Nos. 22-277, 22-555

In The Supreme Court of the United States

ASHLEY MOODY, in her official capacity as Attorney General of Florida, et al.,

Petitioners,

v.

NETCHOICE, LLC d/b/a NETCHOICE, et al.,

Respondents.

NETCHOICE, LLC d/b/a NETCHOICE, et al.,

Petitioners,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Respondent.

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

BRIEF OF MOMS FOR LIBERTY AND INSTITUTE FOR FREE SPEECH AS *AMICI CURIAE* SUPPORTING PETITIONERS IN NO. 22-277 AND RESPONDENT IN NO. 22-555

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INTERESTS OF AMICI CURIAE[1]

Moms for Liberty is a nonprofit organization whose mission is to organize, educate and empower parents to defend their parental rights at all levels of government. Access to social media platforms is crucial to the Moms' efforts to attract new members, coordinate their activities, and communicate their messages to the broader public.

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Protecting individuals' ability to speak about politics and associate for political purposes online advances the Institute's organizational mission in fostering free speech and association.

Amici submit this brief to emphasize that the government may protect consumers against viewpoint discrimination in their use of social media platforms, and to caution the Court against deciding this case in a manner that would preclude the states from providing that protection. Amici thus limit their discussion to the legal doctrines implicated by Section 7 of Texas's

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

HB20, Tex. Civ. Prac. & Rem. Code § 143A.001, et seq., and the "neutrality provisions" of Florida's S.B. 7072, Pet. Br., No. 22-277, at 7, Fla. Stat. §§ 501.2041(2)(b), (c), and (f).

SUMMARY OF ARGUMENT

NetChoice is correct about one thing: social media platforms enjoy the fundamental First Amendment freedoms of speech and association, including the right to exercise editorial control over their own speech. The platforms' rights, which extend beyond the First Amendment, include the right to choose what kinds of services they wish to offer, and the right to empower their customers to control the type of content with which they interact.

But laws barring viewpoint discrimination threaten none of these rights. They do not regulate the platforms' own speech, nor do these provisions prevent the platforms' users from choosing what speech they receive and with whom they interact. In addressing this problem, the states limit only the platforms' power to censor *the discrete speech of others* based on viewpoint—a power the platforms have acquired by electing to become the primary conduit of our social and political discourse.

There is no question that the platforms use this power to prevent people from associating with others, from participating in the political process, and from realizing their potential to help shape our society.

Leveraging their control over "the most important places (in a spatial sense) for the exchange of views," *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017), a small handful of actors are substituting a world tailored to their own ideologies for the one that people would organically develop if they could speak freely. This Court has long rejected the sort of argument NetChoice offers—that the platforms' handling of speech confers a "peculiar constitutional sanctuary" against otherwise valid laws. *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

The states can address this anti-social behavior. In providing that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), the First Amendment did not assign such power to Mark Zuckerberg, or to some faceless programmer at his company. Or, for that matter, to the Chief Editor of NetChoice member TikTok's parent company—who also heads its internal Chinese Communist Party committee. The line between "government" and "private" officials is often blurry, if not artificial. Indeed, the law has long recognized that private actors, no less than government officials, can frustrate people's ability to function in a free society—and that the state's curtailment of such threats from private power promotes rather than infringes on individual liberty.

And while the states may sometimes stumble in calibrating their response to social media censorship,

this Court should preserve some leeway for efforts to strike the proper balance. Above all, this Court should continue to "exercise extreme caution" before approving restrictions on social media access, *Packingham*, 582 U.S. at 105, whatever their source. This policy is consistent with the Court's longstanding preference to give the states a fair opportunity to address difficult new challenges. And its wisdom is confirmed by the courts' experience in favoring consumer access in battles over emerging technologies. The states may not immediately find the perfect solution to this problem, but the First Amendment does not cement a viewpoint censorship regime for the modern public square.

ARGUMENT

I. The First Amendment's application to the internet does not sanction whatever social media platforms wish to do.

These cases would be exceedingly simple were the Court to accept NetChoice's primary assertion: that the states are powerless to address the platforms' viewpoint censorship because the compulsion of speech is generally forbidden, and "there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to speech on the 'Internet.'" NetChoice Tex. Br. at 13 and 30 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). Q.E.D.

The argument is a non-sequitur. Of course "[t]he First Amendment fully applies to the Internet." *Id.* at 30. But if the platforms' behavior would not be protected in an offline context, replicating that behavior online would not imbue it with First Amendment protection. The First Amendment fully applies to newspapers, too, yet the government may compel commercial advertisers to disclose important information even if they print their ads in the *Columbus Citizen Journal*, under the same standard that applies everywhere else. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985).

Beyond this logical flaw, NetChoice apparently conflates social media platforms, a type of online business, with the internet itself. *See*, *e.g.*, NetChoice Tex. Br. at 42 (rationale for regulating cable providers "is 'not appropriate to other speakers' or media, including 'the Internet.'") (citing *Reno*, 521 U.S. at 868-89). But "the internet" is not a speaker, and no one who speaks on the internet or provides internet services thereby becomes "the internet," melting into it indistinguishably as one with all other internet users. What a putative speaker actually does on the internet determines the governing legal framework. Acknowledging the unremarkable fact that the First Amendment applies to the internet does not answer any question in this case, including the most essential one: whether barring social media platforms from censoring their users on the basis of viewpoint implicates *the platforms'* speech.

It does not.

II. The right to exclude speech belongs to speakers who craft their own messages, not to conduits for the transmission of speech that they neither create nor select.

Social media platforms' functions, and the problems posed by their dominance of civic life, are novel. As with all new things, the law first looks to analogies for guidance. In "platforming" their users' speech, do the platforms behave more like newspapers or telephone companies? Web designers or shopping malls? Parades or law schools?

NetChoice's guiding principle in approaching precedent appears simple enough: platforms are *just like* every speaker that has ever been held to enjoy a right to exclude speech, however strained or abstract the comparison, and they are not at all like any entity whose exclusion of speech may be regulated. These arguments, however, "import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) (plurality op.). "[N]o definitive choice among competing analogies . . . allows us to declare a rigid single standard, good for now and for all future media and purposes." *Id.* at 741-42.

Though some land closer to the mark, the analogies are all imperfect. "[S]ocial media platforms cannot

easily be shoehorned into traditional First Amendment rules based on a simplistic model of platform 'rights.'" Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 366 (2021).

Rather than try to squeeze this new creature into a framework established for a different sort of business, this Court may find it more helpful to ask what aspects of these other entities justified, or would continue to justify today, the decisions made about their asserted rights to exclude speech.

Considering what the analogous (or not) entities tend to have in common, the key distinction between those who have a right to exclude speech and those who do not is whether the putative speaker acts primarily as a conduit for other people's speech, or whether it would publish the speech of others as a means of expressing its own message.

1. Creative professionals

At one end of the spectrum lie creative professionals working in all mediums, including website designers and custom cakemakers. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023); *Masterpiece Cakeshop v. Colo. Civ. R. Comm'n*, 138 S. Ct. 1719, 1742-45 (2018) (Thomas, J., concurring in part and concurring in the judgment).[2] These individuals have the right to

[2] Although this Court decided *Masterpiece Cakeshop* on free exercise of religion grounds, *303 Creative* essentially reflects the free speech reasoning of Justice Thomas's *Masterpiece* concurrence.

express themselves as they wish, regardless of whether they accept compensation for doing so. In affirming that right, this Court did not dispute Colorado's characterization of Lorie Smith's business as a public accommodation, and acknowledged (as did Smith) that states "are generally free to apply their public accommodations laws . . . to a vast array of businesses." *303 Creative*, 143 S. Ct. at 2315. But whatever else a public accommodation law could accomplish, "the State could not use its public accommodations statute to deny speakers the right to choose the content *of their own messages*." *Id.* (internal quotation marks and brackets omitted) (emphasis added).

Web designers and custom cakemakers are in the business of transmitting "their own messages," not those of others. *Masterpiece Cakeshop*'s Jack Phillips does not hold his oven door open to the public so that others can bake cakes of their own design and purpose, and Lorie Smith is not in the business of disseminating whatever code the public brings her. Rather, Phillips and Smith's customers ask them to produce discrete works for hire. Unlike social media platforms, they carefully consider what expressive works they will create, intentionally craft these works' every element, and then provide their customers these works of their own creation and expression—not the works of all comers.

Ignoring such obvious distinctions, NetChoice fancies social media platforms as bespoke web designers, quoting liberally from *303 Creative* in asserting that each page a social media platform displays is its own purposeful creative work. NetChoice Tex. Br. at 4. This

is quite a stretch. A visit to 303 Creative's homepage quickly dispels the notion that Smith's business bears any resemblance to Facebook's. That business, as the term "platform" suggests, is not creating "Facebook's own messages," but distributing the messages of others. This is self-evident. Nobody mistakes the Moms for Liberty Dallas chapter's Facebook page for Meta's corporate speech. Billions of people do not visit Facebook seeking Meta Corp.'s views of what they should hear.

Nor does anyone use Facebook to compel Meta's creation or purposeful selection of any specific ideological content, because Meta does not create its users' speech or select it as part of a conscious effort to communicate any of its own messages. Compelling a human being who expresses her values for a living to speak in opposition to those values is one thing; asking a company that expresses no particular message in serving the public as a speech conduit to refrain from discriminating against its users' viewpoints is quite another.

If, as NetChoice offers, social media platforms publish nothing but an endless collection of expressive works akin to Lorie Smith's custom wedding websites, a telephone company could claim that its censorship of phone calls would merely create a unique, curated speech experience on its wires and frequencies. But unlike 303 Creative, a phone company does not create speech; rather, it connects people by serving as conduit for their speech. Social media platforms perform a similar function, even if they retain a First Amendment

right to offer their own speech on their platforms, including the right to recommend or comment on others' speech.

2. Newspapers

Reaching beyond the web designer analogy, the platforms ask to be treated as newspapers, which are entitled to exclude any speech they'd rather not publish. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). "Compelling editors or publishers to publish that which reason tells them should not be published is what [was] at issue in [*Tornillo*]." *Id.* at 256. But when it comes to bearing the legal obligations of editors and publishers, the platforms take a different view—a view with which Congress and this Court correctly agree. 47 U.S.C. § 230; *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

As the platforms recognize when it is more convenient for them to do so, they do not function like newspapers. Again, the familiar distinctions between those entitled to exclude speech and those who are not: platforms, unlike newspapers, are primarily speech-conduits for others that perform no editorial function, and whose output is not understood to express some particular message.

Newspaper readers can rest assured that the paper's editors approved of everything appearing within its pages, at least as matters worthy of discussion. A publication's description as "All the News That's Fit to Print" is a declaration of editorial judgment. But as the

Florida district court recognized, "newspapers, unlike social-media providers, create or select all their content." Pet.App., No. 22-277, at 85a. Most of the speech carried by social media platforms is functionally invisible to them, even if algorithms screen some content. *Id*.

"[T]he sheer volume and breadth of material users seek to share" through social media, NetChoice Fl. Br. at 4, confirms the impossibility of exercising editorial judgment over the platforms, as well as the essential fact that the platforms exist to distribute the speech of others, not their own content. It is precisely that feature which helps to draw in users and allows platforms to leverage network effects. And it is impossible to survey this endless flood of speech generated by billions of people and perceive a coherent speech product, akin to the edition of a newspaper or magazine. *See* Eugene Volokh, *Treating Social Media Like Common Carriers?* 1 J. FREE SPEECH L. 377, 423-428 (2021).

3. Parades, cable systems, and correspondence.

The same two factors—the speakers' expression of their own messages, and their creation or deliberate selection of the speech they wish to preserve against intrusion—distinguish speakers who enjoy the First Amendment exclusion right from NetChoice's constituent platforms.

A social media platform is not a sort-of online parade. In real life, a parade organizer can exclude

unwanted viewpoints from its parade because "[r]ather like a composer, [it] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the [organizer's] eyes comports with what merits celebration on that day." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). A parade organizer is "intimately connected with the communication advanced" by the parade, and thus may bar "dissemination of a view contrary to one's own" from the event. *Id.* at 576. Platforms are nothing like such hosts. They don't pick content to "mak[e] some sort of collective point," *id.*at 568, even an abstract one like "what merits celebration on [St. Patrick's] day," *id.* at 574. Taken as a whole, parade participants communicate a message—even if only that the parade participants fall within the range of speech relevant to the parade's theme. All the speech collected on a social media platform does not communicate any such messages. Indeed, far from presenting a message of its own, a platform may serve different users very different materials. NetChoice Tex. Br. at 4.

With respect to cable systems, NetChoice errs in claiming that this Court, in *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019), "rejected governmental efforts to compel private parties to disseminate speech." NetChoice Tex. Br. at 1. *Halleck*, a case brought by private individuals, held only that cable systems are not state actors. Indeed, this Court carefully avoided the holding NetChoice attributes to the

case: "A distinct question not raised here is the degree to which the First Amendment *protects* private entities such as [cable operators] from government legislation or regulation requiring those private entities to open their property for speech by others." *Halleck*, 139 S. Ct. at 1931 n.2 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"). In *Turner I*, this Court held that cable systems enjoy First Amendment protection. But it later upheld a requirement that cable systems carry some channels against their will. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). As the Fifth Circuit correctly held, the *Turner* cases confirm that viewpoint discrimination bans would satisfy heightened scrutiny, but this Court need not get that far because social media platforms are inapposite. They do not pick their users the way that cable systems create a channel lineup, and no message can be discerned from their "user lineup."

NetChoice's least compelling analogy compares social media platforms to utility bills—communications between a speaker and its clients, from which the speaker may exclude its critics. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986). Mailed envelopes are a conduit for no one's speech but that of the sender, who composes the entirety of its own message.

4. Law schools and shopping malls

In contrast, this Court has denied a First Amendment exclusion right to putative speakers who hosted the speech of others. True, under many if not most

circumstances, hosts enjoy a First Amendment right to exclude speech from their private property. *See*, *e.g.*, NetChoice Tex. Br. at 20 (community bulletin boards and comedy club open-mic nights) (citation omitted). But a different rule may prevail where the "guest's" speech cannot be imputed to the host. Thus, requiring law schools to open their campuses to military recruiters "does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) ("*FAIR*"). The requirement "is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *Id.*

Of course, "nothing in *FAIR* would require schools to publish military-preferred messages in their law reviews." NetChoice Tex. Br. at 30. But law reviews, like newspapers, are carefully edited, expressive and unified speech products. *FAIR* did require schools to "send e-mails and post [bulletin board] notices on behalf of the military" to the same extent that they transmitted such speech for others. *FAIR*, 547 U.S. at 61-62. Likewise, this Court rejected a shopping mall's First Amendment right to exclude visitors' political speech, primarily because the mall was open to the public and the Court believed that pamphleteers and canvassers' speech "will not likely be identified with those of the

owner." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980).[3]

5. Social media platforms—when seeking to avoid liability

Since the right to exclude speech turns on whether the putative speaker is expressing its own message, and whether it carefully selects any elements comprising that message, the most relevant precedent to consider when asking whether social media platforms have this right is precedent concerning social media platforms—when they are called to account for this alleged speech of theirs.

Notwithstanding the platforms' claim of an unrestricted right to "curate" their users' expression, "they've told courts *repeatedly* that they merely serve as 'conduits' for other parties' speech and use 'neutral tools' to conduct any processing, filtering, or arranging that's necessary to transmit content to users." Pet.App., No. 22-555, at 52 (footnote omitted). And courts typically accept these claims. "To be sure, TikTok . . . is primarily a conduit of 'informational

[3] *PruneYard* should be reconsidered in an appropriate case because it erred in conceiving of shopping malls as speech conduits. Shopping malls are meant to provide a shopping experience, and the owner is entitled to calibrate the environment to that end. Outside speech displaces and recontextualizes any messaging the mall's ownership may want to express, including one of negative space, and might well be imputed to the mall. But *PruneYard* erred in misapplying First Amendment principles, not in its understanding that the case would turn on a distinction between the host's own message and that of its guests.

materials.' In that sense, it is (among other things) a 'medium of transmission.'" *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 81 (D.D.C. 2020) (TikTok exempt from regulation as it transmits "information or informational materials" per 50 U.S.C. § 1702(b)(3)). "TikTok surely derives more value as a result of facilitating communications than 1977-era telephone networks and postal services. But that is a difference in degree, not in kind." *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 108 (D.D.C. 2020) (affording TikTok exemption of 50 U.S.C. § 1702(b)(1) for "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value").

The platforms prevailed on such arguments before this Court just last term. Sued for aiding and abetting the terrorism sponsored on their platforms, NetChoice's members evaded liability "because the only affirmative 'conduct' [they] allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history." *Taamneh*, 143 S. Ct. at 1226. This Court had "[no] reason to think that defendants selected or took any action at all with respect to ISIS' content (except, perhaps, blocking some of it)." *Id.* (footnote omitted).

It wasn't their speech. They had nothing to do with it.

"Indeed, there is not even reason to think that [the companies] carefully screened any content before allowing users to upload it onto their platforms. . . . The

mere creation of those platforms, however, is not culpable." *Id.* In this regard, this Court saw the platforms as being no different than "cell phones, email, or the internet generally. Yet, we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large." *Id.*

What the platforms tell courts in hoping to avoid liability for their hosted speech aligns with their messaging to consumers in enticing them to create speech for platform distribution. The platforms exist to distribute user speech,[4] for which they are not responsible,[5] and guidelines on platform use are politically

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[4] YouTube "provides a forum for people to connect . . . and acts as a distribution platform for original content creators." YouTube, *Terms of Service: Our service* (Dec. 15, 2023), https://www.youtube.com/static?template=terms (last visited Jan. 10, 2024). Facebook's mission is to "[c]onnect you with people and organizations you care about," and to "[e]mpower you to express yourself and communicate about what matters to you." Facebook, *Terms of Service: 1. The services we provide* (July 26, 2022), https://www.facebook.com/legal/terms (last visited Jan. 10, 2024). The site's "personalization" is user-generated, based on "the connections you make, the choices and settings you select, and what you share and do on and off our Products." *Id.*

[5] "All Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content." X, *Terms of Service: 3. Content on the Services* (Sept. 29, 2023), https://twitter.com/en/tos#update (last visited Jan. 11, 2024). "Content is the responsibility of the person or entity that provides it to the Service." YouTube, *Terms of Service: Content on the Service* (last visited Feb. 17, 2022), https://www.youtube.com/static?template=terms. "LinkedIn generally does not review content provided by our Members

neutral.[6] One cannot on the one hand claim to be the editor of a coherent speech product, and on the other hand disclaim all responsibility for that content.

Taamneh correctly understood that the platforms are largely passive conduits for the speech of others. When they distribute their users' speech, they do not thereby endorse or adopt it in any way. Platforms are not a sort-of Schrodinger's cat, existing simultaneously in two dimensions as both publishers and conduits, their true nature to be established only when courts open the box to discover whether they're taking initiative or playing defense. They should be satisfied with their success to date.

And now, the platforms "must take the bitter with the sweet." *Bailey v. United States*, 568 U.S. 186, 206 (2013) (Scalia, J., concurring). If the speech is not

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or others." LinkedIn, *User Agreement*, § 3.3 (Feb. 1, 2022), https://www.linkedin.com/legal/user-agreement#rights (last visited Jan. 11, 2024).

[6] "Community Guidelines" apply "to everyone equally—regardless of the subject or the creator's background, political viewpoint, position, or affiliation." YouTube, *Community Guidelines*, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Jan. 11, 2024). "Defending and respecting the user's voice is one of our core values at X." X, *Defending and respecting the rights of people using our service*, https://help.twitter.com/en/rules-and-policies/defending-and-respecting-our-users-voice (last visited Jan. 11, 2024). "We empower people to understand different sides of an issue and encourage dissenting opinions and viewpoints to be discussed openly." X, *Our approach to policy development and enforcement philosophy*, https://help.twitter.com/en/rules-and-policies/enforcement-philosophy (last visited Jan. 11, 2024).

theirs for liability purposes, then it is not theirs to censor for viewpoint, either, and the government can protect their users, the true speakers, from platform disruption.

III. Prohibiting viewpoint discrimination does not impact the platforms' First Amendment rights.

While the platforms lack a First Amendment interest in the speech of others, they retain full First Amendment rights in their own expression. But the viewpoint discrimination prohibitions do not reach the platforms' own expressive website elements or speech, or the platforms' provision or exclusion of speech as requested by the platforms' users. In barring viewpoint discrimination, the states do not regulate Facebook's page format or X's logo, any more than the government regulates a cable operator's channel guide or whatever logo Western Union would print on its telegrams were it still in that business. Nor do the states interfere with the platforms' familiar filtering, following, friending, blocking, protecting, subscription, and search features that allow *users* to curate, to control what they see and share.

The states do not ban content curation; they merely require that it be done according to known rules, in a viewpoint-neutral manner, and with notice. Enforcing the laws' core provisions will not open the floodgates to unwanted content overriding user preferences or interfere with the platforms' presentation of

material according to the nature and limits of their medium. Under the states' approaches, the platforms can moderate content, but they can't do it in a black box.

Treating big platforms as common carriers is analogizable to existing jurisprudence on limited public forums, where content-based restrictions are allowed so long as they are reasonably related to the purposes of the forum but viewpoint discrimination is barred. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (state may reserve limited public forum for certain groups and topics but may not discriminate on basis of viewpoint); *see also* Eugene Volokh, *Video: Whether Social Media Platforms Should Be Treated Like Common Carriers*, CATH. LAW: INAUGURAL SEIGENTHALER DEBATE (Feb. 16, 2022), https://youtu.be/7fnLvXWno5I, timestamp 1:12:43-1:14:36 (suggesting analogy of social media platforms to limited public fora).

Indeed, barring the platforms from engaging in viewpoint discrimination does not impact their First Amendment rights any more than barring viewpoint discrimination in a public forum impacts government speech. No one questions that a city's flying of its flag over city hall is government speech, communicating the government's message. But when Boston opened a flagpole to public use, its "lack of meaningful involvement in the selection of flags or the crafting of their messages [led this Court] to classify the flag raisings as private, not government, speech." *Shurtleff v. City*

of Boston, 142 S. Ct. 1583, 1593 (2022). The "Christian flag," though flown on Boston's flagpole, was nonetheless not Boston's speech, and the city could not discriminate against its viewpoint.

To be sure, big platforms are not state actors (unless they censor at the behest of the government), but the point here is that there already exists an operable jurisprudential framework enabling forum operators to impose reasonable limits on content while remaining viewpoint neutral within those categories. That there may be some line drawing involved, doesn't prevent that framework from allowing courts (and lawyers) to effectively evaluate the public comment periods of city council meetings or school board meetings. *See*, *e.g.*, *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893 (6th Cir. 2021). Like many limited public fora, social media platforms generally cast a wide net for speakers (users) and only exclude some nonconforming content. Indeed, their networks' values largely depend on the length and breadth of the nets they cast.

Sometimes, and in some ways, NetChoice's members speak through their platforms. But mostly, they just facilitate expression by others. That conduit function, not the platforms' expression, is what the states regulate in banning viewpoint discrimination. And just as "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests," *Associated Press*, 326 U.S. at 20 (footnote omitted), any First Amendment interests that NetChoice's members might have in operating social media platforms does

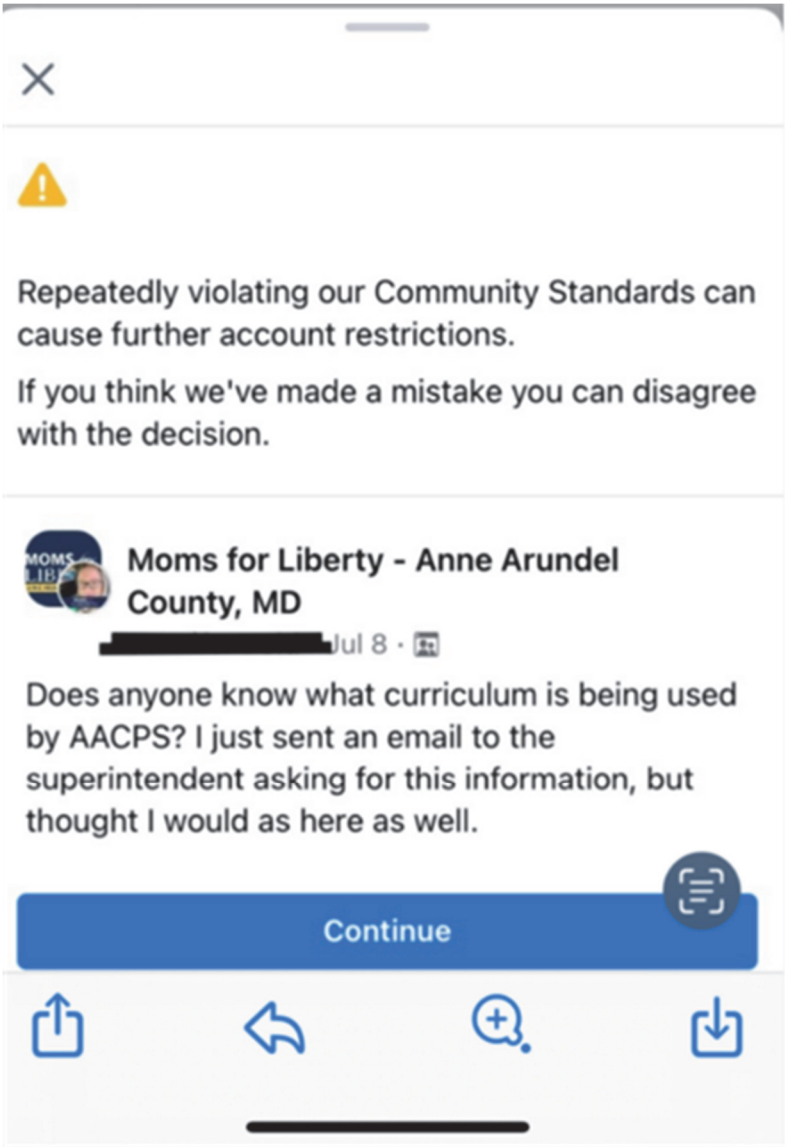
not entitle them to attack their users' speech and association.

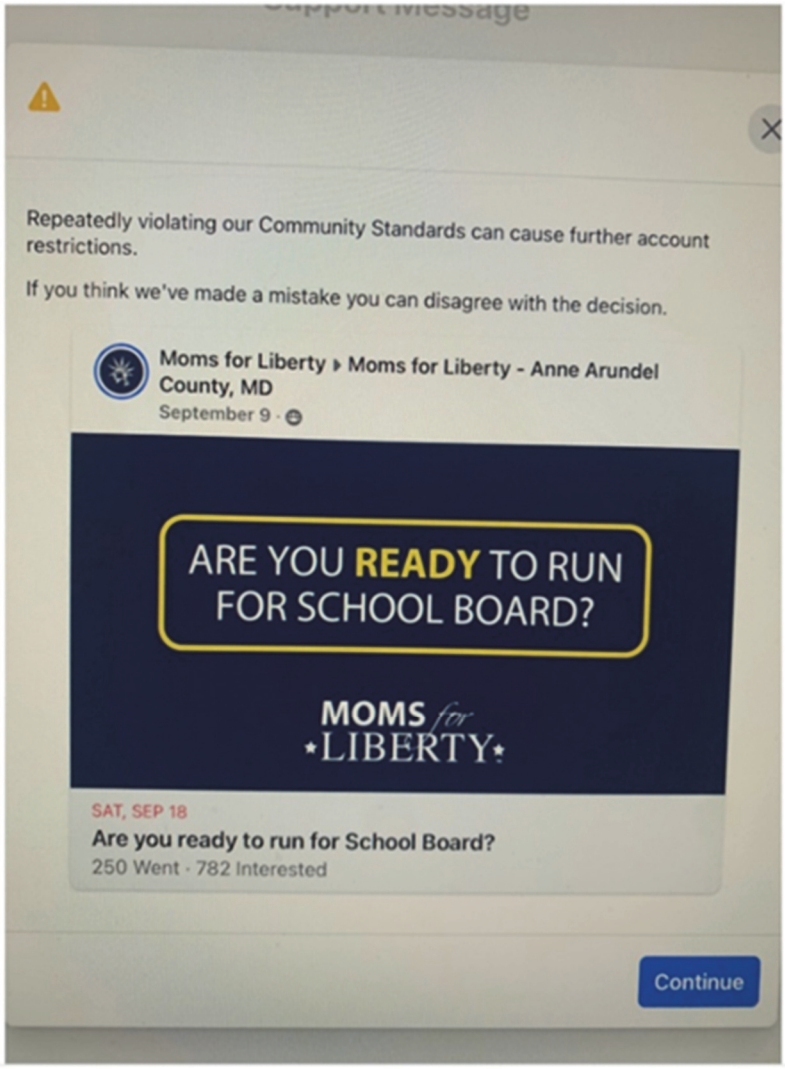
IV. The platforms' viewpoint discrimination seriously disrupts the political process.

The platforms' content-moderation decisions often defy common sense; rules are unknown and haphazardly applied, and political bias often seems determinative. The problem's full exposition lies well-beyond the word limits, and this brief's scope, but some examples warrant discussion—as do some underappreciated aspects of the threat to American political discourse.

Amicus Moms for Liberty had thrived by recruiting and organizing on Facebook when its ideological and political opponent, the National Education Association, began lobbying the platform to censor the Moms' content as "misinformation." Tiffany Justice & Tina Descovich, *Open Letter to Mark Zuckerberg* (Jan. 24, 2022), https://perma.cc/DT3M-U6KW. Soon, Facebook issued 22 Moms chapter groups notifications of community standards violations, and disabled the chapters "for posting basic information about local government operations such as school board meeting times, or questions about student textbooks." *Id.*

These are the sorts of posts that triggered deplatforming:


Repeatedly violating our Community Standards can cause further account restrictions.
If you think we've made a mistake you can disagree with the decision.
Moms for Liberty - Anne Arundel County, MD
[redacted]Jul 8 ·
Does anyone know what curriculum is being used by AACPS? I just sent an email to the superintendent asking for this information, but thought I would as here as well.
Continue



Chrissy Clark, *Parent Group Alleges Facebook Censors Its Harmless Posts In Letter To Mark Zuckerberg*, DAILY CALLER (Jan. 24, 2022), https://bit.ly/3IwWbMV. Facebook restored the Moms' access following public outcry—this time. Similarly, Facebook banned Heroes of Liberty, a conservative publisher of children's

biographies featuring figures such as President Reagan and economist Thomas Sowell, from advertising on the platform, but lifted the ban when it drew negative attention. Thomas Barrabi, *Facebook restores conservative book publisher's account after 'error.'* N. Y. POST (Jan. 4, 2022), https://bit.ly/3puFHgK. At the time, Facebook did not explain why it had incorrectly labeled harmless childrens' book ads to be "Low Quality or Disruptive Content." *Id.*

On the other hand, the platform "shields millions of VIP users from the company's normal enforcement process," allowing favored people to violate the company's content rules with impunity. Jeff Horvitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt*, WALL ST. J. (Sept. 13, 2021), https://on.wsj.com/3tBbvBk. Online, the elite really do live by a different set of rules. And apparently, incumbent office holders are exempt from rules applied to challengers: "While the [privilege] program included most government officials, it didn't include all candidates for public office, at times effectively granting incumbents in elections an advantage over challengers." *Id.*

At times, government actors influence or even direct platform decisions to censor content that they find politically disagreeable, a problem this Court will address in *Murthy v. Missouri*, No. 23-411. Viewpoint censorship by ostensibly private actors poses its own kind of challenge. A (truly) private company might display "extraordinary firmness" in resisting government pressure, perhaps even relishing such a fight owing to a

deep commitment to free speech principles. But when those who control the primary nodes of communications enthusiastically censor their political and ideological opponents, only a nondiscrimination rule can offer practical hope for the silenced. Viewpoint discrimination bans may also help avert the type of egregious jawboning (and worse) that permeates the *Murthy* record. Such laws could stiffen the spines of platform operators, who could resist officials' improper censorship requests on grounds that they solicit unlawful acts.

A nondiscrimination rule might also be the only countervailing force against the imposition of foreign speech regulations on platform speech that would violate the First Amendment if attempted by Congress. However this Court might rule in *Murthy*, protecting ostensibly private discrimination would enable the European Union to ban all manner of First Amendment-protected content if platforms decide it's simply easier or more profitable to cave in to its demands. Adam Satariano, *Illicit Content on Elon Musk's X Draws E.U. Investigation*, N. Y. TIMES (Dec. 18, 2023), https://bit.ly/48G6Bqt.[7]

Moreover, the line between government and private power may be illusory. NetChoice member TikTok denies "remov[ing] or promot[ing] content on behalf of the Chinese government," but its actions restricting

[7] Congress has recognized the threat that foreign legal systems pose to First Amendment freedoms, immunizing Americans from libel tourism. 28 U.S.C. § 4102(a). That immunity extends the reach of platforms' immunity under Section 230 of the Communications Act. 28 U.S.C. § 4102(c).

material critical of China raise doubts. *TikTok Suspends a Film on Jimmy Lai*, WALL ST. J. (May 3, 2023), https://bit.ly/3S7Noa2. The previous Administration regulated TikTok as a foreign threat, alleging that its corporate parent, ByteDance, had (among other things) "placed over 130 CCP [Chinese Communist Party] committee members in management positions throughout the company." *TikTok*, 490 F. Supp. 3d at 78 (citation omitted). Indeed, one person, Zhang Fuping, apparently serves as both ByteDance's Chief Editor and Party Secretary of the company's internal CCP committee. *See* Rachel Lee, Prudence Luttrel, Matthew Johnson, and John Garnaut, *TikTok, ByteDance, and their Ties to the Chinese Communist Party*, Submission to the Senate Select Committee on Foreign Interference through Social Media (Australia) (March 14, 2023) at 49, https://perma.cc/J36Q-PX2U. This official has declared "that ByteDance should 'transmit the correct political direction, public opinion guidance and value orientation into every business and product line [and] use values to guide algorithms.'" *Id.* at 58 (footnote omitted); *see also* Yaqiu Wang, *Targeting TikTok's privacy alone misses a larger issue: Chinese state control*, QUARTZ (Jan. 24, 2020), https://bit.ly/3vNVH3i.

To be sure, limiting undue foreign influence is not the states' primary responsibility. But the constitutional rules made here will be far-reaching. It warrants some pause that awarding NetChoice an absolute, constitutional right to censor online speech might well afford foreign governments, acting through ostensibly

private companies, the very power that the First Amendment forbids to Congress.

Regardless of its source, or its public, private, domestic or foreign nature, viewpoint censorship of social media platforms inflicts tremendous individual and societal harm. A user who is booted off a platform, or who routinely has her content suppressed for ideological reasons, often cannot just switch platforms without losing valuable connections, reach, and content. She is unlike a reader who may select a different publication at a newsstand. Deplatformed users are effectively excluded from vast information networks (including government officials who use social media to interact with the public), and that exclusion directly impacts their ability to speak, consume the speech of others, and participate in civic life.

"[T]he decision by even a single social media company to ban or censor a speaker can effectively exclude that person from participating in political discourse." Brendan Carr & Nathan Simington, *The First Amendment Does Not Prohibit the Government from Addressing Big Tech Censorship*, YALE J. ON REG. BLOG (Jan. 11, 2024), https://perma.cc/J59F-Z2QW. In other contexts, the law has long recognized that the impermissible denial of a single choice among other potential options is unacceptable. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). And while in theory, restaurants and motels have substitutes, there is no substitute for access to that large portion of the population that is only to be found on a particular network.

Telling wrongly deplatformed speakers to "find another Facebook" is no better answer than that which the law properly rejects in the public accommodation context. We don't expect people to start their own motel chains or bus companies in response to bias, and governments appropriately regulate access in those areas.

Beyond its impact on individuals, the threat such exclusion poses to otherwise viable social and political movements is plain. *Cf. TikTok*, 490 F. Supp. 3d at 83 (acknowledging governmental interest in "preventing China from . . . skewing content on TikTok"). When "everyone" is on a platform, that platform is where speakers are likely to find those who are not yet won over to their views or are even aware of their issues. Moreover, in the case of political campaigns and speech, timing is often crucial. Banning or suppressing platform users' political speech during election season, even if only for a limited time period, might sway the outcome of an election. Similarly, preventing someone from raising campaign contributions on Facebook, or another platform, can hobble candidates and may sometimes protect incumbents.

Social media platforms should not act as *sotto voce* king-makers, by determining access to their vast networks.

V. Prohibiting platform viewpoint discrimination is consistent with free speech.

Provisions forbidding social media platforms from discriminating against their users based on viewpoint

are not merely constitutional. They are consistent with the First Amendment interests in promoting more—and more diverse—speech.

"The First Amendment, in particular, serves significant societal interests." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). These include "the liberty to discuss publicly and truthfully all matters of public concern," which "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam). More speakers, not fewer, advance the First Amendment's values. Rejecting an "antidistortion" rationale for the regulation of corporate speech, this Court overturned a censorship regime "vast in its reach" that "suppress[ed] the speech of manifold corporations . . . prevent[ing] their voices and viewpoints from reaching the public. . . ." *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

Indeed, when previous technological and social developments rendered various "modes of communication indispensable instruments of effective political speech," this Court recognized that campaign expenditure limits "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. The restrictions failed First Amendment review, as they

"appear[ed] to exclude all citizens and groups [with few exceptions] from any significant use of the most effective modes of communication." *Id.* at 19-20 (footnotes omitted).

Buckley's condemnation of expenditure limits echoes the states' logic in prohibiting platform viewpoint discrimination. Today, social media platforms are the newly "indispensable instruments of effective political speech." Platform viewpoint censorship substantially restrains the quantity and diversity of political speech, and excludes many citizens from "any significant use of the most effective modes of communication." The states' efforts to address this problem does not violate First Amendment principles—it advances them.

And regulations which do no more than preserve equal access for the dissemination of viewpoints are permissible. For example, Congress requires that broadcasters who wish to carry advertising for political candidates offer such access equally to all candidates, without discrimination or censorship. 47 U.S.C. § 315. But if NetChoice prevails here, it would be difficult to see how such provisions could survive a First Amendment challenge.[8]

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[8] Section 315 is distinguishable from the so-called "Fairness Doctrine," which suffers from the same problems as *Tornillo*'s ill-fated right of reply. *See In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C. Rcd. 5043 (1987), *aff'd on other grounds,* 867 F.2d 654 (D.C. Cir. 1989).

VI. States should be given the space to solve the problem of social media censorship.

Just as "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in [the internet]," *Packingham*, 582 U.S. at 105, it should be at least as cautious before holding that the First Amendment bars all state efforts to *provide* that protection.

Social media censorship severely impairs many Americans from participating in civic society. Left unchecked, this censorship will change election results; it will extinguish some political movements and allow others to grow unquestioned. "This Court has long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (internal quotation marks omitted). Even if it determines that portions of the Florida and Texas laws have overstepped, this Court should be cautious not to pre-empt all future efforts to combat viewpoint discrimination by social media platforms.

History shows that when courts come to a technological crossroads, the better course is to side with individual freedom. Although the substantive legal issues in these earlier cases were quite different from those presented here, the platforms' effort to exert total control over users' platform speech echoes the movie studios' attacks on VCRs, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and

the recording industry's campaign against the MP3 player, *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999) ("*RIAA*"). It merits reflecting, from the vantage point of 2024, that this Court protected Americans' ability to purchase and use videocassette recorders for the purpose of time-shifting by a mere 5-4 vote. A different outcome in *Sony* would have stunted the VCR, and with it, the development of a home video rental market. And had *RIAA* held that an MP3 player is a "digital audio recording device" within the meaning of the Audio Home Recording Act of 1992, the iPod could not have developed as it did, with all that implies for how people consume media, and the development of subsequent devices, such as smartphones and tablets.

The *Sony* and *RIAA* courts could not have imagined the technological evolutions that they unleashed. In one sense, these cases merely interpreted and applied statutory language, and the credit goes to Congress for not legislating away the future. But the courts' rationales in both cases favored consumer freedom over claims of proprietary control over information. Today's media landscape would have been unimaginable had either of these cases been decided differently. There is no telling what society is losing because countless viewpoints are shut out of social media platforms.

CONCLUSION

The First Amendment does not prohibit the states from barring viewpoint discrimination by social media platforms.

Respectfully submitted.

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