second, the provisions serve important interests in ensuring that internet platforms apply their rules as stated and in limiting them from denying speakers access to the modern public square.

Finally, the individualized-disclosure requirement passes muster under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). The platforms have no substantial First Amendment interest in concealing factual information about how or why they selectively stifle the speakers they host. And respondents' assertion that the disclosure requirement is unduly burdensome is

both untested and implausible. If, as respondents emphasize, they have the technological capacity to moderate billions of posts every day, there is no apparent reason they could not also disclose to their users why they are doing so. Respondents already seemingly do so under European Union law, which similarly requires them to explain their individual content-moderation decisions.

ARGUMENT

I. S.B. 7072's neutrality and hosting provisions comply with the First Amendment.

S.B. 7072's neutrality and hosting provisions are constitutional on their face. The platforms are businesses that generate advertising revenue from attracting billions of speakers for various purposes, including posting content, networking, communicating, and buying and selling goods and services. In preventing them from silencing or mistreating a disfavored few among that cacophony of voices, S.B. 7072 does not interfere with any inherently expressive conduct, and so the First Amendment says nothing about it. But even if those provisions regulated expression, they are subject at most to intermediate scrutiny, which they satisfy.

A. The neutrality and hosting provisions regulate economic activity and do not interfere with speech or expression.

1. The First Amendment permits the government to prevent businesses that host third-party speech from silencing their customers.

As the United States recognizes, U.S. Br. 18, 26, this case turns on the First Amendment principles

applicable to the regulation of conduct. And when a private entity hosts third-party speech in the manner the platforms do—generally opening their doors to host all speakers and speech—the First Amendment affords the government significant authority to regulate that conduct.

a. The First Amendment does not protect conduct the same as it protects speech. Conduct that expresses a message is sometimes protected, such as flag-burning or wearing an armband as a symbol of protest. *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969). But the Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376.

Free-speech protections, consequently, extend only to conduct that "possesses sufficient communicative elements to bring the First Amendment into play." *Johnson*, 491 U.S. at 404; *see also Spence v. Washington,* 418 U.S. 405, 409 (1974). Several factors are relevant, including whether the individual "inten[ded]" to "convey a particularized message," *Johnson*, 491 U.S. at 404; whether those observing the conduct would understand it as communicating an idea, *id.*; and whether the conduct expresses an idea on its own or instead requires further "speech explaining" the idea. *FAIR*, 547 U.S. at 66. The question, in other words, is whether the regulated conduct is "inherently expressive." *Id.*; *accord* U.S. Br. 17, 19.

"The government generally has a freer hand in restricting expressive conduct than it has in

restricting the written or spoken word." *Johnson*, 491 U.S. at 406. That principle matters because "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment). "[E]xpressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). Thus, "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *Id.*

Whether a law compels or limits inherently expressive conduct depends on the nature of both the conduct and the law. Walking is conduct. But compelling a person to walk in a protest march would impermissibly compel expression. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). On the other hand, publishing material in a newspaper is expressive. But prohibiting the publication of newspaper advertisements that discriminate against women is a regulation of conduct. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 388–89 (1973); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (noting the facial constitutionality of regulations of discrimination). Dancing can be expressive. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). But limiting a dance hall to minors between 14 and 18 is a regulation of conduct that the First Amendment does not reach. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989).

b. Respondents are therefore wrong to dismiss the distinction between a regulation of conduct and a regulation of expression as "word play." Resp. Br. 40. The threshold question is whether Florida's law targets conduct or expression. And the government regulates conduct when it prevents a private entity that generally opens its doors to all speakers and speech from arbitrarily censoring those speakers. That principle is rooted in precedent, purpose, and history.

First, precedent: This Court has held that "a business establishment that is open to the public to come and go as they please" generally has no inherently expressive interest in silencing its customers. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *see also Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.* ("*PG&E*"), 475 U.S. 1, 22 (1986) (Marshall, J., concurring in the judgment); *id.* at 12 n.8 (plurality op.) (same); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 621 (1984) (men's organization had no First Amendment right to exclude women because it was "neither small nor selective" in admitting members). In *PruneYard*, for instance, the Court upheld a mandate that a shopping mall allow handbillers to collect signatures and distribute handbills on mall property—even though the mall had a policy against such expressive activity. 447 U.S. at 86–88. Justice Rehnquist's opinion for the Court explained that the large number of speakers, and the mall's lack of selectivity in admitting them, meant that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [] will not likely be identified with those of the owner." *Id.* at 87. Nor did the hosting mandate itself interfere with the mall's own speech, because it did not dictate that the mall host any "specific message." *Id.*

The Court extended *PruneYard* in *FAIR*, which rejected a First Amendment challenge brought by law schools that objected to hosting military recruiters on their campuses under the Solomon Amendment. 547 U.S. 47. The Court concluded that "[a]s a general matter, the Solomon Amendment regulat[ed]" law schools' "conduct" in choosing to host recruiters on campus, not the schools' own "speech." *Id.* at 60. The Court explained that "the schools are not speaking when they host interviews and recruiting receptions." *Id.* at 64. Instead, they "facilitate recruiting to assist their students in obtaining jobs." *Id.* And a reasonable observer was unlikely to attribute to a law school any sort of "message" when it deplatformed a military recruiter from its campus. *Id.* at 65–66. The regulated conduct was thus "not inherently expressive." *Id.* at 66. *FAIR* and *PruneYard* show that a business that hosts third-party speech has no inherent license to silence its customers.

Next, purpose: The First Amendment "preserve[s] an uninhibited marketplace of ideas in which truth will ultimately prevail." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (quotations omitted). It would be perverse if powerful private interests could freely deny access to the modern public square while profiting billions from their users' speech after holding themselves out as neutral platforms for free expression. The First Amendment thus "does not sanction repression of that freedom by private interests," *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945), and ensuring "that the public has access to a multiplicity of information sources . . . promotes values central to the First Amendment," *Turner I*, 512 U.S. at 663.

Finally, history: Since before the Founding, the government could regulate businesses that "hosted or transported others" as common carriers, including by precluding them from discriminating against their customers. *303 Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023). At common law, for example, an innkeeper who hung "a sign and open[ed] his house for travellers" assumed "an implied engagement to entertain all persons who travel that way," and the innkeeper would be liable "if he without good reason refuse[d] to admit a traveller." 3 William Blackstone, *Commentaries* 164 (1768); *see also Gisbourn v. Hurst*, 91 Eng. Rep. 220, 220 (K.B. 1710) ("[A]ny man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier.").

The common-carrier doctrine has long extended to those who "disseminate" or facilitate the speech of others. Beginning in 1848, dozens of States and the federal government enacted laws requiring telegraph companies to "operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever." Act of Aug. 7, 1888, ch. 772, § 2, 25 Stat. 382, 383; *see* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2320 & nn.103–05 (2021). Those laws responded to, among other things, the concern that Western Union was manipulating the flow of information by discriminating against disfavored news-gathering organizations and political speech like strike-related telegraphs. *See* Lakier, *supra*, at 2321–23.

States required telegraph companies to transmit messages without discrimination, in accordance with the companies' rules, and transparently as to speakers whose voices were particularly important to public discourse. Several States required telegraph companies to "transmit [all messages] with impartiality and good faith" for anyone who paid the "usual charges."[24] Others required the companies to transmit all messages "with impartiality and good faith" and in accordance with their own "rules and regulations."[25]

Common-carrier duties were also imposed on telephone companies, *see, e.g.*, *Hockett v. Indiana*, 5 N.E. 178, 182 (Ind. 1886), and those duties continue to apply in that context today, *see* 47 U.S.C. § 202(a) (prohibiting telecommunications common carriers from "mak[ing] any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services").

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[24] *E.g.*, *Petze v. W. Union Tel. Co.*, 128 A.D. 192, 193 (N.Y. App. Div. 1908) (quoting 1890 New York statute); *Bell Tel. Co. v. Commonwealth ex rel. Balt. & O. Tel. Co.*, 3 A. 825, 827 (Pa. 1886) (quoting 1874 Pennsylvania statute); *see also, e.g.*, *Postal Tel.-Cable Co. v. Umstadter*, 50 S.E. 259, 261 (Va. 1905) (discussing similar 1887 Virginia statute).

[25] *E.g.*, Mich. Pub. Act No. 195, § 1 (1893); Md. Code art. 26, § 117 (1860); *Thurn v. Alta Tel. Co.*, 15 Cal. 472, 474 (1860) (quoting California statute); *W. Union Tel. Co. v. Timmons*, 20 S.E. 649, 650 (Ga. 1893) (same for Georgia). Nebraska required the companies to transmit "all dispatches directed to newspapers, or private individuals, or public officers, with impartiality, in the order in which they are received." Laws of Neb. ch. 89a, § 5 (1883); *see also* Ky. Rev. Stat. § 365.230 (1942) (companies "shall afford the same and equal facilities to all publishers of newspapers"). And Illinois prohibited the companies from "suppress[ing] a message." Ill. Rev. Stat. ch. 134, § 7, at 996 (1877).

Consistent with *FAIR* and *PruneYard*—and the interest in the free flow of information—the First Amendment permits that sort of common-carrier regulation. Common carriers have generally opened their facilities to all speakers and speech. Requiring them to open that door a crack more interferes with no expression of their own. Thus, the telephone company, internet-service provider, and delivery service have license neither to snuff out the speech they carry, nor to cancel disfavored subscribers. *See* U.S. Br. 16–17. That conduct may be regulated in the public interest.

c. Respondents distinguish *FAIR* and *PruneYard* with the circular assertion that they, unlike a mall or a law school, "are in the business of expression." Resp. Br. 42 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 761 (1988)). But declaring the diverse entities covered by S.B. 7072 all to be "in the business of expression" does not answer whether the conduct that S.B. 7072 regulates is expressive. Regardless, the business of expression is not immune from government regulation. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *Pittsburgh Press*, 413 U.S. at 388–89. The universities in *FAIR* were "in the business of expression" at least as much as many platforms, like Facebook, X, and YouTube, and more so than many others, like eBay, Etsy, Uber, and PayPal.

Respondents also wave away *PruneYard* on the ground that the mall owner did not object to the speech the owner was required to host, while here they do. Resp. Br. 41. But in *FAIR* the law schools objected to hosting military recruiters because they disagreed with the military's "Don't Ask, Don't Tell" policy. 547 U.S. at 52. Those complaints did not

transform conduct into expression. *Id.* at 65–66. Otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66.

Last, respondents quote (at 19, 40) language from *Sorrell v. IMS Health Inc.*, 564 U.S. 553, 570 (2011), stating that "dissemination of information" is "speech within the meaning of the First Amendment." But that partial quotation omits that *Sorrell* addressed "*the creation and* dissemination of information." *Id.* (emphasis added). Not all hosting of third-party speech is equivalent to "speech"; otherwise telegraph and telephone companies would be speaking when they disseminate their subscribers' communications. *See* U.S. Br. 16–17; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (explaining that a university's "facilitat[ion]" of others' speech was not its "own speech").

2. The neutrality and hosting provisions regulate conduct, not speech or expression.

S.B. 7072's neutrality and hosting provisions regulate inherently nonexpressive conduct: the platforms' hosting of third-party speech.

Because respondents bring a pre-enforcement facial challenge, they must establish, at a minimum, that the neutrality and hosting provisions lack a "plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). They must show that the provisions broadly sweep up speech or conduct that is inherently expressive. They have not done so.

a. Respondents' core theory is that the existence and arrangement of content on their sites is a "compilation" representing a product of their own "editorial judgments," and that S.B. 7072 is presumptively unconstitutional because it alters that compilation. Resp. Br. 19, 24–26, 28–30, 40. But the vast and varied amalgamations of content that appear on the platforms are not expression at all, let alone the platforms' own expression.

Like common carriers, the platforms overwhelmingly do "not make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Instead, they are generally open to all users and content. The "basic aspect[]" of the social-networking platforms' "business models" is to permit basically anyone to "upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023). "[A]lmost anyone can create an account and post content," JA 72, and each user is presented with the same boilerplate terms of service, JA 114 n.3, 131, 151. Also like a common carrier, platforms generally permit users to post content transparently "without much (if any) advance screening." *Twitter*, 598 U.S. at 480. As the district court found, the platforms allow "well north of 99% of the content" on their sites to be posted without further review. Pet. App. 85a.

Few would think, then, that the "500 hours of video . . . uploaded to YouTube, 510,000 comments . . . posted on Facebook, and 347,000 tweets" posted every minute, *Twitter*, 598 U.S. at 480, are a unified "compilation." Nor is the platforms'

organization of that speech inherently expressive. By holding themselves out as accepting all comers, they have accumulated billions of users, and they host a historically unprecedented amount of speech. They make hosting decisions not with an "intent to convey a particularized message," *Johnson*, 491 U.S. at 404, but because hosting that much user speech requires organizing it. So similar to traditional common carriers, the platforms make decisions for "the due accommodation" of their users and "for the due arrangements of their business." *Jencks v. Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (Story, J.). By contrast, a "newspaper, cable television provider, publishing house, bookstore, or movie theater," Resp. Br. 23, carefully selects and compiles the materials it presents.

The experience on the platform is also user-driven. Like a communications common carrier, many platforms mainly exist to provide a convenient venue for people to communicate and connect with each other—their "hosting function." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 408–09 & n.122 (2021). A newspaper presents the same top-down unified publication to all its readers—mostly its own reporting, but third-party content as well. But for the platforms, the choice of what content can be viewed is driven by the user. Users do that, for example, by subscribing to newsfeeds that display content on chosen topics; "following" or "friending" people whose content they want to view; conducting searches of the sites for content they wish to find; and communicating with those with whom they wish to speak or listen. So curling enthusiasts will see curling content that will never appear to most users. That user

choice, not platform choice, drives most of what each user views on the platforms underscores that it is not the platforms' own expression.

The platforms do sometimes speak in hosting: They issue press releases and sometimes "attach warning labels, disclaimers, or general commentary" to "user-submitted content." JA 77. But the presentation of content on the platforms to users, as described above, represents the platforms' conduct in hosting their users' choices of how to speak and connect, not the platforms' expression. That hosting is what S.B. 7072 regulates.

b. S.B. 7072 permissibly regulates that conduct.

In the main, S.B. 7072 requires the platforms to apply their censorship standards consistently and to continue to serve all comers and content. As in *PruneYard* and *FAIR*, those requirements do not command the platforms to speak a message. *See PruneYard*, 447 U.S. at 87; *FAIR*, 547 U.S. at 62. Instead, they generally permit the platforms to adopt content-moderation standards of their choosing and apply them consistently.

Neutrality Provisions. The neutrality provisions require a platform to disclose the "standards" it uses to censor, deplatform, and shadow-ban users and to apply them "in a consistent manner." Fla. Stat. § 501.2041(2)(a), (b). To prevent a platform from evading those requirements, the law requires the platforms to avoid changing their "rules" more than once every 30 days. *Id.* § 501.2041(2)(c). Finally, the law requires the platforms to allow users to opt out of viewing content mediated by the platforms' algorithms. *Id.* § 501.2041(2)(f).

Requiring the platforms to consistently apply their own standards and to maintain the standards for at least 30 days does not regulate expression. It regulates conduct "because of the action it entails"—arbitrary and inconsistent treatment of users—not because of any "ideas" expressed. *R.A.V.*, 505 U.S. at 385. The provisions are consumer-protection measures that simply require platforms to adhere to their representations of their policies. Similar measures have long governed common carriers. *See supra* pp. 19–20. The neutrality provisions also resemble the federal government's net-neutrality regulations, which forbade internet-service providers from holding themselves out to customers as offering "neutral, indiscriminate access" but then discriminating against disfavored content. *See* U.S. Br. 25. The "First Amendment poses no obstacle to holding the provider to its representation." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 392 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing en banc).

If anything, the neutrality provisions are even less intrusive than traditional nondiscrimination obligations that do not violate the First Amendment. *See, e.g.*, *Hurley*, 515 U.S. at 572. The provisions allow platforms to have discriminatory standards if they apply them consistently.

Nor does it interfere with expression for the law to require the platforms to allow individual users to opt out of seeing content mediated by the platforms' algorithms and choose, instead, to view content transparently (though the requirement may well affect the platforms' advertising revenue). *See* Fla. Stat. § 501.2041(2)(f). Such opt-outs align with the platforms' generally user-driven model. Opt-outs affect

only the content that the user sees and would be invisible to others. That requirement is thus nothing like "telling a newspaper what constitutes front-page news," Resp. Br. 25, among other reasons because the platforms have no First Amendment right to send unwanted material. *See Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 738 (1970).

The platforms err in contending that the neutrality provisions would require them to "disseminate speech praising ISIS" if they chose to allow speech critical of ISIS. Resp. Br. 30. A platform could adopt a policy of removing content that promotes terrorism. The consistency provision just prohibits applying that policy, for example, to forbid content praising ISIS but allow content praising Al-Qaeda. It does not require the platforms to host any particular content. It requires only that they apply their censorship rules consistently.

Hosting Provisions. The law has two hosting provisions.

The first prohibits deplatforming, censoring, and shadow-banning a "journalistic enterprise," which is defined to include media organizations with an especially large online presence and large cable broadcasters. Fla. Stat. § 501.2041(1)(d). That provision does not require the platforms to permit a journalistic enterprise "to post *anything* it wants." Pet. App. 62a. It forbids them from retaliating against a journalistic enterprise "based on the content of their publication or broadcast." Fla. Stat. § 501.2041(2)(j). That is, a platform cannot deplatform or censor MSNBC because it disagrees with a television segment that praised President Biden. But it may do so if MSNBC

harassed a user and on other bases unrelated to the content of the enterprise's reporting.

The second requirement provides that a platform cannot deplatform any user it knows to be a political candidate, or post-prioritize or shadow-ban content by or about such a user, during the election season. Fla. Stat. §§ 501.2041(2)(h), 106.072(2).

The platforms do not have an inherently expressive interest in silencing journalistic enterprises and political candidates. The platforms are generally open to all manner of journalistic and political expression, consistent with their chosen business model. *See supra* p. 23. Precluding them from silencing a few voices in that cacophony no more interferes with any message of theirs than does prohibiting a communications common carrier from doing so. That is especially true for e-commerce sites like Etsy and eBay, which are little different from the mall in *PruneYard*.[26]

FAIR is also instructive. "An observer who sees military recruiters interviewing away from the law school," the Court explained, "has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *FAIR*, 547 U.S. at 66. In other words, "empty rooms don't speak." Oral Arg. Tr. 65:8–9, *303*

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[26] Those hosting requirements dovetail with the many state and local laws that have long prohibited retaliating against an employee based on his speech or his voting choices. *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Tex. Rev. L. & Pol. 295, 299–307 (2012).

Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (Roberts, C.J.).

Empty cyberspace also does not speak. Even if an observer saw a post removed, the observer would have no way to know the site's message unless that "conduct" comes with explanatory "speech." *FAIR*, 547 U.S. at 66. Most of the time, though, no one will even know that anyone has been censored, shadow-banned, or deplatformed. For example, a shadow-banned Reddit user continued to spend four to five hours a day posting on the site for weeks before realizing that the content was invisible to other users. N.D. Fla. Doc. 106-5, App. 1357. The Solomon Amendment demanded that military recruiters be given the "most favorable access" granted to a nonmilitary recruiter. *FAIR*, 547 U.S. at 55. So too, S.B. 7072's censorship and shadow-banning protections prevent the platforms from rendering a speaker's access meaningless: They demand that once a platform decides broadly to host speech, it cannot make that speech inaccessible.

Mirroring the panel below, respondents object that the journalistic-enterprise provision would "prohibit a child-friendly platform like YouTube Kids from removing—or even adding an age gate to—soft-core pornography posted by PornHub." Resp. Br. 25 (quoting Pet. App. 62a). But even assuming taking action against PornHub would be considered content-based within the meaning of the statute, *but see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986), respondents overlook that S.B. 7072 may only be "enforced to the extent not inconsistent with" 47 U.S.C. § 230, Fla. Stat. § 501.2041(9). Section 230 precludes liability for actions taken "in good faith to restrict access to . . . material that the provider or user considers

to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).[27] In any event, "speculat[ion] about imaginary cases" does not demonstrate facial invalidity. *United States v. Hansen*, 599 U.S. 762, 786 (2023) (Thomas, J., concurring).

The journalistic-enterprise provision, like the rest of S.B. 7072, leaves the platforms free to "express whatever views they may have" on the content of the enterprise's publications and broadcasts. *FAIR*, 547 U.S. at 60. The lone exception is that a platform may not "post an addendum" to content because they disagree with the enterprise's reporting. Fla. Stat. § 501.2041(1)(b), (2)(j). Even that, however, is permissible because it regulates speech only as an incident to conduct. *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978). In *FAIR*, the law schools contended that the Solomon Amendment compelled their direct speech because their activities in hosting military recruiters involved "elements of speech," but the Court held that any speech was only compelled as an incident to regulation of conduct. *FAIR*, 547 U.S. at 61–62. Here, the addendum provision likewise ensures that the hosting requirement is meaningful. Otherwise, a platform could drown out the voice of the hosted enterprise with endless addenda. And a platform may counter the enterprise's speech in any other way apart from altering the enterprise's own speech.

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[27] Respondents also give the example of "a video of a mass shooter's killing spree" reposted by a journalistic enterprise. Resp. Br. 25. Even if that video were the enterprise's own "publication or broadcast," Fla. Stat. § 501.2041(2)(j), section 230(c)(2)(A) also applies to "excessively violent" content.

That leaves post-prioritization. Along with preventing deplatforming and shadow-banning, the candidates provision (but not the journalistic-enterprise provision) restricts the platforms, close to an election, from applying their recommendation algorithms to content "by or about" a user who is a political candidate. Fla. Stat. § 501.2041(1)(e), 2(h). The platforms must instead allow such content to appear on their sites transparently, such as in chronological order.

That provision too is facially constitutional. It does not mandate that the platforms carry any content or user. The provision does limit the platforms' algorithms from making recommendations. But transparent-transmission requirements have long applied to common carriers. *See supra* pp. 19–20. Many of the platforms' algorithms, moreover, "appear agnostic as to the nature of the content" and are designed to implement user choice about what content they wish to view. *Twitter*, 598 U.S. at 498. An algorithm's placement of a post in a more prominent position just because it computed that demographically similar users often liked it is no more expressive than a grocery store's placement of candy bars on the bottom shelf of the checkout line so that children pester their parents to buy one. *Cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001) (holding that the interest in "regulat[ing] the placement of tobacco products" in stores was "unrelated to the communication of ideas"). That is enough to reject the platforms' facial challenge, especially because the record contains no specifics about the precise nature and operation of all the different platforms' algorithms. *See Wash. State Grange*, 552 U.S. at 454–55.

In short, the neutrality and hosting provisions do not regulate inherently expressive conduct and so align with the First Amendment.

3. The platforms' remaining arguments to the contrary are wrong.

Respondents are incorrect to characterize the platforms' hosting decisions as the constitutional equivalent of the publishing decisions of newspapers. Resp. Br. 16, 25, 26, 29, 37, 41. In support, they rely mainly on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the *PG&E* plurality opinion, and *Hurley*. But those were cases in which "the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63. They are not this case.

a. *Tornillo* held unconstitutional a "right of reply" statute penalizing the Miami Herald for refusing to print a political candidate's response to an editorial the paper had published that was critical of his candidacy. 418 U.S. at 243–44, 258. *PG&E* held that California could not require a utility company to publish the "hostile views" of a local interest group in the "small newspaper" it "distributed . . . in its monthly billing envelope." 475 U.S. at 5, 8, 14 (plurality op.). And *Hurley* held that a parade organizer had a First Amendment right to exclude a group from a parade, which the Court viewed as "similar" to the "edited compilation of speech" that constitutes "most newspaper's opinion pages." 515 U.S. at 570. Those decisions are inapplicable here.

A newspaper, unlike the platforms, does not operate "as a sort of community billboard, regularly carrying the message of third parties." *PG&E*, 475 U.S. at

23 (Marshall, J., concurring in the judgment); *id.* at 12 n.8 (plurality op.); *see Tornillo*, 418 U.S. at 258. As the district court observed in rejecting this analogy, "newspapers, unlike social-media providers, create or select all their content," all with "substantive, discretionary review." Pet. App. 85a; *see also Twitter*, 598 U.S. at 498. Given that practice, everyone knows that the compilation a newspaper presents is its own expression. But that is not how the platforms work. *See supra* pp. 23–25.

The parade in *Hurley* was more like a newspaper than an internet platform. Although, as respondents emphasize (at 43), the parade organizer was "rather lenient" in admitting participants, 515 U.S. at 569, the parade was not generally open. Admissions had to be approved by a committee case by case. *Id.* at 562. The parade had an "inherent expressiveness" akin to a "protest march[]," which would have been "understood" by observers to have a "common theme" that was "intimately connected" to the organizer. *Id.* at 568, 576. The Court contrasted that deliberate selection and expression with a broadcaster who disclaims any identity of viewpoint between "the management and the speakers who use the broadcast facility." *Id.* at 576. "Parades and demonstrations . . . are not understood to be so neutrally presented or selectively viewed." *Id.*

The platforms are the opposite. They do not select the content featured on their platforms—their users do. Whether the platforms feature political commentary, celebrity gossip, sports talk, or all of the above, is dictated by their users. And users do "selectively view[]" the content they access on the platforms. Again, unlike parades or newspapers, the whole

experience on the platforms is user-driven.[28] *See supra* pp. 24–25. Nor do the platforms carefully curate user speech such that each disparate piece of content is "perceived" as part of a "common theme" that the platform is advancing. *See Hurley*, 515 U.S. at 576–77.

The risk of "misattribution" that motivated *Hurley* is thus absent here. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,* 140 S. Ct. 2082, 2088 (2020) (describing *Hurley* as a "speech misattribution" case). Platforms disclaim any identity of viewpoint between themselves and the content on their sites.[29] Even without that disclaimer, the reasonable observer could hardly conclude otherwise given the vastness and diversity of that content.

It is especially odd to characterize what e-commerce platforms like eBay, Etsy, or Uber do in organizing user expression as "curation." Etsy is up front about this fact: It makes clear in its terms of service that it is "not a curated marketplace."[30] So too with

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[28] The Eleventh Circuit observed that some websites may have more of a platform-driven message, like child-oriented sites or those designed to cater to various ideologies. Pet. App. 4a, 28a; *see* EFF Amicus Br. 6–7. Even setting aside that those platforms are not among respondents' members, JA 66, 96, and that there is no evidence in this record about them anyway, that would at most raise constitutional concerns in some applications, not show facial invalidity.

[29] *See* Terms of Service, YouTube (Dec. 15, 2023), http://tinyurl.com/4zdvu45v; Terms of Service, X (Sept. 29, 2023), https://twitter.com/en/tos; Terms of Service, Pinterest (Aug. 1, 2023), http://tinyurl.com/3ynuf6b8.

[30] Our House Rules, Etsy, https://etsy.com/legal/prohibited/ (last visited Jan. 15, 2024).

messaging platforms like WhatsApp[31] and Gmail, which are indistinguishable from traditional communications carriers. Even the social-networking platforms offer transparent communication services, such as Facebook's, X's, and Instagram's messaging services.[32] That is enough to defeat this facial challenge. *See N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11–12 (1988).

b. Respondents dismiss as irrelevant that they are unselective in the speech they host. Resp. Br. 43. But that assertion clashes with cases distinguishing between government speech and the creation of a private forum.

Like private entities, the government sometimes speaks and sometimes hosts the speech of others. *See Shurtleff v. City of Boston*, 596 U.S. 243, 251–52 (2022). The distinction is critical because the First Amendment does not apply to the government's own speech but does apply when the government provides a forum to host the speech of others. *Id.* But under respondents' false equivalence between speech and speech-hosting, all government-provided forums, including a social-networking platform like those respondents' members operate, would be government speech not subject to the First Amendment at all.

That is not so. When the government hosts third-party speech, whether it is co-opting that speech as its

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[31] About WhatsApp, WhatsApp, https://whatsapp.com/about (last visited Jan. 15, 2024).

[32] More Ways to Stay Connected, Facebook Messenger, https://messenger.com/features/ (last visited Jan. 15, 2024) About Direct Messages, X, http://tinyurl.com/2cy7sc89 (last visited Jan. 15, 2024); Instagram DMs, Instagram, http://tinyurl.com/muv3hwpn (last visited Jan. 15, 2024).

own or merely facilitating the expression of others turns on the degree of selectivity it exercises over the expression. *See id.* at 256–57. In *Matal v. Tam*, for instance, the Court held that the Patent and Trademark Office was not speaking when it maintained a principal register of approved trademarks—even though PTO refused to register marks it found "offensive." 582 U.S. 218, 227–29, 235 (2017). PTO was not speaking because it did not "dream up" the marks or "edit" them. *Id.* at 235.

Similarly, the platforms exercise nowhere near the level of control over their users' speech that would suggest the companies are co-opting the speech to communicate their own message.

c. *Hurley*, *Tornillo*, and *PG&E* are also different because they involved media with limited capacity. As this Court explained in *FAIR*, a hosting requirement applicable to a newspaper "tak[es] up space that could be devoted to other material the newspaper may have preferred to print.'" 547 U.S. at 64 (quoting *Tornillo*, 418 U.S. at 256). "The same [was] true in [*PG&E*]," *id.*, which involved a company newsletter, *PG&E*, 475 U.S. at 5–6, 8–9; *see id.* at 24 (Marshall, J., concurring in judgment) (distinguishing *PruneYard* because the newsletter, unlike a mall open to all, is "a forum of inherently limited scope"). Here, however, the platforms face no meaningful space constraints: Cyberspace is practically infinite.

The platforms and the United States also cite *Turner I*, Resp. Br. 40; U.S. Br. 15, which held that the Cable Act implicated a cable-television operator's First Amendment rights by reducing the number of channels the operator could use to decide which stations or programs to carry. *See Turner I*, 512 U.S. at

644–45. But the cable medium there was of limited capacity and involved a host that was not generally open to all speakers and content. Not so here.

d. Respondents attempt to distinguish themselves from common carriers. They note that the platforms reserve discretion in their terms of service to moderate content. Resp. Br. 49; *see* U.S. Br. 25. But the mall in *PruneYard* had a policy against allowing "any publicly expressive activity." 447 U.S. at 77. That did not transform the message of the many it hosted on its property into its own.

And contrary to respondents' suggestion, Resp. Br. 49, common carriers often exercised discretion over how to organize and arrange the speech and speakers they carried. Telegraph companies, for example, were not mere "dumb pipes." They prioritized certain messages and certain speakers' messages,[33] and they could refuse to carry obscene messages.[34] During Reconstruction, some railroads even sought exemptions from their common-carrier obligations to ghettoize women, black people, and immigrants into designated cars. They lost. *See Brown v. Memphis & C.R. Co.*, 5 F. 499, 502–03 (C.C.W.D. Tenn. 1880); *Brown v. Memphis & C.R. Co.*, 7 F. 51, 56–68 (C.C.W.D. Tenn. 1881).

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[33] *See Reese v. W. Union Tel. Co.*, 24 N.E. 163, 165 (Ind. 1890) (telegraph companies were expected to prioritize messages based on the companies' judgments about "the character and importance of the message"); *W. Union Tel. Co. v. Coffin*, 30 S.W. 896, 896 (Tex. 1895) (same).

[34] *See Nye v. W. Union Tel. Co.*, 104 F. 628, 630 (C.C.D. Minn. 1900). Railroads, too, exercised discretion in refusing service to intoxicated or belligerent passengers. *See Holton v. Bos. Elevated Ry. Co.*, 21 N.E.2d 251, 253 (Mass. 1939).

Common carriers continue to make decisions today about how they disseminate the speech they host. Verizon's terms of service specify that it can limit service "for any good cause."[35] Phone companies filter calls and messages for spam, junk, and the like, identifying or blocking billions of them.[36] Email providers, like Gmail, "arrange" user interfaces in various ways.[37] None of that transforms their users' speech into their own.

Finally, respondents discount the relevance of common-carrier regulation on the strength of *303 Creative*. Resp. Br. 47–48. But *303 Creative* was an as-applied challenge to a public-accommodations law that compelled a wedding-website designer to produce a website the State had stipulated was expressive. 600 U.S. at 593–94. In *Hurley*, the compelled expression similarly flowed from the fact that the parade organizer was being compelled to admit a marcher—a gay and lesbian advocacy group—whose "participation as a unit in the parade was . . . expressive." 515 U.S. at 570. Both cases rejected any suggestion that the anti-discrimination laws were facially unconstitutional.

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[35] Customer Agreement, Verizon, http://tinyurl.com/3npj6u8m (last visited Jan. 15, 2024).

[36] Ashley Colette, *Verizon Continues its Crack Down on Spam Calls and Texts*, Verizon (July 27, 2022), http://tinyurl.com/4ksf26d4 ("From May to June 2022 alone, Verizon identified or blocked 2.5 billion unwanted calls for wireless customers—detecting more than 26.5 billion spam calls to date—and blocks tens of millions of spam text messages daily . . . .").

[37] *See* Learn About the New Integrated Gmail Layout, Gmail Help, http://tinyurl.com/h6an3way (last visited Jan. 15, 2024).

See id. at 572; *303 Creative*, 600 U.S. at 591–92. And this case is a facial challenge.

B. The neutrality and hosting provisions pass heightened constitutional scrutiny in any event.

Even if the neutrality and hosting provisions regulate inherently expressive conduct, they are at most subject to intermediate scrutiny, which they satisfy. *See Turner Broad. Sys., Inc. v. FCC*, ("*Turner II*"), 520 U.S. 180, 185 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The provisions are not content-based because they are not "directed at the communicative nature of [the platforms'] conduct." *Johnson*, 491 U.S. at 406. Intermediate scrutiny therefore applies, and the provisions satisfy "*O'Brien*'s relatively lenient standard," which requires only "a sufficiently important governmental interest" that is "unrelated to the suppression of free expression." *Id.* at 407.

1. *Neutrality Provisions.* First, the consistency provision is agnostic as to content, like common-carrier nondiscrimination requirements. It respects a platform's stated policy of hosting only certain content, so long as the platform is consistent in applying that policy. And the provision advances an important governmental interest: preventing discrimination. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (state interest in non-discrimination rules is "weighty"). It also directly serves the government's substantial interest in preventing consumer deception, no less than the federal government's net-neutrality regulations. *See supra* p. 26. The provision simply requires of the platforms: "if you say it, do it." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 392 (D.C.

Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing en banc).

Second, the 30-day rule targets no expression; it prevents evasion of the consistency provision, which would have little meaning if platforms could constantly change their standards. It also ensures that the platforms' consumers receive accurate information about the commercial transaction they enter into by using the platforms. Platforms could render even full disclosure of their (lengthy) rules meaningless if they were able to constantly change them.

Finally, the opt-out requirement is content-neutral and serves the State's interest in empowering consumers to decline to receive unwanted material.

Hosting Provisions. Under *Turner I* and *FAIR*, the hosting requirements are also content-neutral and subject at most to intermediate scrutiny.

In *Turner I*, the Court held that a federal law was content-neutral, even though it required cable operators to carry local stations, because the application of the law did "not depend upon the content of the cable operators' programming." *Turner I*, 512 U.S. at 644. And in *FAIR*, the Court held that the Solomon Amendment was constitutional because it did not target expression at all, even though it required "accommodating the military's message." 547 U.S. at 64.

Similarly, the hosting requirements do not target any expression of the platforms. Instead, they seek to protect the speech of the platforms' users. They require the platforms to carry user "content and material posted by or about a . . . candidate" during the election season and to stop excluding or censoring a "journalistic enterprise" based on the "content" of the

enterprise's "publication or broadcast." Fla. Stat. § 501.2041(2)(h), (j). Their application does not "depend upon the content of the" platforms' own services. *Turner I*, 512 U.S. at 644.

In arguing otherwise, respondents and the United States confuse the standard for regulation of expressive conduct with the standard for regulation of speech. Resp. Br. 28–29; U.S. Br. 28. Florida's law does not "appl[y] to particular speech because of the topic discussed." *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 69 (2022). Instead, it regulates at most expressive conduct. Whether a regulation of expressive conduct triggers strict scrutiny, in turn, depends on whether the law "proscribe[s] particular conduct *because* it has expressive elements." *Johnson*, 491 U.S. at 406. If "the governmental interest" is "unrelated to the suppression of free expression," *id.* at 407 (cleaned up), the law is content-neutral.

Florida's interest is unrelated to suppressing any "expression" of the platforms. The allegedly "expressive elements," *id.* at 406, in the platforms' hosting is their desire to "foster . . . communit[ies]." Resp. Br. 28. But any such "expressive elements" are "distinct from" the speech of the platforms' particular users. U.S. Br. 16. In respondents' view, moreover, each platform is apparently expressing a different message. *See* Resp. Br. 4–5. But the hosting provisions apply to all platforms regardless of what any of those various messages may be. The mere mention of certain third-party speakers and topics in S.B. 7072 does not mean that Florida acted "because of" any of those amorphous "messages." It shows only that Florida desired to advance the content-neutral interest in "assuring that

the public has access to a multiplicity of information sources." *Turner I*, 512 U.S. at 663.[38]

Respondents and the United States answer that the interest in promoting third-party speech recognized in *Turner I* necessarily suppresses the platforms' expression because this case involves the internet rather than cable television or broadcasting. Resp. Br. 36–37; U.S. Br. 31–32. But the nature of the medium involved goes to the importance of that interest, not whether advancing it is content-neutral. *See Turner I*, 512 U.S. at 662–63. And here, the importance of the medium cuts in the opposite direction. The unfathomable vastness of the internet compared to cable broadcasting makes it even more critical to preserve government authority to prevent private censorship.

If, as respondents argue, a motive to protect the speech of third-party speakers and content automatically triggers strict scrutiny, Resp. Br. 29–30, much would be on the chopping block. From the Post Office Act of 1792 until the end of congressional regulation of postage rates in 1970, Congress provided preferential postage rates for newspapers. *See generally Postage Rates for Periodicals: A Narrative History*, USPS (June 2010), http://tinyurl.com/5n6nbcd6; *see also*

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[38] The United States contends that Florida has no "valid interest in increasing the diversity of views *presented by a particular private speaker*." U.S. Br. 30. The hosting provisions help all journalistic enterprises and candidates, not any "particular private speaker." And that is a curious position indeed for the United States, of all parties, to take given that it persuaded this Court that requiring a speaker to carry the "military's message," *FAIR*, 547 U.S. at 64, through a federal statute that specifically prefers military speakers, does not implicate the First Amendment at all, let alone trigger strict scrutiny.

Lakier, *supra*, at 2310, 2314. The Cable Act prohibits cable operators from exercising "editorial control" over video programming based on its "content." 47 U.S.C. § 532(c)(2). The Communications Act has long required broadcasters to permit qualified candidates to buy advertising at the same rates as their opponents, 47 U.S.C. § 315(a), and to provide "reasonable" access to "a legally qualified candidate for Federal elective office on behalf of his candidacy," *id.* § 312(a)(7). Federal law also prohibits newspapers from charging more for political advertising than for commercial advertising. 52 U.S.C. § 30120(b).

The motive for all those laws is not meaningfully different from traditional common-carrier regulation: preventing businesses that host large amounts of third-party speech from suppressing the voices they host. They are not presumptively unconstitutional, and neither are Florida's hosting requirements. They are subject to no more than intermediate scrutiny.

2. Which they satisfy. They advance an interest that *Turner I* identified not just as content-neutral, but also "a governmental purpose of the highest order": "assuring that the public has access to a multiplicity of information sources." *Id.* at 663; *see also Turner II*, 520 U.S. at 189. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner I*, 512 U.S. at 657. A massive proportion of Americans' public discourse now occurs online—with half of American adults using social-networking

platforms to get the news.[39] Barring the platforms from squelching those voices advances the interest of ensuring Americans' access to "a multiplicity of information sources." *Turner I*, 512 U.S. at 663.

The candidate provision also "makes a significant contribution to freedom of expression": "enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (upholding 47 U.S.C. § 312(a)(7) against constitutional challenge).

3. Respondents attack S.B. 7072 as a whole as well. They contend that S.B. 7072 is content- and viewpoint-based across the board because, in their view, it targets "liberal bias." Resp. Br. 50. But the law "impose[s] obligations upon all" platforms that are of a certain size, "regardless of the [message] they now offer or have offered in the past." *Turner I*, 512 U.S. at 644. Its restrictions apply to any platform that meets S.B. 7072's user or revenue thresholds. Fla. Stat. § 501.2041(1)(g).

Even so, respondents repeatedly suggest that the Court should invalidate S.B. 7072 because of what they take to be the "motivation and aim" of the Florida officials who enacted the law: to target "Big Tech." Resp. Br. 6; *see* Resp. Br. 30–35, 45–46, 50. The Eleventh Circuit correctly rejected those arguments, Pet. App. 50a–54a, and this Court denied respondents' cross-petition requesting review of that conclusion. There is no jurisdiction to consider it now because the arguments if accepted would enlarge the judgment

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[39] *Social Media and News Fact Sheet*, Pew Research Center (Nov. 15, 2023), http://tinyurl.com/2pnpa68t.

below. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (citing cases).

There is nothing to those arguments anyway. S.B. 7072 is viewpoint-neutral. It applies regardless of the ideological bent of a platform and protects political candidates and journalistic enterprises of any persuasion. The "size and revenue requirements" do not target companies of a particular ideology. Resp. Br. 31–32. Even if the law does not cover "Rumble, Truth Social, and Gab," Resp. Br. 32—the record says nothing about the matter—many other websites of diverse views are also exempted. And the platforms on which respondents focus—Facebook, YouTube, and X—are, in their own telling, ideologically diverse. *See* Resp. Br. 4–5, 37 n.5.

Respondents (at 30–32) also err in invoking *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Pet. App. 53a–54a. The statute invalidated there applied to just two Minnesota newspapers, unlike the multiplicity of platforms governed by S.B. 7072 that exercise control over the channels of discourse. *Id.* at 591–92 & n.15.

Finally, respondents contend that S.B. 7072—again, as a whole—is not reasonably tailored because it "sweeps in entities regardless of whether they disseminate the kinds of speech with which the state purports to be concerned or are e-commerce websites like Etsy." Resp. Br. 38. But e-commerce websites, much like the mall in *PruneYard*, might well distort the public discourse too if they cancelled or censored users with which they disagree. At any rate, respondents' complaints about the breadth of the law are largely based on their mistaken understanding of the law's

scope. *Compare* Resp. Br. 38, *with supra* pp. 27, 29–30.

II. S.B. 7072's individualized-disclosure requirement is constitutional.

S.B. 7072's individualized-disclosure requirement satisfies the First Amendment. The court below correctly concluded that the law's disclosure provisions must be weighed under the standard in *Zauderer*, and it upheld the law's general-disclosure rules under that test. The requirement that a platform provide a prompt, written notice to each user it censors setting forth the "rationale" for the censorship and an "explanation of how the [covered] platform became aware of the censored content or material," Fla. Stat. § 501.2041(3), is also constitutional under *Zauderer*.

A commercial speaker has a "minimal" First Amendment interest in withholding from consumers "purely factual and uncontroversial information about the terms under which [its] services will be available." *Zauderer*, 471 U.S. at 651. So States may mandate disclosure of such information if the requirement is "reasonably related to the State's interest in preventing deception of consumers" and not "unduly burdensome." *Id.*

Respondents do not dispute that the individualized-disclosure requirement compels disclosure only of "purely factual and uncontroversial information about the terms under which [the platforms'] services will be available." *Id.* The requirement is also reasonably related to Florida's interest in preventing "inherently misleading commercial" conduct—platforms' enforcing content-moderation policies that are not

disclosed to consumers or are at odds with the policies that are otherwise disclosed. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). As explained above, *see supra* pp. 4–5, large social-networking platforms attract a large, diverse usership by assuring consumers that they may speak about anything they want on their platforms, subject only to the platforms' written content policies. But as Meta's own Oversight Board once determined, that is not always accurate, and "[u]sers [are] left guessing" as to what standards platforms are enforcing.[40] The absence of individualized disclosure, as mandated by S.B. 7072, results in platforms' "not treating [consumers] fairly."[41] So the justification for the requirement is "reasonable enough to support a requirement that information regarding [content moderation] be disclosed." *Zauderer*, 471 U.S. at 653.

In a footnote, respondents resist the application of *Zauderer*, arguing that "[t]his Court has never applied [it] . . . outside the context of correcting misleading commercial advertising." Resp. Br. 39 n.6. But the Court has never imposed that arbitrary limit on *Zauderer*, 471 U.S. at 651. Respondents offer no reason why a commercial entity's interest in misleading consumers is greater when the consumer confusion is accomplished through means other than "advertising"—like terms of service.

Respondents also argue that the law's individualized-disclosure requirement fails *Zauderer* scrutiny

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[40] Catalina Botero-Marino, et al., *Oversight Board Demands More Transparency from Facebook*, Oversight Board (Oct. 2021), http://tinyurl.com/mrx53ts4.

[41] *Id.*

because it is unduly burdensome. According to respondents, platforms "remove millions of posts per day," and providing notice and an explanation of the reason for each of those decisions would be "paralyzingly burdensome." Resp. Br. 39. That conclusory assertion has not yet been tested by discovery given the expedited nature of the preliminary-injunction proceedings below.

Respondents offer no explanation for how the platforms have the technological capability to review the content of and remove millions of posts per day, but not the capability to disclose and explain those actions to Florida users. Indeed, many platforms have voluntarily imposed such obligations on themselves. In response to the Meta Oversight Board's concerns over consumer confusion, Meta implemented the Board's recommendation to explain to users why content was removed and how it was reviewed.[42] A dozen leading social-networking platforms endorsed the Santa Clara Principles,[43] which would require platforms to "provide notice to each user whose content is removed, whose account is suspended, or when some other action is taken due to noncompliance with the service's rules and policies, about the reason for the removal, suspension or action."[44] And most major platforms go

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[42] Oversight Board, *2022 Annual Report: Oversight Board Reviews Meta's Changes to Bring Fairness and Transparency to its Platforms* (June 2023), http://tinyurl.com/2s5ctfur.

[43] Gennie Gebhart, *Who Has Your Back? Censorship Edition 2019*, Electronic Frontier Found. (June 12, 2019), https://bit.ly/3kRhwG5.

[44] *See* The Santa Clara Principles on Transparency and Accountability in Content Moderation, Santa Clara Principles, https://santaclaraprinciples.org (last visited Jan. 15, 2024).

even further, offering appellate review of content-moderation decisions.[45] Additionally, the European Union recently enacted its Digital Services Act, requiring a platform to provide EU users subject to content moderation a "clear and specific statement" that explains "the facts and circumstances relied on in taking the [moderation] decision" and the reasons "why the [content] is considered to be incompatible" with the platform's policies. Regulation 2022/2065, art. 17, 2022 O.J. (L 277) 51–52. The platforms appear to have continued operating in Europe without being "paralyz[ed]." Resp. Br. 39. There is no reason to believe that complying with a similar policy in Florida would be any different.

CONCLUSION

The Court should reverse.

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[45] *See, e.g.*, Appealed Content, Meta Transparency Center, http://tinyurl.com/7xcnyw9e (last visited Jan. 15, 2024); Our Range of Enforcement Options, X Help Center, http://tinyurl.com/4h4eh7cj (last visited Jan. 15, 2024); Appeal Community Guidelines Actions, YouTube Help, http://tinyurl.com/2nneteaw (last visited Jan. 15, 2024).

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