No. 22-277, 22-555

In the
Supreme Court of the United States

ASHLEY MOODY, Attorney General of Florida, et al.,
Petitioners,
v.
NETCHOICE, LLC, et al.,
Respondents.

NETCHOICE, LLC, et al.,
Petitioners,
v.
KEN PAXTON, Attorney General of Texas, et al.,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Fifth and Eleventh Circuits

Brief of Missouri, Ohio, 17 other States, and the Arizona Legislature in support of Texas and Florida

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INTEREST OF *AMICI* STATES

The States of Missouri, Ohio, Alaska, Alabama, Arkansas, Iowa, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Virginia, and the Arizona Legislature ("the States"), agree with many points in the amicus brief of New York, *et al.*, which focuses on social media problems *other* than censorship. The States here submit this amicus brief to focus directly on the censorship question.

The States do so for two reasons. First, it is the constitutional duty of the States to protect their citizens' inherent rights, including the right to free speech. Just as States pass criminal and civil laws to protect citizens from private abridgment of rights of life and property, States have a long history of regulating to protect citizens from abridgment of their free speech rights by dominant communication platforms. Second, the States have a vital interest in hearing the speech of their citizens, especially political speech. That is necessary for States to be democratically responsive. NetChoice's position threatens these interests because it seeks to upend the longstanding authority of States to prohibit mass communication networks from engaging in censorship and viewpoint discrimination.

1. The Founders were clear that the purpose of government is to secure liberty. The Declaration of Independence recognizes that natural rights, including "Life" and "Liberty," preexist government, and that "Governments are instituted among Men" for

one principal purpose: "to secure these rights." Declaration of Independence ¶ 2.

The Founders thus recognized that governments are created to protect rights from *private* abridgment—the only abridgment that can occur before government is formed. Society must of course always resist government abuse of power (which occurs too often), but government is created in the first instance to protect against private abuse. As James Madison put it, "If men were angels, no government would be necessary." The Federalist No. 51, at 319 (Clinton Rossiter ed., Signet Classic 2003) (1788). Government must be obliged "to control itself"—through separation of powers—but it is equally true that society "must first enable the government to control the governed." *Ibid.*

One right States "are instituted among Men" to "secure" is the freedom of speech. As Madison said when proposing the draft of the First Amendment, freedom of speech is a "natural right" predating government itself. Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 264 (2017) (citing Madison's notes reflecting his speech in Congress). This Court has held the same, explaining that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008) (emphasis in original).

So NetChoice is flat wrong to contend (at 25 in *Paxton*)[1] that *only* the government is capable of censorship. Because freedom of speech is a freedom States were created to secure, it is the duty of States to secure that freedom from private abridgment, including abridgment by extraordinarily powerful communication platforms.

The States can pass criminal laws against theft and murder—thus protecting against private interference with rights of property or life. And if dominant firearm dealers refuse to sell on account of race, States can regulate to secure for their citizens the right to bear arms. So too, if dominant communication platforms censor based on viewpoint, States can pass laws to stop that censorship—as they have done for well over 100 years.

A State of course cannot, in the name of protecting free speech, abridge the freedom of speech. But this Court has held that the First Amendment does not prohibit States from protecting the marketplace of ideas when that marketplace is threatened by private actors. "It would be strange indeed," this Court said, "if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). As with freedom of the press, so too with freedom of speech. *See W. Union Tel. Co.* v. *James*, 162 U.S. 650, 651, 660 (1895)

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[1] This amicus references briefs in the two consolidated cases as *Paxton* briefs (for No. 22-555) and *Moody* briefs (for No. 22-277).

(upholding law prohibiting telegraph companies from engaging in viewpoint discrimination); *see also* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2316–19 (2021) (listing statutory examples protecting free speech).

2. States also have an interest in preventing censorship because censorship deprives States of the information they need to be responsive to the people. "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). "[I]t it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Ibid.*

Many landmark legal changes arose from government responding to the speech of everyday citizens. That includes "great matters of state," such as Magna Carta, women's suffrage, the Declaration of Independence, and antislavery legislation. *Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 395–97 (2011). Those reforms illustrate that "representative democracy" works best when the "free exchange" of ideas "facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Mahanoy Area Sch. Dist.* v. *B. L.*, 141 S. Ct. 2038, 2046 (2021). Today, one of the most common ways individuals speak to their governments is through public posts on social media.

Top-down censorship by dominant communication platforms thus threatens the ability of States to operate. Censorship deprives local government of

the information needed to "remain[] responsive to the will of the people." *Terminiello*, 337 U.S., at 4.

* * *

As Judge Oldham's opinion below recognized, States and Congress have enacted regulations like the ones enacted by Texas and Florida for well over one hundred years. *NetChoice, L.L.C.* v. *Paxton*, 49 F.4th 439, 470–71 (CA5 2022). While the earlier laws applied to telegraphs and telephones, it is no different when the companies carrying other people's speech are digital rather than analog. The States thus have a paramount interest in urging this Court to affirm that longstanding, historic authority of States to protect freedom of speech and enable representative government by prohibiting dominant communication networks from censoring.

That interest is especially weighty here in light of the unprecedented control these platforms have over speech central to political and public discourse. "[I]n the modern economy, the Platforms provide the most effective way to disseminate news, commentary, and other information." *Id.*, at 476. And never before has there been so much "concentrated control of so much speech in the hands of a few private parties." *Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring). Today the ability "to cut off speech lies most powerfully in the hands of private digital platforms." *Id.*, at 1227. That explains why the Federal Government has inserted itself through pressure into those content-moderation policies and practices—as shown in *Murthy* v. *Missouri*. The concentration of power in a handful of platforms can facilitate government censorship.

That power creates other real concerns. A Facebook executive admitted in a 2019 internal memo—later leaked—that the company's power over speech is so immense that Facebook could unilaterally "pull any lever" to alter the outcome of a presidential election. *Andrew Bosworth Memo*, N.Y. Times (Jan. 7, 2020).[2] The States have authority to protect citizens from abuse of that immense power.

SUMMARY OF ARGUMENT

I.A. The easiest path to resolve this case is to determine whether social media is more like telephones or more like newspapers. The law has consistently permitted requiring telephones and the like to distribute third-party speech and has generally rejected requiring the same of companies like newspapers.

This Court has already unanimously rejected NetChoice's maximalist argument that companies have a categorical right not to "disseminate … speech generated by others." NetChoice *Paxton* Br., at 13; *see PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 85 (1980). Instead, this Court has considered whether the regulated company "possess[es] the power to obstruct readers' access to" information, *Turner Broad. System, Inc.* v. *FCC* ("*Turner 1994*"), 512 U.S. 622, 656 (1994), and whether requiring a company to distribute third-party speech would

[2] https://perma.cc/V8NP-6K4A; https://web.archive.org/web/20200107185034/https://www.nytimes.com/2020/01/07/technology/facebook-andrew-bosworth-memo.html.

materially harm the company's ability to get out its "own message," *Rumsfeld* v. *Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

On these critical questions, newspapers and telephones are different. Local newspapers cannot restrict access to information. Nationwide phone companies can. For newspapers, parades, and the like, space constraints and limited number of content creators means compelling a company to carry third-party speech materially harms the company's ability to express its "own message." *Ibid.* The space constraints mean material loss of the company's opportunity to speak, and the nature of the medium means listeners become confused about whether speech belongs to third parties or the company. *Id.,* at 65. But for mass communication networks like telephones, those risks are not substantial. So courts have long permitted requiring companies like telephones to distribute third-party speech free from viewpoint discrimination.

Social media companies are much more like telephone networks than newspapers. Unlike newspapers, which "do[ ] not possess the power to obstruct readers' access to" information, *Turner 1994*, 512 U.S., at 656, social media companies do—and they exercise that power. Like telephone companies, and "unlike newspapers," social media companies "hold themselves out as organizations that focus on distributing the speech of the broader public." *Knight First Amend. Inst.*, 141 S. Ct., at 1224 (Thomas, J., concurring). Unlike the space constraints for newspapers, the space on social media is nearly boundless. And like telephones, nearly all

speech on social media platforms is created by third parties.

For all these reasons, NetChoice cannot meet its burden of establishing that the regulations at issue here would materially limit a social media company's speech or cause ordinary members of the public to confuse speech on Facebook, YouTube, or X (formerly Twitter) as speech of the company itself, rather than third parties using those platforms. *Rumsfeld*, 547 U.S., at 64.

I.B. NetChoice barely addresses the analogy to telephones and telegraphs, stating only that regulating those companies is permissible because they transmit speech "on an 'unedited basis' from point A to point B." *Moody* Br., at 49. That argument fails for many reasons.

First, it is demonstrably false historically. As the Fifth Circuit explained, telegraph companies engaged in the same kind of viewpoint discrimination NetChoice's members engage in today.

Second, the argument would make regulation pointless. If the only companies that can be required to carry content without discrimination are those already doing so, regulation does nothing at all. Relatedly, NetChoice's argument begs the question. If this Court permits the regulations to go into effect, social media platforms likewise will transmit speech "on an 'unedited basis' from point A to point B."

Third, NetChoice's argument creates a recipe for censorship by telephones and government. Under their logic, as soon as an actor begins "editing" content, that transforms the content into the actor's own speech. Telephones can thus evade the 100-plus

years of regulation simply by starting to censor. So too, government can simply "edit" people's speech, and turn everything into government speech.

I.C. Because NetChoice has brought facial challenges against these laws, this Court need not answer the thornier questions about what to do when platforms mix their own speech with that of third parties (such as when they append "fact checks" to third-party speech).

II.A. The extraordinary market power social media platforms possess reinforces the ability of States to regulate in this area. At common law, companies with substantial market power were required to serve without discrimination. This Court has long permitted States and Congress to apply the same concept to large communication platforms.

No doubt, these platforms possess extraordinary power. This industry has monumental barriers to entry. What makes these companies valuable is their network sizes, such as Facebook's 3-billion person network. That makes it very difficult to compete, and the one time an upstart (called Parler) finally gained momentum, Apple, Google, and Amazon forcibly removed it from the internet.

These companies also aggressively engage in censorship that impoverishes free exchange of ideas. Many examples are notorious, such as the systematic censorship (at the instigation of the Federal Government) of the Hunter Biden laptop story and of the theory that COVID originated in a lab in China—now the predominant theory of the Energy Department and the FBI. Platforms censor viewpoints on the most hotly contested topics of the

day, like transgender issues. And they suppress "misinformation" later proven accurate. While most censored speech is conservative, there are complaints about censorship of left-wing speech. All this censorship harms not only the marketplace of ideas, but also the ability of the States to respond to the concerns of their citizens.

III. Dominant digital platforms are not the only problem. Government systematically pressures platforms to censor. This Court granted certiorari to *Murthy* v. *Missouri*, No. 23-411, where a district court made extensive fact findings that the White House, the FBI, an agency within the Department of Homeland Security, and other federal actors systematically pressured social media companies to censor even more speech.

In its brief in *Murthy*, the Federal Government does not dispute the accuracy of these extensive, alarming findings. It does not dispute, for example, that it successfully induced removal of millions of posts—even posts that do not violate policies of social media companies—or that this removal affected everyone on social media. Instead, it argues it successfully induced these things through legal "persuasion," not illegal "coercion," and that the plaintiffs lack standing to contend otherwise. U.S. Br., No. 23-411, at 14, 25, 34.

That likely reveals why the United States backs NetChoice here, even though its position threatens the United States' own laws. The Federal Government knows it will be much more difficult for federal officials to induce social media companies to suppress speech if state law prohibits it. So the

Federal Government seeks to eliminate those state laws.

That shows that the Texas and Florida laws, far from infringing the First Amendment, in fact shield social media companies from government pressure and deprive *government* of the opportunity to control expression.

ARGUMENT

I. States have authority to prohibit mass communication platforms from censoring speech.

A. Requiring social media companies to distribute third-party speech without viewpoint discrimination is permissible because social media better resembles telephones than newspapers.

1. NetChoice does not dispute that telephones and telegraphs can be compelled, consistent with the First Amendment, to distribute third-party speech. They can be compelled to behave as common carriers even though this Court has declared that "they are *not* common carriers," *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, 14 (1894) (emphasis added), and even though these companies have a history of exercising the very "editorial discretion" NetChoice's members seek to exercise today, *Paxton*, 49 F.4th, at 470.

In fact, it is only because telegraph companies behaved the way social media companies do today that nondiscrimination regulations were imposed. In the 1800s, "Western Union, the largest telegraph

company, … discriminated against certain political speech," confirming the fear "'that the private entities that controlled this amazing new technology would use that power to manipulate the flow of information to the public when doing so served their economic or political self-interest.'" *Ibid.* (quoting Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299, 2321 (2021)). "In response, States enacted common carrier laws to limit discrimination in the transmission of telegraph messages." *Ibid.* Congress did the same. *Ibid.* (citing Telegraph Lines Act, ch. 772, § 2, 25 Stat. 382, 383 (1888)); *see also W. Union Tel. Co.* v. *James*, 162 U.S. 650, 651 (1895) (rejecting a challenge to an Iowa law requiring telegraph companies to deliver messages with "impartiality and good faith").

On the other hand, this Court has been clear that companies generally cannot be compelled to distribute third-party speech in their own "newspapers," *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), or in their own "newsletters," which are "no different from a small newspaper," *P. Gas and Elec. Co.* v. *Pub. Utilities Comm'n. of California*, 475 U.S. 1, 8 (1986). The Court has applied similar analysis to parade organizers and expressive associations. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574–75 (1995); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 655 (2000).

In two seminal cases, this Court explained what makes newspapers and the like different from organizations that can be required to distribute third-party speech. First, a newspaper, unlike a cable

company,[3] "does not possess the power to obstruct readers' access to" other information. *Turner Broad. System, Inc.* v. *FCC* ("*Turner 1994*"), 512 U.S. 622, 656 (1994). Second, newspapers, newsletters, and the like generally cannot be required to distribute third-party content because that requirement "sufficiently interferes with any message of [the company]."[4] *Rumsfeld* v. *Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006). Telephones and shopping centers are different because no space constraints materially impede the company from getting out its "own message," and "there [i]s little likelihood that the views of those [third parties] engaging in the expressive activities would be identified with the" company. *See id.*, at 65 (citing *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 88 (1980)).

In other words, the First Amendment tolerates compelled hosting to preserve access to information when:

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[3] Although cable companies differ from newspapers in important ways, they resemble (or at least did in the 1990s) newspapers in others. This Court stressed, for example, that cable companies in the 1990s had meaningful space constraints. *Turner 1994*, 512 U.S., at 637.

[4] Even newspapers "are prohibited from charging more for political advertising than they charge for commercial advertising" or "receiving money or any other thing of value in exchange for their editorial endorsement of a political candidate or an idea." Lakier, *supra*, at 2330 (citing 52 U.S.C. § 30120(b) and state laws).

(1) the company has power to obstruct access to information, *Turner 1994*, 512 U.S., at 656; or

(2) there is no "danger … that the statute would 'dampen the vigor and limit the variety of public debate,'" *PruneYard*, 447 U.S., at 88 (quoting *Miami Herald*, 418 U.S., at 257) (brackets omitted), because the act of hosting "lack[s] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," *Rumsfeld*, 547 U.S., at 64.

That makes sense because a law requiring a company to host the speech of third parties is more akin to a property regulation than a speech regulation: it regulates the ability of a company like Facebook to exclude people from its network. Because any effect on the company's own speech is indirect, must-carry regulations are more likely than direct regulations to survive review.

NetChoice is thus wrong to assert that companies have a categorical right not to "disseminate … speech generated by others." *Paxton* Br., at 13. This Court squarely considered and (unanimously) rejected that argument. *PruneYard*, 447 U.S., at 85 (rejecting the argument "that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others"). Instead, what matters are the contextual questions whether NetChoice's members can obstruct access to other information and whether hosting third-party speech would materially impede the ability of NetChoice's members to get out their own message.

That means there is a much simpler way for this Court to assess the two NetChoice cases: evaluate

whether companies like Facebook are more like newspapers, parade organizers, cake bakers,[5] and website designers,[6] or more like telephones, telegraphs, schools, and shopping malls.

2. Social media companies are much more like telephones, telegraphs, schools, and shopping centers than newspapers and newsletters.

Consider first "the power [of social media companies] to obstruct readers' access to … publications." *Turner 1994*, 512 U.S., at 656. As explained more fully in Part II.B, perhaps the most infamous censorship decision by social media companies was blocking access to a newspaper report containing unflattering information about the Democratic candidate for President. "A daily newspaper, no matter how secure its local monopoly, does not possess th[is] power." *Ibid.* Social media companies do, and they exercise it. "The potential for abuse of this private power over a central avenue of communication cannot be overlooked." *Id.*, at 657.

Consider also the number of people contributing content to a newspaper versus a telephone network or social media network. Unlike a newspaper, which might have at most a few hundred people contributing content, "3 billion people" contribute content on Facebook. *Knight First Amend. Inst.*, 141 S. Ct., at 1224 (2021) (Thomas, J., concurring). "[U]nlike

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[5] *Masterpiece Cakeshop, Ltd.* v. *Colorado Civ. Rights Commn.*, 138 S. Ct. 1719 (2018).

[6] *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 592 (2023).

newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public," and so it is the public who creates nearly all the content on the platform. *Ibid.* Moreover, while newspapers carefully curate third-party content that they accept (such as letters to the editor), social media companies, like telephones and telegraphs, generally "hold [themselves] out to serve any member of the public without individualized bargaining." *Paxton*, 49 F.4th, at 470; *see also Shurtleff* v. *City of Bos., Massachusetts*, 596 U.S. 243, 256–57 (2022) (holding that flag raisings were not government speech because "Boston told the public that it sought 'to accommodate all applicants'").

Then there is the lack of space constraints. *Rumsfeld*, 547 U.S., at 64. While nothing in the physical universe is truly infinite, social media companies come about as close to infinity as possible. They operate with nothing like the space constraints of a newspaper. "The New York Times publishes around 150 original pieces of journalism a day, on average." *How We Choose the Great Read*, N.Y. Times (Apr. 4, 2022).[7] In contrast, the vast majority of public speech flows through social media, with 1.7 million posts made to Facebook and 500 hours of video are uploaded to YouTube every *minute*. *Media Usage in an Internet Minute as of April 2022*, Statista

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[7] https://perma.cc/578R-L88S; https://web.archive.org/web/20220421090948/https://www.nytimes.com/2022/04/21/insider/how-we-choose-the-great-read.html.

(2023).[8] That is 2.4 billion Facebook posts and 720,000 hours of video uploaded to YouTube every day. Unlike a newspaper, where forced hosting of third-party content meaningfully decreases space for the newspaper's own message, *Miami Herald*, 418 U.S., at 257, social media companies have plenty of space to express their own message. For social media, "accommodation does not sufficiently interfere with any message of the [social media company]." *Rumsfeld*, 547 U.S., at 64.

And unlike newspapers or parade organizers (which carefully curate all content toward a specific message or messages), nearly all content on social media companies is posted unedited by the companies. While these platforms "use algorithms to screen out" far less than even one percent of content, "virtually everything else is just posted to the Platform with *zero* editorial control or judgment." *Paxton*, 49 F.4th, at 459 (emphasis in original).

In fact, contrary to NetChoice's assertions now that its members exercise "editorial control" over everything, these companies have expressly stated, "We try to explicitly view ourselves as *not editors* …. We don't want to have editorial judgment over the content that's in your feed." *Id.*, at 460 (emphasis added) (quoting Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. Times (Oct. 26, 2014)[9]). NetChoice's current

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[8] https://perma.cc/C6XH-DBJ2 (last visited Jan. 9, 2024).

[9] https://perma.cc/YTZ9-6VVL; https://web.archive.org/web/20141027091945/https://www.nytim

presentation before this Court is likewise inconsistent with the assertions of its members in other lawsuits that they merely distribute content created by others and are therefore entitled to immunity under § 230 of the Communications Decency Act. *E.g.*, Br. of Twitter, *Gonzalez* v. *Google*, No. 21-1333, at 7 (Jan. 2023) (stating that Twitter merely "disseminat[es] third-party content"); *see also NetChoice, LLC* v. *Paxton*, 142 S. Ct. 1715, 1717 n.2 (2022) (Alito, J., dissenting) (noting the argument that NetChoice's "position in this litigation is in conflict or tension with the positions of its members in cases regarding the interpretation of § 230").

Finally, it is Congress's judgment that these companies operate more like telephones than newspapers, which is why Congress shielded them from defamation liability. *See* 47 U.S.C. § 230.

For all these reasons, social media companies better resemble telephone companies than newspapers. They have power to obstruct customers from receiving speech, they are principally in the business of distributing the content of others from point A to point B, they do not deal with meaningful space constraints, and the vast majority of the speech they distribute is unedited.

NetChoice thus cannot prove that distributing third-party speech without viewpoint discrimination will materially impede social media companies from speaking for themselves or that members of the public

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es.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html.

will mistake third-party speech on Facebook, YouTube, or Twitter as speech *by* the platforms. *Rumsfeld*, 547 U.S., at 64. Just as "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," *ibid.*, so too everyday Americans can distinguish between speech *on* Facebook and Facebook's own speech[10]—especially because these companies expressly disclaim third-party content as their own. *See, e.g.*, *Terms of Service*, Facebook (last updated July 26, 2022), https://www.facebook.com/legal/terms ("We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct (whether online or offline) or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content).").

All these facts sharply distinguish social media companies not only from newspapers, but also from cake decorators, website designers, and parade

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[10] Section 230 lawsuits ask a different question. There is usually no debate about whether the speech is third-party speech. The question instead is whether the platform helped "develop[ ]" the third-party's speech "in part," thus removing immunity. 47 U.S.C. § 230(f)(3); *see also Malwarebytes, Inc.* v. *Enigma Software Group USA, LLC*, 141 S. Ct. 13, 16 (2020) (Thomas, J., concurring). There is an active debate about whether things like algorithms help "develop[ ]" third-party speech "in part." A conclusion by this Court that individuals are unlikely to mistake third-party speech on social media companies for the speech of the companies themselves would have no effect on whether those companies could invoke § 230 as a shield with respect to the same content.

organizers. While there is little to no risk that everyday observers will mistake third-party speech on Facebook for Facebook's "own message," requiring a cake artist or independent website designer to speak a third party's speech does "deny speakers the right 'to choose the content of their own messages'" because the risk of attribution is high. *303 Creative LLC*, 600 U.S., at 592 (quoting *Hurley*, 515 U.S., at 573) (brackets omitted). Indeed, the "very purpose" of Colorado's requirement to force companies to design websites supporting certain events was "the coercive elimination of dissenting ideas about marriage." *Id.*, at 588 (brackets and internal quotation marks omitted). Forcing a cake baker or newspaper to state third-party speech unlawfully compels speech. Requiring companies in the business of transmitting other peoples' speech billions of times a day to do so without viewpoint discrimination does not.

3. It makes no difference that posts on social media typically are distributed to many people rather than to one. Organizations subject to must-carry regulations are regularly used to broadcast speech to many recipients. "[S]upposedly one-to-one media have long been used to distribute material to the public at large." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 387 (2021). One speaker can use the U.S. Postal Service to broadcast a message to millions. *Ibid.* And hundreds or even thousands of people can join a single conference call or group text message thread.

B. Social media companies cannot evade accountability simply by choosing to edit some content.

The Fifth Circuit opinion extensively discussed the historical regulation of telephones and telegraphs, yet NetChoice's brief in *Paxton* makes no attempt to address that analogy. Its brief in *Moody* is hardly better, principally arguing (at 49) that telegraph and telephone companies are different because they merely transmit speech "on an 'unedited basis' from point A to point B." The United States amicus brief repeats this argument, asserting (at 11) that "unlike [telephones and telegraphs], the platforms are not merely conduits transmitting speech from one person to another" but instead choose to edit or remove content.

Although the Eleventh Circuit adopted this argument, *NetChoice, LLC* v. *Moody*, 34 F.4th 1196, 1222 (CA11 2022), the argument overlooks basic history, is circular and begs the question, would enable phone companies to evade regulation, and would create a roadmap for government censorship.

As to history, telephone and telegraph companies transmit speech on an "unedited basis" only because they are compelled to do so by law. Those companies historically did the same thing NetChoice's members currently do until the States, Congress, and this Court stepped in. *See* Lakier*, supra*, at 2322; *Paxton*, 49 F.4th, at 470; *W. Union Tel. Co.*, 162 U.S., at 651.

History thus favors the States, not NetChoice. The Eleventh Circuit concluded social media companies could censor content because they have "historically exercised" power to refuse transmission

of disfavored ideas. *Moody*, 34 F.4th, at 1222. But telegraph companies have a much longer history of censorship. Social media is less than two decades old. Congress did not impose must-carry requirements on telegraphs until 1888, 50 years after their invention. *Paxton*, 49 F.4th, at 471. Yet it is well recognized today that those must-carry regulations were constitutional—even though this Court declared that telegraph companies are "*not* common carriers." *Primrose*, 154 U. S., at 14 (emphasis added). History thus provides no basis for dismissing the striking similarities between social media companies and telegraph and telephones by dubbing social-media censorship "editorial judgment."

The attempt to avoid the telephone analogy is also circular and would wipe out traditional regulations. The Eleventh Circuit concluded Florida could not require social media companies to distribute content without viewpoint discrimination because the companies already "exercise editorial judgment." *Moody*, 34 F.4th, at 1221. In other words, the State can compel a company to refrain from censoring only if the company is already refraining. Under that rule, must-carry regulations are pointless. Telephones, telegraphs, and parcel delivery companies can become immune under the First Amendment from any must-carry regulation as soon as they chose to engage in "editorial judgment" to cut off calls and not deliver messages and products that express ideas they dislike.

Or if those traditional regulations are valid, then the Eleventh Circuit's analysis is self-refuting: the regulations here would become valid as soon as a company complies. NetChoice asserts that imposing

must-carry regulations on telephones is fine because telephones transmit speech "on an 'unedited basis,'" but the same will be true of NetChoice's members if they comply with these statutes.

The argument is also a roadmap for government censorship. If NetChoice and the Eleventh Circuit are correct that the act of "discriminat[ing] among messages" converts third-party speech into the platform's first-party speech, *Moody*, 34 F.4th, at 1221, then the Federal Government could freely censor speech on its property because the censorial act would convert the speech into government speech, which "is not restricted by the Free Speech Clause," *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009); *see also Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 213 (2015). Much like this Court should "prevent the government-speech doctrine from being used as a cover for censorship," *Shurtleff*, 596 U.S., at 263 (Alito, J., concurring), it should prevent the First Amendment from blocking States' efforts to stop private censorship. Like the government, social media companies may not hide behind the First Amendment when they deploy a "come-one-come-all attitude" with exceptions for select disfavored speakers. *Id.*, at 257 (majority op.).

C. In the context of facial challenges, this Court need not consider more complex questions.

Because NetChoice has asserted facial challenges, this Court need not wade into more difficult questions, such as whether a social media company can be

prohibited from attaching a disclaimer or a fact check to third-party speech.

It is far from obvious how this Court's precedents would apply. On the one hand, a platform that appends a note to third-party speech undoubtedly engages in its own speech. On the other hand, communication networks often are required to serve all comers without "undue or unreasonable preference or advantage to any particular person" or "class of persons." 47 U.S.C. § 202. If a phone company appended a 30-second ad supporting one political candidate to every call originating from the campaign office of that candidate's opponent, the phone company would certainly be engaging in speech, but it would also be giving "preference or advantage" to one customer over another.

Those more difficult questions should not be resolved in the context of a facial challenge.

II. The hyperconcentration of social media reinforces State authority to regulate.

Both the common law and American courts have long recognized that protecting the marketplace of ideas involves more than keeping government from abridging speech; it sometimes means regulating dominant private actors to ensure they cannot abridge speech either.

At common law, it was well recognized that companies with substantial market power could be compelled not to discriminate. As Matthew Hale, the well-known English barrister and scholar on the history of the common law, put it, "if a wharf owner operated the 'only wharf licensed by the queen' or if

'there was no other wharf in that port,' then the wharf was 'affected with a public interest,' and the owner acquired a duty to serve without discrimination." *Paxton*, 49 F.4th, at 472 (quoting Matthew Hale, *De Portibus Maris*, *in* A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77–78 (Francis Hargrave ed., 1787)) (brackets omitted).

American courts have long applied this principle to communications technology, assessing whether a "communications firm … play[s] a central economic and social role in society." *Paxton*, 49 F.4th, at 471. As this Court put it, because "values central to the First Amendment" include "assuring that the public has access to a multiplicity of information sources," government can take "steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *E.g.*, *Turner 1994*, 512 U.S., at 657, 663; *accord U.S. Telecom Ass'n* v. *FCC*, 855 F.3d 381, 434–35 (CADC 2017) (Kavanaugh, J., dissenting from rehearing en banc) ("If the Internet service providers have market power, then the Government may impose open-access or similar carriage obligations.").

This Court has thus held that radio's "unique characteristic[s]" permit the government to restrict "specified network practices" without abridging freedom of speech. *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 226–27 (1943). And this Court approved government regulations that prohibited cable companies from silencing "the voice of" some "speakers with a mere flick of the switch." *Turner 1994*, 512 U.S., at 656; *see also Turner Broad. Sys., Inc.* v. *FCC ("Turner 1997")*, 520 U.S. 180, 225 (1997).

Applied to social media companies, these cases mean, at the least, that regulations are justified when "the service provider possesses 'bottleneck monopoly power' in the relevant geographic market" and can use it to "diminish[] the diversity and amount of content available." *U.S. Telecom Ass'n*, 855 F.3d, at 431, 433 n.12 (Kavanaugh, J., dissenting from denial of rehearing en banc) (quoting *Turner 1994*, 512 U.S., at 661); *see also Comcast Cable Commc'ns, LLC* v. *FCC*, 717 F.3d 982, 993 (CADC 2013) (Kavanaugh, J., concurring). "[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of" other communication companies, including social media companies. *Turner 1994*, 512 U.S., at 684 (opinion of O'Connor, J.).

The core of the Florida and Texas laws comfortably fits that rubric. The laws address companies that possess extraordinary market power and use it to reduce diversity of ideas.

A. Market power

While these companies were much smaller and less entrenched even six or eight years ago, the extraordinary scale and scope of large social media platforms today makes it impossible to deny that they "play[] a central economic and social role in society." *Paxton*, 49 F.4th, at 471. These platforms are "the modern public square," *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017), and "serve as the primary source of news about important public issues for many Americans," *Murthy* v. *Missouri*, 144 S. Ct. 32, 32 (2023) (Alito, J., dissenting).

Consider their network effects. A fax machine is valuable only to the extent others use fax machines. The most valuable thing about Facebook is that "3 billion people use it." *Knight First Amendment Inst.*, 141 S. Ct., at 1224 (Thomas, J., concurring). While network size makes Facebook an extraordinary marketplace for ideas, network size also means these dominant platforms are the only way most speakers can avoid speaking into a void, *see, e.g.*, Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. Free Speech Law 337, 357 (2021). Other options for speech are not comparable. Switching from Facebook to "competitor" upstart social media companies is not like switching from AT&T to Verizon. It is like switching from flying to walking.

Network effects also mean enormous barriers to new entry—as evidenced by these companies' sky-high profit margins.[11] In a competitive market, "astronomical profit margins … would induce new entrants into the market. That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry." *Knight First Amendment Inst.*, 141 S. Ct., at 1225 (Thomas, J., concurring).

In fact, three years ago, the last time a newer social media company gained serious traction, other platforms banded together to kill it. In January

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[11] Google obtained $76 billion in profits (revenue minus expenses) in 2021. Alphabet, Inc., *Form 10-K* (Feb. 2, 2023), https://perma.cc/M4A4-DC8L.

2021, Parler, which branded itself as a free-speech platform, was the most downloaded app. Then Google (YouTube's parent company) and Apple "removed" "the app for the conservative-focused Twitter competitor Parler … from their app stores." Volokh, *supra*, at 397–98 (citations omitted). That made Parler virtually inaccessible on phones for anybody who had not already downloaded the app. Then Parler's "hosting company, Amazon Web Services" "blocked" it from the Amazon servers Parler was renting, taking Parler entirely offline, even though "Parler was merely refusing to forbid certain speech, much of which is constitutionally protected—thus voluntarily acting in a way close to how the post office and phone companies are required by law to act." *Id.*, at 398. Amazon's power to kick companies entirely off the internet has caused Amazon to be described as "more like a utility provider than a broadcaster." Scott Rosenberg, *Big Tech's Free Speech Showdown*, Axios (Jan. 10, 2021).[12]

This illustrates a concerning fact: the dominant internet players are so powerful that the only way startups can take off is by relying on the mercy of the companies against which they wish to compete.

The conclusion that a handful of companies dominate the social media market aligns with conclusions by States and the Federal Government. In 2020, the Federal Trade Commission initiated an ongoing antitrust suit on the theory that "Facebook

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[12] https://www.axios.com/2021/01/10/big-techs-free-speech-showdown.

holds monopoly power in the market for personal social networking services … in the United States." *FTC* v. *Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. filed Dec. 8, 2020), Am. Compl., ¶ 2. And nearly every State and the Department of Justice has been involved in antitrust litigation against the major social media companies in recent years. *See, e.g.*, *Antitrust Reform and Big Tech Firms*, Congressional Research Service R46875 (Nov. 21, 2023) (describing some active cases).[13]

B. Discriminatory use of power

Although described by this Court as "the modern public square," *Packingham*, 582 U.S., at 107, these platforms are in fact more important than the historic public square because they hold "unprecedented … control of so much speech in the hands of a few private parties," *Knight First Amendment Inst.*, 141 S. Ct., at 1221 (Thomas, J., concurring). True, other aspects of the internet have enormous network effects (such as email), but nobody has central control over those networks. In contrast, "control of [social media] networks is highly concentrated" in the hands of a few people. *Id.*, at 1224. The platforms' power to facilitate and restrict speech on a large scale means they wield power "far greater than that of individual broadcasters who compete with one another as well as with satellite and cable networks." Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress*

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[13] https://crsreports.congress.gov/product/pdf/R/R46875.

Can Prevent Big Tech from Becoming the Speech Police, The Hill (Feb. 18, 2021).[14]

These platforms have used their unprecedented power to censor mainstream speakers on important issues of public debate. That selective censorship—the Florida and Texas legislatures concluded—threatens the marketplace of ideas and the free flow of information to the detriment of citizens and democratic governance.

These legislative judgments rest on solid ground. Companies covered by the Texas and Florida laws currently exercise unchecked power to suppress ideas. And they have shown little inclination to self-limit their "incredible influence over the content that's put out into the world." Ahiza García-Hodges, *Big Tech Has Big Power over Online Speech. Should It Be Reined In?*, NBC News (Jan. 21, 2021).[15]

1. Perhaps most famously, weeks before the 2020 general election while voters were deciding among presidential candidates, Twitter blocked users from posting links to a New York Post article about unflattering information found on the laptop of the Democratic candidate's son, and Facebook "deprecate[d]" the story by preventing users from linking to the New York Post. Kate Cox, *Twitter, Facebook Face Blowback after Stopping Circulation of NY Post Story*, Ars Technica (Oct. 14, 2020).[16] The

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[14] https://perma.cc/645W-LMLP.

[15] https://perma.cc/FN7D-BL9T.

[16] https://perma.cc/6NYG-STXX.

laptop information was "authenticated" by the New York Times more than a year later, after the censorship damage was done. Katie Benner, et al., *Hunter Biden Paid Tax Bill, but Broad Federal Investigation Continues*, N.Y. Times (Mar. 16, 2022).[17]

2. Platforms restrict not only news reporting, but also speech by everyday Americans. They "have certainly been willing to restrict opinions that are well within the American political mainstream." Volokh, *supra*, at 395. This conclusion is borne out in countless examples. *Id.*, at 397 (listing several).

Consider one of the most hotly contested issues today: the many controversial legal and policy questions related to the increasing number of individuals who identify as transgender. These include questions about separate bathrooms, locker rooms, and sports teams; about appropriate medical care; and even about the nature of what it means to be male or female. Nobody doubts these questions are important, yet social media companies have made mainstream views on these questions off limits. For example, a clear majority (57%) of adults believe sex is determined at birth, regardless of a person's later-expressed gender identity. Ashley Kirzinger, et al., *KFF/The Washington Post Trans Survey* (Mar. 24, 2023).[18] But the 57% of Americans who believe that

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[17] https://perma.cc/QJ97-J26Q; https://web.archive.org/web/20240109032322/https://www.nytimes.com/2022/03/16/us/politics/hunter-biden-tax-bill-investigation.html.

[18] https://perma.cc/M2Y8-CNLD.

are not allowed to say so on social media. For example, when a U.S. Representative expressed his view that a high-ranking official in the Biden administration who identifies as a woman is in fact "a man," Twitter locked the Representative's account until he deleted the post. *Indiana Congressman Deletes Post, Gets Twitter Access Back*, Associated Press (Nov. 5, 2021).[19] Similarly, Twitter suspended a commenter when she expressed opposition to a transgender individual competing in the women's division in the Olympics, stating "men shouldn't compete against women." Joseph Wulfsohn, *Allie Beth Stuckey Released from "Twitter Jail" after Referring to Transgender Olympic Athlete as a "Man,"* Fox News (Aug. 6, 2021).[20]

These questions are hotly debated today, and views on all sides of the issues are held "in good faith by reasonable and sincere people." *Obergefell* v. *Hodges*, 576 U.S. 644, 657 (2015). But it is extraordinary that dominant communications companies through which the vast majority of public speech flows can make a viewpoint held by 57% of Americans, on one of the most salient political topics of the day, off limits in the "modern public square," *Packingham*, 582 U.S., at 107. That censorship "harm[s] … society as a whole" by "depriv[ing]" society

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[19] https://perma.cc/X3DX-X4EF; https://web.archive.org/web/20230401020728/https://apnews.com/article/business-media-social-media-indiana-fort-wayne-16fb83191716f3dc1e9440f2cc972b54.

[20] https://perma.cc/X5E3-JZBV.

of "an uninhibited marketplace of ideas." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003).

Much of the speech targeted by these dominant communication platforms is conservative, which is not surprising given Mark Zuckerberg's acknowledgment that tech companies reside in "an extremely left-leaning place." Morgan Chalfant, *Cruz Presses Zuckerberg on Alleged Censorship of Conservative Speech* (Apr. 10, 2018).[21] Right after Elon Musk purchased Twitter, he and journalist Bari Weiss uncovered internal evidence that at Twitter, "the rules were enforced against the right, but not against the left." Elon Musk tweet, Dec. 8, 2022.[22]

But several platforms have also received allegations about censorship of opinions commonly viewed as left wing. Currently, social media companies face accusations of reducing the visibility of posts expressing political support for a Palestinian state in the present conflict. Priyanka Shankar, et al., *Are Social Media Giants Censoring Pro-Palestine Voices Amid Israel's War?*, Al Jazeera (Oct. 24, 2023).[23] Last summer, a federal district court found that social media platforms, at the request of federal officials, blocked Robert F. Kennedy, Jr.'s efforts to communicate with the public about his campaign for the Democratic presidential nomination. *See Missouri* v. *Biden*, 2023 WL 4335270, *5, *9, *40 (W.D.

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[21] https://perma.cc/BWB3-3SF5.

[22] https://perma.cc/7684-AB49.

[23] https://perma.cc/8V95-U3DZ.

La., July 4, 2023). And in the aftermath of George Floyd's murder, Facebook allegedly flagged and removed posts calling attention to allegedly racist conduct. Craig Silverman, *Black Lives Matter Activists Say They're Being Silenced by Facebook*, Buzzfeed (June 19, 2020).[24]

3. Platforms also censor true information that is difficult to brand as left or right. Speech surrounding COVID is a prime example. When COVID first hit, "major social networks rolled out a series of policy changes to curb … claims about the virus, including theories about its roots"—like that it originated in a Chinese lab. Cristiano Lima, *New Report on Covid-19 Origin Puts Social Media in GOP's Crosshairs*, Washington Post (Feb. 27, 2023).[25] That origin theory is now the predominant theory of many agencies under the Biden administration. Both the Energy Department and the FBI have concluded that the COVID-19 "virus likely spread due to an accident at a Chinese laboratory." *Ibid.*

Similarly, in the summer of 2021, YouTube removed a video that a U.S. Senator, who is a doctor, posted opining about the relative inefficacy of masks made out of cloth. *See, e.g.*, *YouTube Suspends Rand Paul after Misleading Video on Masks,* PBS News Hour (Aug. 11, 2021).[26] YouTube also banned him from posting any videos—on any topic—for a week.

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[24] https://perma.cc/6F6S-UL4V.

[25] https://perma.cc/6STJ-N8EH.

[26] https://perma.cc/U2PD-K76U.

Yet Senator Paul's view is widely accepted today. *See* Apoorva Mandavilli, *The C.D.C. Concedes that Cloth Masks Do Not Protect Against the Virus as Effectively as Other Masks.*, N.Y. Times (Jan 14, 2022).[27] And his perspective might have been immensely important at the time to individuals deciding how best to protect themselves and others.

4. These examples may only scratch the surface because of platforms' deliberate opacity about their practices. They censor by taking down content or suspending people from their accounts, but they also "shadowban" by distributing content less widely than would otherwise occur. Geoffrey Fowler, *Shadowbanning Is Real: Here's How You End up Muted by Social Media*, Washington Post (Dec. 27, 2022).[28] "[U]sers often have no way of telling for sure whether they have been shadowbanned or whether their content is simply not popular."[29] Gabriel Nicholas, *Shadowbanning Is Big Tech's Big Problem*, The Atlantic (April 28, 2022).[30]

If recent history is any guide, that will not change. These companies continue to resist transparency. In

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[27] https://perma.cc/77LD-NL5K; https://web.archive.org/web/20231106050019/https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html.

[28] https://perma.cc/6AM9-XV7M.

[29] That some censorship occurs by *leaving up* content (but simply not distributing it as widely) further undermines NetChoice's contention that social media companies must censor content to avoid unwanted association with speech they dislike.

[30] https://perma.cc/MW3Y-LYDZ.

early 2023, for example, Facebook's parent company, Meta, declined the recommendation of its Oversight Board to disclose which public-figure Facebook pages are subject to the site's "cross-check" moderation program for high-profile users. Clare Duffy, *Facebook Revamps Controversial Content Moderation Process for VIPs*, CNN Business (Mar. 3, 2023).[31]

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Whether the target is left-wing speech, right-wing speech, or centrist speech, censorship harms everyone. From the start, our constitutional order recognized that "error of opinion may be tolerated where reason is left free to combat it." Jefferson's First Inaugural Address (March 4, 1801).[32] The Constitution aims to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *Nat'l Inst. of Fam. & Life Advocates.* v. *Becerra*, 138 S. Ct. 2361, 2374 (2018) (citation omitted). That is because the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press*, 326 U.S., at 20. "This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Mahanoy*, 141 S. Ct., at 2046.

Platforms leverage their extraordinary power to threaten that constitutional project. Florida and

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[31] https://perma.cc/W8UJ-BQPS.

[32] https://perma.cc/VX6E-FA33.

Texas's challenged response, designed to ensure information flows freely and fairly, strengthens rather than offends the First Amendment.

C. The Court should respect legislative fact findings of market power and censorship.

In the face of this discriminatory use of market dominance, the Texas and Florida legislatures made legislative findings about the power of large platforms to impoverish the marketplace of ideas. Texas concluded that social media platforms with "more than 50 million active users in the United States in a calendar month" have "market dominance" that justifies treating them as "common carriers." Tex. Code § 120.002(b); Tex. H.B. 20 §1(4). Florida determined that platforms with 100 million monthly global users or $100 million annual gross revenue "have become as important for conveying public opinion as public utilities are for supporting modern society" and "should be treated similarly to common carriers." Fla. Stat. § 501.2041(g); Fla. S.B. 7072 § 1(5)–(6). Those legislative judgments deserve significant weight in evaluating whether the Constitution permits the States' regulations. *Cf. Munn* v. *Illinois*, 94 U.S. 113, 132 (1876); *Turner 1994*, 512 U.S., at 665 (plurality op.); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). After all, if "it stands to reason" that "Congress may demand" that telephone and cable companies carry third-party speech, *Turner 1994*, 512 U.S., at 684 (O'Connor, J., concurring in part and dissenting in part), it equally stands to reason that the States may demand the same of digital platforms. Where the

Bill of Rights polices government conduct, there is "no daylight between the federal and state conduct it prohibits or requires." *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019); *see also Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020); *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964).

III. State laws preventing platforms from censoring speech provide a prophylactic vanguard against government censorship.

The United States says it submits a brief because, Congress having "enacted laws governing the communications industry," the United States "has a substantial interest in the resolution of the questions presented." U.S. Br., at 1. Yet it advocates a position that threatens to *undermine* federal laws.

Why? Perhaps because the Federal Government intends to continue its well-documented practice of pressuring companies to wield their censorship discretion to remove disfavored viewpoints.

It is undisputed that the Federal Government, including the White House, has engaged in a years-long, behind-closed-doors campaign to push social media companies to suppress millions of constitutionally protected posts. This Court granted certiorari in *Murthy* v. *Missouri*, No. 23-411, and while the legal conclusions there are disputed, the fact findings are not.

In its opening brief in *Murthy*, the Federal Government does not dispute any fact finding. It does not dispute that—behind closed doors—it successfully used "unrelenting pressure" to push social media companies to "suppress[] millions of protected free speech postings by American citizens."

Missouri, 2023 WL 4335270, at *44. It does not dispute it targeted "disfavored" speech "well beyond COVID-19," including "the Hunter Biden laptop story," *Missouri* v. *Biden*, 83 F.4th 350, 368, 381 (CA5 2023), and topics related to "racial justice, the U.S. withdrawal from Afghanistan," U.S. "[s]upport of Ukraine," and content posted by an individual who was challenging President Biden for the Democratic presidential nomination, 2023 WL 4335270, at *9, *67. The Federal Government does not dispute it targeted "nearly every major American social media company," and that those companies "capitulated" into "total compliance," even removing constitutionally protected content that "did not run afoul of their policies." 83 F.4th, at 359, 362–63, 392. And the Federal Government does not dispute its "conduct has not stopped," it has even "started monitoring" the platforms for compliance with governmental demands "to remove disfavored content," and its push for censorship has been so widespread that "it impacts every social-media user." *Id.*, at 359–60, 393, 398.

Instead, the Federal Government argues it induced all these things through legal "persuasion," not illegal "coercion," and the plaintiffs lack standing to contend otherwise. U.S. Br., No. 23-411, at 14, 25, 34. The Federal Government even doubles down, all but promising to continue pressing platforms to suppress millions of posts because it believes these posts are "false information," *id.*, at 34, even though much speech it pushed to suppress turned out to be true.

The Federal Government's interest in the *NetChoice* cases is thus clear.[33] The Texas and Florida laws pose no threat to federal laws; they only threaten the ability of federal officials to continue pushing platforms to "suppress[] millions of protected free speech postings by American citizens." 2023 WL 4335270, at *44.

Pressuring platforms would become much more difficult if state law prohibited platforms from complying with federal takedown demands. One of "anti-discrimination obligations' great virtues is that it protects private entities from complying with government's censorship demands. A private company with no legal obligation to treat users in a non-discriminatory fashion readily can accede government's request to censor, block, or otherwise treat users unfairly. But, if a private firm is prohibited by law to do so, then the government cannot even ask." Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J. L. & Tech. 391, 432–33 (2020).

The Federal Government's real interest here is that it will no longer be able to "persuade" platforms to take down millions of constitutionally protected

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[33] As further evidence that the United States views the *NetChoice* cases as fundamentally related to *Murthy*, the United States repeats the same "editorial discretion" arguments in *Murthy*. U.S. Br., No. 23-411, at 3–4, 16, 36. The United States is also represented in this case by two Civil Division attorneys who represented the Federal Government in *Murthy* at the Fifth Circuit.

posts if this Court affirms the Texas and Florida laws. That is a reason to support the state laws, not to strike them down. In passing these laws, Texas and Florida afforded their citizens the "double security [that] arises" when one government "guard[s] … society against the injustice of the other." The Federalist No. 51, *supra*, at 320 (Madison). The Fifth Circuit in *Murthy* said the Federal Government forced social media companies to "bend to the government's will." 83 F.4th, at 371. The laws challenged here provide the legal backbone platforms need to stand straight.

CONCLUSION

The Court should affirm the longstanding authority of States to protect their citizens from censorship imposed by mass communication networks.

Respectfully submitted,

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