INTRODUCTORY NOTE ON THE NETCHOICE CASES

Texas House Bill 20 and Florida Senate Bill 7072, both enacted in 2021, attempt to prohibit large social media companies from discriminating against certain types of content. The sponsors of these bills alleged that platforms such as Twitter, Facebook, and YouTube were systematically biased against conservative speech. Both bills are complicated, with many moving parts, including both nondiscrimination and transparency rules, and which apply to somewhat different types of content. (This section discusses only the nondiscrimination obligations.)

To simplify greatly, Texas HB 20 applies to platforms with more than 50 million monthly active users, and Florida SB 7072 applies to platforms with more than 100 million monthly individual participants. The core nondiscrimination provision in Texas HB 20, Section 7, provides:

> A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:
>
> (1) the viewpoint of the user or another person;
>
> (2) the viewpoint represented in the user's expression or another person's expression; or
>
> (3) a user's geographic location in this state or any part of this state.

Tex. Civ. Prac. & Rem. Code § 143A.002(a). "Censor" is defined as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). There are exceptions when these restrictions are specifically allowed under federal law, to prevent sexual abuse of children, for incitement of criminal activity based on membership in several protected categories (e.g. race, religion, or status as a law enforcement officer), and a catchall for "unlawful expression."

Florida S.B. 7072 has several nondiscrimination provisions. Most notably, a platform "may not willfully deplatform a candidate for office." Fla. Stat. § 106.072(2), where "deplatform" is defined as"the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c). Similarly, "[a] social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about … a candidate." *Id.* § 501.2041(2)(h), where "post prioritization" refers to arranging content more or less prominently in the display to a user, *id.* § 501.2041(1)(e), and "shadow banning" is defined as "limit[ing] or eliminat[ing] the exposure of a user or content or material posted by a user to other users," i*d.* § 501.2041(1)(f). In addition, platforms may not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." *Id.* § 501.2041(2)(j). The term "censor" is defined not just to include removing content but also "post[ing] an addendum to any content or material." *Id.* § 501.2041(1)(b).

An industry association, NetChoice, sued to block both bills from taking effect.

NETCHOICE, LLC V. PAXTON

49 F.4th 439 (5th Cir. 2022)

Oldham, Circuit Judge:

A Texas statute named House Bill 20 generally prohibits large social media platforms from censoring speech based on the viewpoint of its speaker. The platforms urge us to hold that the statute is facially unconstitutional and hence cannot be applied to anyone at any time and under any circumstances.

In urging such sweeping relief, the platforms offer a rather odd inversion of the First Amendment. That Amendment, of course, protects every person's right to "the freedom of speech." But the platforms argue that buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech. ...

Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say. ...

III.

The Platforms contend that Section 7 of HB 20 is facially unconstitutional. We disagree. ...

C.

Rather than mount any challenge under the original public meaning of the First Amendment, the Platforms instead focus their attention on Supreme Court doctrine. And under that doctrine, the Platforms contend, Section 7 somehow burdens their right to *speak*. How so, you might wonder? Section 7 does nothing to prohibit the Platforms from saying whatever they want to say in whatever way they want to say it. Well, the Platforms contend, when a *user* says something using one of the Platforms, the act of hosting (or rejecting) that speech is the *Platforms*' own protected speech. Thus, the Platforms contend, Supreme Court doctrine affords them a sort of constitutional privilege to eliminate speech that offends the Platforms' censors.

We reject the Platforms' efforts to reframe their censorship as speech. It is undisputed that the Platforms want to eliminate speech—not promote or protect it. And no amount of doctrinal gymnastics can turn the First Amendment's protections for free *speech* into protections for free *censoring*. We (1) explain the relevant doctrine and Supreme Court precedent. Then we (2) hold this precedent forecloses the Platforms' argument that Section 7 is unconstitutional.

1.

Supreme Court precedent instructs that the freedom of speech includes the right to refrain from speaking at all. So the State may not force a private speaker to speak someone's else message.

But the State can regulate conduct in a way that requires private entities to host, transmit, or otherwise facilitate speech. Were it otherwise, no government could impose nondiscrimination requirements on, say, telephone companies or shipping services. *But see* 47 U.S.C. § 202(a) (prohibiting telecommunications common carriers from "making any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services"). Nor could a State create a right to distribute leaflets at local shopping malls. *But see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding a California law protecting the right to pamphleteer in privately owned shopping centers). So First Amendment doctrine permits regulating the conduct of an entity that hosts speech, but it generally forbids forcing the host itself to speak or interfering with the host's own message.

Five Supreme Court cases elucidate this distinction. The first is *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). It involved a Florida law providing that when a newspaper article criticizes the character or record of a political candidate, the newspaper must offer the candidate equal space in the paper to reply to the criticism. The Court held that this "right-of-reply" law violated the First Amendment.

The Court explained that the law interfered with the newspaper's speech by imposing a content-based penalty on it, If the newspaper chose to speak about most topics, there was no penalty—but if it spoke critically about a political candidate, it was penalized with the "cost in printing and composing time and materials" necessary to give the candidate a free and equally prominent response column. *Id.* Moreover, the reply would "take up space that could be devoted to other material the newspaper may have preferred to print." *Id.* This interference would disincentivize the newspaper's speech: Faced with these penalties, "editors might well conclude that the safe course is to avoid controversy" and reduce coverage of political candidates altogether. *Id.* at 257.

The Court also concluded that the right-of-reply law impermissibly compelled the newspaper to speak messages it opposed. As the Court explained:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Id. at 258. Because a newspaper prints a curated set of material selected by its editors, everything it publishes is, in a sense, the newspaper's own speech. And the newspaper has a right to "editorial control and judgment" over its speech. *Id.* Newspapers thus cannot be compelled to "publish that which reason tells them should not be published." *Id.* at 256.

The second case is *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). That case involved a group of high school students who sought to distribute pamphlets and solicit signatures at a local shopping mall. The California Supreme Court held that California law protected the right to "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 447 U.S. at 78. The mall objected on First Amendment grounds, arguing 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." *Id.* at 85.

The Supreme Court rejected the shopping mall's challenge. It found the state law exacted no penalty on the basis of the mall's speech, and the mall could "expressly disavow any connection with the pamphleteers' message by simply posting signs in the area where the speakers or handbillers stood." *Id.* at 87-88. Nor did California law impermissibly compel the mall itself to speak. To the contrary, because the mall was open to anyone, "the views expressed by members of the public in passing out pamphlets or seeking signatures … will not likely be identified with those of the owner." *Id.* at 87. The Court also emphasized California's neutrality among viewpoints: Because "no specific message is dictated by the State to be displayed on appellants' property," there was "no danger of governmental discrimination for or against a particular message." *Id.*

The third case is *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 475 U.S. 1 (1986). A utility company, PG&E, had a longstanding practice of including a monthly newsletter in its billing envelopes. "In appearance no different from a small newspaper," the newsletter included political editorials and stories on matters of public interest alongside tips on energy conservation and information about utility services. *Id.* at 8. Concerned that the expense of PG&E's political speech was falling on customers, the California Public Utilities Commission ("Commission") decided to apportion the billing envelopes' "extra space"—that

is, the space occupied by the company's newsletter—and permit a third-party group representing PG&E ratepayers to use that space for its opposing messages four months per year. PG&E objected, arguing that the First Amendment prevented the Commission from forcing it to include an adverse party's speech in its billing envelopes.

The Supreme Court ruled for PG&E. A plurality held that the Commission's order both interfered with PG&E's own speech and impermissibly forced it to associate with the views of other speakers. As in *Miami Herald*, the "one-sidedness" of the Commission's order penalized and disincentivized PG&E's expression by awarding space only to those who disagreed with PG&E's speech. …

The fourth case is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). GLIB, an organization of Irish-American gay, lesbian, and bisexual individuals, sought to march in a St. Patrick's Day parade in Boston. The parade was organized by a private group, the South Boston Allied War Veterans Council. The Council refused to admit GLIB, citing "traditional religious and social values." *Id.* at 562. But the Supreme Judicial Court of Massachusetts held that the parade was a public accommodation under state law, so the Council had to let GLIB participate. The Council argued that this application of Massachusetts's public accommodation law violated the First Amendment, and the Supreme Court agreed.

The Court concluded that the parade was a "form of expression" that receives First Amendment protection. *Id.* at 568. That's because "rather like a composer, the Council 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 Council's eyes comports with what merits celebration on that day." *Id.* at 574. And it didn't matter that the Council was "rather lenient in admitting participants," because "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70.

The cornerstone of the Court's reasoning was that the parade sponsors were "intimately connected" to the message communicated by the parade. *Id.* at 576. This intimate connection was crucial, the Court held, because forcing the sponsors to include a particular float was tantamount to forcing the sponsors to speak: "When dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576.

The final case that's particularly relevant to our discussion is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). Certain law schools sought to restrict military recruiting on their campuses because of the military's policies on sexual orientation. Congress responded by enacting the Solomon Amendment, which denied federal funding to schools that did not give military recruiters "access to students that is at least equal in quality and scope to the access provided other potential employers." *Id.* at 54. An organization of law schools sued, arguing that the Solomon Amendment violated the First Amendment. The Supreme Court disagreed. It unanimously held that "the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement," and the statute thus did not place an unconstitutional condition on the receipt of federal funds. *Id.* at 60.

The Court first held that the Solomon Amendment did not impermissibly force the law schools to speak. *Id.* at 61-62. The Court recognized that "recruiting assistance provided by the schools often includes elements of speech"—like sending emails or posting bulletin board notices on the recruiter's behalf. *Id.* at 61. But the Court determined that this speech was "plainly incidental to the Solomon Amendment's regulation of conduct" and was nothing like a "Government-mandated pledge or motto" as in *Barnette* and *Wooley*. *Id.* at 62. Congress could therefore compel this "incidental" speech without violating the First Amendment. *Id.*

The Court then held that the Solomon Amendment did not impermissibly interfere with the schools' own speech, distinguishing *Miami Herald, PG&E*, and *Hurley*. It acknowledged that those three cases "limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id.* at 63. But it then explained that these "compelled-speech violation[s] … resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* In *Rumsfeld*, by contrast, "accommodating the military's message [did] not affect the law schools' speech, because the schools [were] not speaking when they host interviews and recruiting receptions." *Id.* at 64. That was true despite the risk that students might mistakenly interpret the law schools' conduct as sending the message that they see nothing wrong with the military's policies. In sum, even though it required law schools to host and accommodate others' speech, the Solomon Amendment was constitutional because it "neither limited what law schools may say nor required them to say anything." *Id.* at 60.

2.

Under these precedents, a speech host must make one of two showings to mount a First Amendment challenge. It must show that the challenged law either (a) compels the host to speak or (b) restricts the host's own speech. The Platforms cannot make either showing. And (c) the Platforms' counterarguments are unpersuasive.

a. …

The Platforms are nothing like the newspaper in *Miami Herald*. Unlike newspapers, the Platforms exercise virtually no editorial control or judgment. The Platforms use algorithms to screen out certain obscene and spam-related content. And then virtually everything else is just posted to the Platform with *zero* editorial control or judgment. Thus the Platforms, unlike newspapers, are primarily "conduits for news, comment, and advertising." *Miami Herald*, 418 U.S. at 258. And that's why the Supreme Court has described them as "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

The Platforms' own representations confirm this. They've told their users: "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." They've told the public that they "may not monitor," "do not endorse," and "cannot take responsibility for" the content on their Platforms. They've told Congress that their "goal is to offer a platform for all ideas." And they've told courts—over and over again—that they simply "serve as conduits for other parties' speech."

It is no answer to say, as the Platforms do, that an observer might construe the act of hosting speech as an expression of support for its message. That was the precise contention the Court rejected in both *PruneYard* and *Rumsfeld*: Neither the shopping mall nor the law schools wanted to endorse the hosted speech. The

Rumsfeld Court dismissed that concern out of hand because even schoolchildren know the difference between sponsoring speech and allowing it.

Recognizing that their compelled-speech analogy to newspapers is a stretch, the Platforms turn to parades and the *Hurley* case. The Platforms contend that Section 7 forces them to host speech that's inconsistent with their corporate "values." But of course, the Platforms do not contend that they carefully curate users' speech the way a parade sponsor or composer "selects ... expressive units ... from potential participants." *Hurley*, 515 U.S. at 568. Nor do they suggest that they are "intimately connected with the communication" Section 7 requires them to host. *Id.* at 576. The Platforms instead contend that their censorship is protected because *Hurley* creates a freewheeling right for speech hosts to discriminate against messages they don't like.

Hurley said nothing of the sort. The Court instead carefully limited its holding to a speech host (like a parade organizer or composer) who is "intimately connected" with the hosted speech (like a parade or a symphony). *Id.* And the Platforms are nothing like such hosts. They don't pick content to "make some sort of collective point," even an abstract one like "what merits celebration on St. Patrick's day." *Id.* at 568, 574. Rather, the Platforms permit any user who agrees to their boilerplate terms of service to communicate on any topic, at any time, and for any reason. And as noted above, virtually none of this content is meaningfully reviewed or edited in any way.

Nor can the Platforms point to the content they *do* censor and claim that makes them akin to parade organizers. In *Rumsfeld*, for example, the law schools argued that their denial of access to military recruiters was protected expressive conduct because it "expressed" the schools' disagreement with the military. 547 U.S. at 66. But the Court held that the denial of access was not *inherently* expressive, because such conduct would only be understood as expressive in light of the law schools' speech explaining it. *See Id.* Otherwise, observers wouldn't know that the denial of access stemmed from an ideological disagreement—they might instead conclude, for example, that "the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.*

The same reasoning applies here. If a Platform censors a user's post, the expressive quality of that censorship arises only from the Platform's *speech* (whether on an individualized basis or in its terms of service) stating that the Platform chose to censor the speech and explaining how the censorship expresses the Platform's views. Otherwise, as in *Rumsfeld*, an observer might just as easily infer that the user himself deleted the post and chose to speak elsewhere. In terms of the conduct's inherent expressiveness, there is simply no plausible way to distinguish the targeted denial of access to only military recruiters in *Rumsfeld* from the viewpoint-based censorship regulated by HB 20. Section 7 does not compel the Platforms to speak.

b.

Nor does it do anything to prohibit the Platforms from speaking. That's for three independent reasons.

First, the Platforms have virtually unlimited space for speech, so Section 7's hosting requirement does nothing to prohibit the Platforms from saying what they want to say. Contrariwise, both *Miami Herald* and *PG&E* involved "forums of inherently limited scope"—a newspaper and newsletter with significant space constraints. *PG&E*, 475 U.S. at 24 (Marshall, J., concurring in the judgment). So when the State appropriated space in the newspaper or newsletter for a third par-

ty's use, it necessarily curtailed the owner's ability to speak in its own forum. … By contrast, "space constraints on digital platforms are practically nonexistent"—unlike with newspapers, cable companies, and many of the other entities the Platforms invoke by analogy. *Biden v. Knight First Amendment Foundation*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). For this reason, the Platforms can host users' speech without giving up their power or their right to speak their own message(s).

Second, the Platforms are free to say whatever they want to distance themselves from the speech they host. The Supreme Court has been very careful to limit forced-affiliation claims by speech hosts. … For example, Platforms can add addenda or disclaimers—containing their own speech—to users' posts. And many of them already do this, thus dramatically underscoring that Section 7 prohibits *none* of their speech.

Third, Section 7 does not impose a content-based penalty on the Platforms' speech. Recall that the right-of-reply law in burdened newspapers with the duty to publish a response column if they published an article questioning the character or record of a political candidate. … Here, by contrast, no category of Platform speech can trigger any additional duty—or obviate an existing duty—under Section 7. And Section 7 does not create a special privilege for those who disagree with the Platforms' views. Rather, it gives the exact same protection to all Platform users regardless of their viewpoint.

c.

The Platforms do not seriously dispute any of this. Instead, they argue that Section 7 interferes with their speech by infringing their "right to exercise editorial discretion." They reason as follows. Premise one is that "editorial discretion" is a separate, freestanding category of First-Amendment-protected expression. Premise two is that the Platforms' censorship efforts constitute "editorial discretion." Conclusion: Section 7 burdens the Platforms' First Amendment rights by obstructing their censorship efforts.

Both premises in that syllogism are flawed. Premise one is faulty because the Supreme Court's cases do not carve out "editorial discretion" as a special category of First-Amendment-protected expression. Instead, the Court considers editorial discretion as one relevant consideration when deciding whether a challenged regulation impermissibly compels or restricts protected speech. Take, for example, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"). There the Court noted a cable operator "exercises editorial discretion over which stations or programs to include in its repertoire." *Id.* at 636. For this reason, among others, the Court concluded that selecting a limited repertoire of cable channels to transmit constitutes First-Amendment-protected speech. *See id.* at 636-37. Similarly, *Miami Herald* emphasized newspapers' "exercise of editorial control and judgment" to support its holding that their close affiliation with the speech they publish gives them the right not to publish "that which reason tells them should not be published." 418 U.S. at 256, 258. But both cases treated editorial discretion as a relevant consideration supporting their legal conclusions about the presence or absence of protected *speech*. Neither case implied that editorial discretion is *itself* a freestanding category of constitutionally protected expression. …

Premise two of the Platforms' syllogism is also faulty. Even assuming "editorial discretion" is a freestanding category of First-Amendment-protected expression, the Platforms' censorship doesn't qualify. …

First, an entity that exercises "editorial discretion" accepts reputational and legal responsibility for the content it edits. In the newspaper context, for instance, the Court has explained that the role of "editors and editorial employees" generally includes "determining the news value of items received" and taking responsibility for the accuracy of the items transmitted. *Associated Press v. NLRB*, 301 U.S. 103, 127 (1937). And editorial discretion generally comes with concomitant legal responsibility. For example, because of "a newspaper's editorial judgments in connection with an advertisement," it may be held liable "when with actual malice it publishes a falsely defamatory" statement in an ad. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 386 (1973). But the Platforms strenuously disclaim any reputational or legal responsibility for the content they host. ...

Second, editorial discretion involves "selection and presentation" of content *before* that content is hosted, published, or disseminated. The Platforms do not choose or select material before transmitting it: They engage in viewpoint-based censorship with respect to a tiny fraction of the expression they have already disseminated. ...

E.

The common carrier doctrine is a body of common law dating back long before our Founding. It vests States with the power to impose nondiscrimination obligations on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining. The Platforms are communications firms of tremendous public importance that hold themselves out to serve the public without individualized bargaining. And Section 7 of HB 20 imposes a basic nondiscrimination requirement that falls comfortably within the historical ambit of permissible common carrier regulation. ...

This section (1) begins with a brief primer on the history of common carrier doctrine. Then it (2) explains why common carrier doctrine permits Texas to impose Section 7's nondiscrimination requirement on the Platforms. And this (3) supports our constitutional holding that the Platforms' viewpoint-based censorship is not First-Amendment-protected speech.

1.

The doctrine's roots lie in the notion that persons engaged in "common callings" have a "duty to serve." This principle has been part of Anglo-American law for more than half a millennium. For early English courts, this principle meant that private enterprises providing essential public services must serve the public, do so without discrimination, and charge a reasonable rate. The first "carriers" to which this principle was applied were ferries. As Justice Newton of the Court of Common Pleas recounted, a ferry operator is "required to maintain the ferry and to operate it and repair it for the convenience of the common people." *Trespass on the Case in Regard to Certain Mills*, YB 22 Hen. VI, fol. 14 (C.P. 1444).

By the time of the American Founding, the duty to serve had crystallized into a key tenet of the common law. English courts applied this principle to numerous "common callings," like stagecoaches, barges, gristmills, and innkeepers. *See* 3 Blackstone, *supra*, at *164 (discussing the duties of innkeepers, bargemasters, and farriers). For example, Blackstone explained that a public innkeeper offers "an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler." *Id.* Or as Sir Matthew Hale explained

regarding wharves, when a private person builds the only wharf in a port, "the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only." Matthew Hale, *De Portibus Maris, in* A Collection Of Tracts Relative To The Law Of England 77-78 (Francis Hargrave ed., 1787). The common law thus required the wharf owner to serve the public and not to impose discriminatory or unreasonable rates.

The common carrier's duty to serve without discrimination was transplanted to America along with the rest of the common law. It got its first real test with the rise of railroad empires in the second half of the nineteenth century. Rail companies became notorious for using rate differentials and exclusive contracts to control industries dependent on cross-country shipping, often structuring contracts to give allies (like the Standard Oil Company) impenetrable monopolies. American courts, however, often found that these discriminatory practices violated the railroads' common carrier obligations. *See, e.g., Messenger v. Pa. R.R. Co.*, 37 N.J.L. 531, 534 (1874) (refusing to enforce rate differentials because "the carrier cannot discriminate between individuals for whom he will render the service"). And even when courts did not impose common carrier duties, they reaffirmed that state legislatures were vested with the power to do so by statute, as England did with the Railway and Canal Act of 1854.

The telegraph was the first communications industry subjected to common carrier laws in the United States. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2320-24 (2021). Invented in 1838, the telegraph revolutionized how people engaged with the media and communicated with each other over the next half century. But by the end of the nineteenth century, legislators grew "concerned about the possibility 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." *Id.* at 2321. These fears proved well-founded. For example, Western Union, the largest telegraph company, sometimes refused to carry messages from journalists that competed with its ally, the Associated Press—or charged them exorbitant rates. And the Associated Press in turn denied its valuable news digests to newspapers that criticized Western Union. Western Union also discriminated against certain political speech, like strike-related telegraphs. And it was widely believed that Western Union and the Associated Press "influenced the reporting of political elections in an effort to promote the election of candidates their directors favored." *Id.*

In response, States enacted common carrier laws to limit discrimination in the transmission of telegraph messages. The first such law, passed by New York, required telegraph companies to "receive dispatches from and for … any individual, and on payment of their usual charges … to transmit the same with impartiality and good faith." Act of April 12, 1848, ch. 265, § 11, 1848 N.Y. Laws 392, 395. New York further required such companies to "transmit all dispatches in the order in which they were received." *Id.* § 12. Many States eventually passed similar laws, *see* Lakier, *supra*, at 2320, 2322, and Congress ultimately mandated that telegraph companies "operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever." Telegraph Lines Act, ch. 772, § 2, 25 Stat. 382, 383 (1888).

Courts considering challenges to these laws—or requests to impose common carrier duties even in their absence—had to grapple with deciding whether and to what extent the common carrier doctrine applied to new innovations and tech-

nologies. For transportation and communications firms, courts focused on two things. *First*, did the carrier hold itself out to serve any member of the public without individualized bargaining? As Justice Story had explained in the transportation context, "to bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation." Joseph Story, Commentaries On The Law Of Bailments § 495 (9th ed. 1878). ...

Second, drawing on Hale's influential seventeenth-century formulation, courts considered whether the transportation or communications firm was "affected with a public interest." This test might appear unhelpful, but it was "quickened into life by interpretation" over centuries of common law decisions. *See* Walton H. Hamilton, *Affectation with Public Interest*, 39 Yale L.J. 1089, 1090 (1930). Courts applying this test looked to whether a firm's service played a central economic and social role in society. This discussion by the Supreme Court of Indiana is an instructive example:

> The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well-defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel a hundred years ago, or as the steam-boat, the railroad, and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news—a common carrier in the sense in which the telegraph is a common carrier—and impose upon it certain well-defined obligations of a public character.

Hockett v. Indiana, 105 Ind. 250, 5 N.E. 178, 182 (Ind. 1886).

In determining whether a communications firm was "affected with a public interest," courts also considered the firm's market share and the relevant market dynamics. In Hale's original formulation, 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. Hale, *supra*, at 77-78. Similarly, a railroad, telegraph, or telephone company's status as the only provider in a region heavily suggested it was affected with the public interest.

When state legislatures or state courts imposed new common carrier requirements, affected firms often sought to evade them by bringing constitutional claims in federal court. The landmark case is *Munn v. Illinois*, 94 U.S. 113 (1876). Illinois passed a statute regulating railroads and grain elevators. Among other things, the statute regulated grain elevators' rates and prohibited rate discrimination. *See id.* at 117. Munn & Scott, proprietors of a Chicago grain elevator, brought a litany of constitutional challenges to Illinois's law, arguing that it violated the Commerce and Port Preference Clauses of Article I, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The thrust of the challenge was that Illinois's law subverted private property rights without compensation and without sufficient justification.

The Supreme Court rejected Munn & Scott's claims and held that state legislatures may constitutionally regulate private firms if the service they provide is "affected with a public interest." *Id.* at 130. The Court expounded at length "the doctrine which Lord Hale has so forcibly stated," approving Hale's formulation and tracing its adoption and development in American common law. *See id.* at 126-30. It then explained that the Illinois legislature could have reasonably determined that grain elevators were affected with a public interest. That's because they were enormously important to the agriculture and shipping industries: They stood in the "gateway of commerce" and provided an indispensable link between western grain and eastern markets. *Id.* at 132. And while there were fourteen grain elevators in Chicago, controlled by nine firms, the market was small and interconnected enough to be ripe for abuse if state regulation was wholly prohibited.

After *Munn*, the Supreme Court repeatedly upheld common carrier regulations against constitutional challenges. The same year, for example, it easily rejected a railroad's challenge to rate regulation and nondiscrimination requirements imposed by the Iowa legislature. *See Chicago, B. & Q. R. Co. v. Iowa*, 94 U.S. 155, 161 (1876). It similarly rejected a constitutional challenge to a state legislature's imposition of a duty on telegraph companies to deliver messages with "impartiality and good faith." *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896). …

2.

Texas permissibly determined that the Platforms are common carriers subject to nondiscrimination regulation. That's because the Platforms are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest.

To state the obvious, the Platforms are communications firms. The Platforms halfheartedly suggest that they are not "members of the 'communications industry'" because their mode of transmitting expression differs from what other industry members do. But that's wrong. The whole purpose of a social media platform—as aptly captured in HB 20's definitional provisions—is to "enable users to communicate with other users." Tex. Bus. & Com. Code § 120.001(1). The Platforms' own representations confirm this—for example, Facebook's Terms of Service indicates its purpose is to enable users to "communicate with friends, family, and others." In that sense, the Platforms are no different than Verizon or AT&T.

The Platforms also hold themselves out to serve the public. They permit any adult to make an account and transmit expression after agreeing to the same boilerplate terms of service. They've thus represented a "willingness to carry anyone on the same terms and conditions." *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960).

The Platforms resist this conclusion, arguing that they have not held themselves out to serve the public equally. That's so, they contend, because they are only willing to do business with users who agree to their terms of service. But requiring "compliance with their reasonable rules and regulations" has never permitted a communications firm to avoid common carrier obligations. The relevant inquiry isn't whether a company *has* terms and conditions; it's whether it offers the "*same* terms and conditions to any and all groups." *Semon*, 279 F.2d at 739 (emphasis added). Put differently, the test is whether the company "makes individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Here, it's undisputed the Platforms apply the same terms and conditions to all existing and prospective users.

The Platforms also contend they are not open to the public generally because they censor and otherwise discriminate against certain users and expression. To the extent the Platforms are arguing that they are not common carriers because they filter some obscene, vile, and spam-related expression, this argument lacks any historical or doctrinal support. For example, phone companies are privileged by law to filter obscene or harassing expression, and they often do so. 47 U.S.C. § 223; *see, e.g., Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987). Yet they're still regulated as common carriers. Similarly, transportation providers may eject vulgar or disorderly passengers, yet States may nonetheless impose common carrier regulations prohibiting discrimination on more invidious grounds. *E.g., Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).

The Platforms nonetheless contend that they cannot be regulated as common carriers because they engage in viewpoint-based censorship—the very conduct common carrier regulation would forbid. This contention is upside down. The Platforms appear to believe that any enterprise can avoid common carrier obligations by violating those same obligations. That is obviously wrong and would rob the common carrier doctrine of any content. …

The Platforms' contention also involves a fair bit of historical amnesia. As discussed earlier, telegraph companies once engaged in extensive viewpoint-based discrimination, but that did not immunize them from common carrier regulation. Rather, for most legislators and courts, it made such regulation all the more urgent. …

Texas also reasonably determined that the Platforms are "affected with a public interest." Numerous members of the public depend on social media platforms to communicate about civic life, art, culture, religion, science, politics, school, family, and business. The Supreme Court in 2017 recognized that social media platforms "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737. The Court's "modern public square" label reflects the fact that in-person social interactions, cultural experiences, and economic undertakings are increasingly being replaced by interactions and transactions hosted or facilitated by the Platforms. And if anything, the Platforms' position as the modern public square has only become more entrenched in the four years between *Packingham* and the Texas legislature's finding, as the public's usage of and dependance on the Platforms has continued to increase.

The centrality of the Platforms to public discourse is perhaps most vividly illustrated by multiple federal court of appeals decisions holding that the replies to a public official's Twitter feed constitute a government "public forum" for First Amendment purposes. *See Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated*, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021) (mem.); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 2022 WL 2963453, at *15 (9th Cir. 2022). These decisions reflect the modern intuition that the Platforms are the forum for political discussion and debate, and exclusion from the Platforms amounts to exclusion from the public discourse. And for many, the Platforms are also no less central to quotidian discussions about matters like school, family, and business, than they are to debates about politics, science, and religion.

In addition to their social importance, the Platforms play a central role in American economic life. For those who traffic in information—journalists, acade-

mics, pundits, and the like—access to the Platforms can be indispensable to vocational success. That's because in the modern economy, the Platforms provide the most effective way to disseminate news, commentary, and other information. The same is true for all sorts of cultural figures, entertainers, and educators, a growing number of whom rely for much or all of their income on monetizing expression posted to the Platforms. Finally, even people and companies who traffic in physical goods often lean heavily on the Platforms to build their brand and market their products to consumers. That's why the Platforms, which earn almost all their revenue through advertising, are among the world's most valuable corporations. Thus, just like the telephone a century ago, the Platforms have become a key "factor in the commerce of the nation, and of a great portion of the civilized world." *Webster*, 22 N.W. at 239. Or at the very least, one cannot say the Texas legislature's judgment to that effect was unreasonable.

It's also true that each Platform has an effective monopoly over its particular niche of online discourse. Many early telephone companies did not have legal monopolies, but as a practical matter, they monopolized their geographic area due to the nature of the telephone business. Likewise with the Platforms: While no law gives them a monopoly, "network effects entrench these companies" because it's difficult or impossible for a competitor to reproduce the network that makes an established Platform useful to its users. *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Academics have explored this concept in depth, but to those familiar with the Platforms, a few concrete examples can easily demonstrate the point. To effectively monetize, say, carpet cleaning instructional videos (a real niche), one needs access to YouTube. Alternatively, sports "influencers" need access to Instagram. And political pundits need access to Twitter. It's thus no answer to tell the censored athlete, as the Platforms do, that she can just post from a different platform. As Justice Thomas has aptly pointed out, that's like telling a man kicked off the train that he can still "hike the Oregon Trail." *Id.* at 1225. The Platforms' entrenched market power thus further supports the reasonableness of Texas's determination that the Platforms are affected with a public interest. …

At bottom, the Platforms ask us to hold that in the long technological march from ferries and bakeries, to barges and gristmills, to steamboats and stagecoaches, to railroads and grain elevators, to water and gas lines, to telegraph and telephone lines, to social media platforms—that social media marks the point where the underlying technology is finally so complicated that the government may no longer regulate it to prevent invidious discrimination. But we may not inter this venerable and centuries-old doctrine just because Twitter's censorship tools are more sophisticated than Western Union's. *Cf. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("Basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."). …

F.

Suppose Section 7 did implicate the Platforms' First Amendment rights. The Platforms would still not be entitled to facial pre-enforcement relief. That's because (1) it's a content-and viewpoint-neutral law and is therefore subject to intermediate scrutiny at most. And (2) Texas's interests undergirding Section 7 are sufficient to satisfy that standard.

1.

Even if Section 7 burdens the Platforms' First Amendment rights, it does so in a content-neutral way. ... Section 7 is content-neutral. Even assuming viewpoint-based censorship is speech, the burden Section 7 imposes on that speech does not depend on "the ideas or views it expresses." *Turner I*, 512 U.S. at 643. In other words, Section 7's burden in no way depends on what message a Platform conveys or intends to convey through its censorship. That's because Section 7 applies equally regardless of the censored user's viewpoint, and regardless of the motives (stated or unstated) animating the Platform's viewpoint-based or geography-based censorship. ...

2.

Section 7 satisfies intermediate scrutiny. A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. We hold that Section 7's regulation of viewpoint-based censorship meets each of these requirements.

First, Section 7 advances an important governmental interest. HB 20's legislative findings assert that Texas "has a fundamental interest in protecting the free exchange of ideas and information in this state." And Supreme Court precedent confirms that this is "a governmental purpose of the highest order." *Turner I*, 512 U.S. at 663; *see Id.* ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); *Turner II*, 520 U.S. at 189 ("promoting the widespread dissemination of information from a multiplicity of sources" is an important government interest); *see also Associated Press v. United States*, 326 U.S. 1, 20, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945) ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."). ...

Second, Section 7 is "unrelated to the suppression of free speech" because it aims to protect individual speakers' ability to speak. *Turner II*, 520 U.S. at 189. The Platforms resist this conclusion only by insisting that Section 7 curtails the Platforms' own speech. That conflates the criteria for triggering intermediate scrutiny with the requirements for satisfying it. Intermediate scrutiny only kicks in when a law curtails speech, so the Platforms' test would mean that no law triggering intermediate scrutiny could ever satisfy that standard. And that would make little sense. Section 7 is plainly unrelated to the suppression of free speech because at most it curtails the Platforms' censorship—which they call speech—and only to the extent necessary to allow Texans to speak without suffering viewpoint discrimination.

Third, Section 7 "does not burden substantially more speech than necessary to further Texas's interests." *Id.* This is perhaps best illustrated by considering the Platforms' main argument to the contrary: that "if the State were truly interested in providing a viewpoint-neutral public forum, the State could have created its own government-run social-media platform." The same network effects that make the Platforms so useful to their users mean that Texas (or even a private competitor) is unlikely to be able to reproduce that network and create a similarly valuable communications medium. It's almost as absurd to tell Texas to just make its own Twitter as it would have been to tell broadcasters to just make their own cable systems. And aside from this bizarre claim, the Platforms offer no less restrictive alternative that would similarly advance Texas's interest in "promoting the wide-

spread dissemination of information from a multiplicity of sources." *Turner II*, 520 U.S. at 189. ...

Section 7 thus serves Texas's important interest in protecting the widespread dissemination of information, is unrelated to the suppression of free expression, and does not burden substantially more speech than necessary to advance Texas's interest. Section 7 therefore satisfies intermediate scrutiny and would be constitutional on that basis *even if* its censorship prohibitions implicated the Platforms' First Amendment rights. ...

* * *

The First Amendment protects speech: It generally prevents the government from interfering with people's speech or forcing them to speak. The Platforms argue that because they host and transmit speech, the First Amendment also gives them an unqualified license to invalidate laws that hinder them from censoring speech they don't like. ...

We reject the Platforms' attempt to extract a freewheeling censorship right from the Constitution's free speech guarantee. The Platforms are not newspapers. Their censorship is not speech. ... And HB 20 is constitutional because it neither compels nor obstructs the Platforms' own speech in any way.

NETCHOICE, LLC V. ATTORNEY GENERAL, STATE OF FLORIDA

34 F.4th 1196 (11th Cir. 2022)

Newsom, Circuit Judge:

Not in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok. But "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). One of those "basic principles"—indeed, the most basic of the basic—is that "the Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Put simply, with minor exceptions, the government can't tell a private person or entity what to say or how to say it.

The question at the core of this appeal is whether the Facebooks and Twitters of the world—indisputably "private actors" with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms. The State of Florida insists that they aren't, and it has enacted a first-of-its-kind law to combat what some of its proponents perceive to be a concerted effort by "the 'big tech' oligarchs in Silicon Valley" to "silence" "conservative" speech in favor of a "radical leftist" agenda. To that end, the new law would, among other things, prohibit certain social-media companies from "deplatforming" political candidates under any circumstances, prioritizing or deprioritizing any post or message "by or about" a candidate, and, more broadly, removing anything posted by a "journalistic enterprise" based on its content.

We hold that it is substantially likely that social-media companies—even the biggest ones—are private actors whose rights the First Amendment protects, that their so-called "content-moderation" decisions constitute protected exercises of editorial judgment, and that the provisions of the new Florida law that restrict

large platforms' ability to engage in content moderation unconstitutionally burden that prerogative. ...

I

A

We begin with a primer: This is a case about social-media platforms. (If you're one of the millions of Americans who regularly use social media or can't remember a time before social media existed, feel free to skip ahead.)

At their core, social-media platforms collect speech created by third parties—typically in the form of written text, photos, and videos, which we'll collectively call "posts"—and then make that speech available to others, who might be either individuals who have chosen to "follow" the "post"-er or members of the general public. Social-media platforms include both massive websites with billions of users—like Facebook, Twitter, YouTube, and TikTok—and niche sites that cater to smaller audiences based on specific interests or affiliations—like Roblox (a child-oriented gaming network), ProAmericaOnly (a network for conservatives), and Vegan Forum (self-explanatory).

Three important points about social-media platforms: First—and this would be too obvious to mention if it weren't so often lost or obscured in political rhetoric—platforms are private enterprises, not governmental (or even quasi-governmental) entities. No one has an obligation to contribute to or consume the content that the platforms make available. And correlatively, while the Constitution protects citizens from governmental efforts to restrict their access to social media, *see Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), no one has a vested right to force a platform to allow her to contribute to or consume social-media content.

Second, a social-media platform is different from traditional media outlets in that it doesn't create most of the original content on its site; the vast majority of "tweets" on Twitter and videos on YouTube, for instance, are created by individual users, not the companies that own and operate Twitter and YouTube. Even so, platforms do engage in some speech of their own: A platform, for example, might publish terms of service or community standards specifying the type of content that it will (and won't) allow on its site, add addenda or disclaimers to certain posts (say, warning of misinformation or mature content), or publish its own posts.

Third, and relatedly, social-media platforms aren't "dumb pipes": They're not just servers and hard drives storing information or hosting blogs that anyone can access, and they're not internet service providers reflexively transmitting data from point A to point B. Rather, when a user visits Facebook or Twitter, for instance, she sees a curated and edited compilation of content from the people and organizations that she follows. If she follows 1,000 people and 100 organizations on a particular platform, for instance, her "feed"—for better or worse—won't just consist of every single post created by every single one of those people and organizations arranged in reverse-chronological order. Rather, the platform will have exercised editorial judgment in two key ways: First, the platform will have removed posts that violate its terms of service or community standards—for instance, those containing hate speech, pornography, or violent content. Second, it will have arranged available content by choosing how to prioritize and display posts—effectively selecting which users' speech the viewer will see, and in what order, during any given visit to the site.

Accordingly, a social-media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby par-

ticipate in the community it has created. In that way, the platform creates a virtual space in which every user—private individuals, politicians, news organizations, corporations, and advocacy groups—can be both speaker and listener. In playing this role, the platforms invest significant time and resources into editing and organizing—the best word, we think, is *curating*—users' posts into collections of content that they then disseminate to others. By engaging in this content moderation, the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints. …

II

A

Social-media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights, and when they (like other entities) "disclos[e]," "publish[]," or "disseminat[e]" information, they engage in "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). More particularly, when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site. As the officials who sponsored and signed S.B. 7072 recognized when alleging that "Big Tech" companies harbor a "leftist" bias against "conservative" perspectives, the companies that operate social-media platforms express themselves (for better or worse) through their content-moderation decisions. When a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in "speech" within the meaning of the First Amendment.

Laws that restrict platforms' ability to speak through content moderation therefore trigger First Amendment scrutiny. …

1 …

The Supreme Court has repeatedly held that a private entity's choices about whether, to what extent, and in what manner it will disseminate speech—even speech created by others—constitute "editorial judgments" protected by the First Amendment. [Summaries of *Miami Herald v. Tornillo* and *Pacific Gas and Electric v. Public Utilities Commission* omitted.]

So too, in *Turner Broadcasting Systems, Inc. v. FCC*, the Court held that cable operators—companies that own cable lines and choose which stations to offer their customers—"engage in and transmit speech." 512 U.S. at 636. "[B]y exercising editorial discretion over which stations or programs to include in [their] repertoire," the Court said, they "seek to communicate messages on a wide variety of topics and in a wide variety of formats." *Id.* (quotation marks omitted); *see also Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."). Because cable operators' decisions about which channels to transmit were protected speech, the challenged regulation requiring operators to carry broadcast-TV channels triggered First Amendment scrutiny. 512 U.S. at 637. …

[Summaries of *Hurley v. GLIB* and *FAIR v. Rumsfeld* omitted.]

3 …

Social-media platforms' content-moderation decisions are, we think, closely analogous to the editorial judgments that the Supreme Court recognized in *Miami*

Herald, *Pacific Gas*, *Turner*, and *Hurley*. Like parade organizers and cable operators, social-media companies are in the business of delivering curated compilations of speech created, in the first instance, by others. Just as the parade organizer exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social-media platforms regularly make choices "not to propound a particular point of view." *Hurley*, 515 U.S. at 575. Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups. A few examples:

- YouTube seeks to create a "welcoming community for viewers" and, to that end, prohibits a wide range of content, including spam, pornography, terrorist incitement, election and public-health misinformation, and hate speech.
- Facebook engages in content moderation to foster "authenticity," "safety," "privacy," and "dignity," and accordingly, removes or adds warnings to a wide range of content—for example, posts that include what it considers to be hate speech, fraud or deception, nudity or sexual activity, and public-health misinformation.
- Twitter aims "to ensure all people can participate in the public conversation freely and safely" by removing content, among other categories, that it views as embodying hate, glorifying violence, promoting suicide, or containing election misinformation.
- Roblox, a gaming social network primarily for children, prohibits "singling out a user or group for ridicule or abuse," any sort of sexual content, depictions of and support for war or violence, and any discussion of political parties or candidates.
- Vegan Forum allows non-vegans but "will not tolerate members who promote contrary agendas."

And to be clear, some platforms exercise editorial judgment to promote explicitly political agendas. On the right, ProAmericaOnly promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS." And on the left, The Democratic Hub says that its "online community is for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology."

All such decisions about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on platforms' own particular values and views—fit comfortably within the Supreme Court's editorial-judgment precedents. …

Separately, but similarly, platforms' content-moderation activities qualify as First-Amendment-protected expressive conduct … . A reasonable person would likely infer "some sort of message" from, say, Facebook removing hate speech or Twitter banning a politician. Indeed, unless posts and users are removed *randomly*, those sorts of actions necessarily convey *some* sort of message—most obviously, the platforms' disagreement with or disapproval of certain content, viewpoints, or users. Here, for instance, the driving force behind S.B. 7072 seems to have been a perception (right or wrong) that some platforms' content-moderation decisions reflected a "leftist" bias against "conservative" views—which, for better or worse, surely counts as expressing a message. That observers perceive bias in platforms' content-moderation decisions is compelling evidence that those decisions are indeed expressive. …

B

In the face of the editorial-judgment and expressive-conduct cases, the State insists that S.B. 7072 doesn't even implicate, let alone violate, the First Amendment. The State's first line of argument relies on two case [*PruneYard* and *FAIR*] in which the Supreme Court upheld government regulations that effectively compelled private actors to "host" others' speech. The State's second argument seeks to evade—or at least minimize—First Amendment scrutiny by labeling social-media platforms "common carriers." We find neither argument convincing.

1

We begin with the "hosting" cases. The first decision to which the State points, *PruneYard*, is readily distinguishable. There, the Supreme Court affirmed a state court's decision requiring a privately owned shopping mall to allow members of the public to circulate petitions on its property. 447 U.S. at 76-77, 88. In that case, though, the only First Amendment interest that the mall owner asserted was the right "not to be forced by the State to use its property as a forum for the speech of others." *Id.* at 85. The Supreme Court's subsequent decisions in *Pacific Gas* and *Hurley* distinguished and cabined *PruneYard*. The *Pacific Gas* plurality explained that "notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets." 475 U.S. at 12. Because NetChoice asserts that S.B. 7072 interferes with the platforms' own speech rights by forcing them to carry messages that contradict their community standards and terms of service, *PruneYard* is inapposite.

FAIR may be a bit closer, but it, too, is distinguishable. In that case, the Supreme Court upheld a federal statute—the Solomon Amendment—that required law schools, as a condition to receiving federal funding, to allow military recruiters the same access to campuses and students as any other employer. 547 U.S. at 56. The schools, which had restricted recruiters' access because they opposed the military's "Don't Ask, Don't Tell" policy regarding gay servicemembers, protested that requiring them to host recruiters and post notices on their behalf violated the First Amendment. But the Court held that the law didn't implicate the First Amendment because it "neither limited what law schools may say nor required them to say anything." *Id.* at 60. In so holding, the Court rejected two arguments for why the First Amendment should apply—(1) that the Solomon Amendment unconstitutionally required law schools to host the military's speech, and (2) that it restricted the law schools' expressive conduct. *Id.* at 60-61.

With respect to the first argument, the Court distinguished *Miami Herald, Pacific Gas*, and *Hurley* on the ground that, in those cases, "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. The Solomon Amendment's requirement that schools host military recruiters did "not affect the law schools' speech," the Court said, "because the schools were]not speaking when they hosted interviews and recruiting receptions": Recruiting activities, the Court reasoned, simply aren't "inherently expressive"—they're not *speech*—in the way that editorial pages, newsletters, and parades are. *Id.* at 64. Therefore, the Court concluded, "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *Id.* Nor did the Solomon Amendment's requirement that schools send notices on behalf of military recruiters unconstitutionally compel speech, the Court held, as it was merely incidental to the law's regulation of *conduct*.

The *FAIR* Court also rejected the law schools' second argument—namely, that the Solomon Amendment restricted their inherently expressive conduct. The schools' refusal to allow military recruiters on campus was expressive, the Court emphasized, "only because they accompanied their conduct with speech explaining it." *Id.* at 66. In the normal course, the Court said, an observer "who saw military recruiters interviewing away from the law school would have no way of knowing" whether the school was expressing a message or, instead, the school's rooms just happened to be full or the recruiters just preferred to interview elsewhere. *Id.* Because "explanatory speech" was necessary to understand the message conveyed by the law schools' conduct, the Court concluded, that conduct wasn't "inherently expressive." *Id.*

FAIR isn't controlling here because social-media platforms warrant First Amendment protection on both of the grounds that the Court held that law-school recruiting services didn't.

First, S.B. 7072 interferes with social-media platforms' own "speech" within the meaning of the First Amendment. Social-media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech. A social-media platform that "exercises editorial discretion in the selection and presentation of" the content that it disseminates to its users "engages in speech activity." *Ark. Educ. TV Comm'n*, 523 U.S. at 674; *see Sorrell*, 564 U.S. at 570 (explaining that the "dissemination of information" is "speech within the meaning of the First Amendment"); *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) ("If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." (cleaned up)). Just as the must-carry provisions in *Turner* "reduce[d] the number of channels over which cable operators exercise[d] unfettered control" and therefore triggered First Amendment scrutiny, 512 U.S. at 637, S.B. 7072's content-moderation restrictions reduce the number of posts over which platforms can exercise their editorial judgment. Because a social-media platform itself "speaks" by curating and delivering compilations of others' speech—speech that may include messages ranging from Facebook's promotion of authenticity, safety, privacy, and dignity to ProAmericaOnly's "No BS | No LIBERALS"—a law that requires the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights.

Second, social-media platforms are engaged in inherently expressive conduct of the sort that the Court found lacking in *FAIR*. As we were careful to explain in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F. 3d 1235 (11th Cir. 2018), *FAIR* "does not mean that conduct loses its expressive nature just because it is also accompanied by other speech." 901 F.3d at 1243-44. Rather, "[t]he critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct." *Id.* at 1244. And we held that an advocacy organization's food-sharing events constituted expressive conduct from which, "due to the context surrounding them, the reasonable observer would infer some sort of message"—even without reference to the words "Food Not Bombs" on the organization's banners. *Id.* at 1245. Context, we held, is what differentiates "activity that is sufficiently expressive [from] similar activity that is not"—*e.g.*, "the act of sitting down" from "the sit-in by African Americans at a Louisiana library" protesting segregation. *Id.* at 1241 (citing *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966)).

Unlike the law schools in *FAIR*, social-media platforms' content-moderation decisions communicate messages when they remove or "shadow-ban" users or content. Explanatory speech isn't "*necessary* for the reasonable observer to perceive a message from," for instance, a platform's decision to ban a politician or remove what it perceives to be misinformation. *Id.* at 1244. Such conduct—the *targeted removal of users' speech* from websites whose primary function is to serve as speech platforms—conveys a message to the reasonable observer "due to the context surrounding" it. *Id.* at 1245. Given the context, a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval. Thus, social-media platforms engage in content moderation that is inherently expressive notwithstanding *FAIR*. ...

2

The State separately seeks to evade (or at least minimize) First Amendment scrutiny by labeling social-media platforms "common carriers." The crux of the State's position, as expressed at oral argument, is that "[t]here are certain services that society determines people shouldn't be required to do without," and that this is "true of social media in the 21st century." For reasons we explain, we disagree.

At the outset, we confess some uncertainty whether the State means to argue (a) that platforms are *already* common carriers, and so possess no (or only minimal) First Amendment rights, or (b) that the State can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights that they currently possess. Whatever the State's position, we are unpersuaded.

a

The first version of the argument fails because, in point of fact, social-media platforms are not—in the nature of things, so to speak—common carriers. That is so for at least three reasons.

First, social-media platforms have never acted like common carriers. "[I]n the communications context," common carriers are entities that "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing"—they don't "make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). While it's true that social-media platforms generally hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by their community standards. In other words, Facebook is open to every individual if, but only if, she agrees not to transmit content that violates the company's rules. Social-media users, accordingly, are *not* freely able to transmit messages "of their own design and choosing" because platforms make—and have always made—"individualized" content- and viewpoint-based decisions about whether to publish particular messages or users.

Second, Supreme Court precedent strongly suggests that internet companies like social-media platforms aren't common carriers. While the Court has applied less stringent First Amendment scrutiny to television and radio broadcasters, the *Turner* Court cabined that approach to "broadcast" media because of its "unique physical limitations"—chiefly, the scarcity of broadcast frequencies. 512 U.S. at 637-39. Instead of "comparing cable operators to electricity providers, trucking companies, and railroads—all entities subject to traditional economic regulation"—the *Turner* Court "analogized the cable operators [in that case] to the publish-

ers, pamphleteers, and bookstore owners traditionally protected by the First Amendment." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 428, 428 U.S. App. D.C. 439 (D.C. Cir. 2017) (Kavanaugh, J., dissental); *see Turner*, 512 U.S. at 639. And indeed, the Court explicitly distinguished online from broadcast media in *Reno v. American Civil Liberties Union*, emphasizing that the "vast democratic forums of the Internet" have never been "subject to the type of government supervision and regulation that has attended the broadcast industry." 521 U.S. 844, 868-69 (1997). These precedents demonstrate that social-media platforms should be treated more like cable operators, which retain their First Amendment right to exercise editorial discretion, than traditional common carriers.

Finally, Congress has distinguished internet companies from common carriers. The Telecommunications Act of 1996 explicitly differentiates "interactive computer services"—like social-media platforms—from "common carriers or telecommunications services." *See, e.g.*, 47 U.S.C. § 223(e)(6) ("Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."). And the Act goes on to provide protections for internet companies that are inconsistent with the traditional common-carrier obligation of indiscriminate service. In particular, it explicitly protects internet companies' ability to restrict access to a plethora of material that they might consider "objectionable." *Id.* § 230(c)(2)(A). Federal law's recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights.

b

If social-media platforms are not common carriers either in fact or by law, the State is left to argue that it can force them to *become* common carriers, abrogating or diminishing the First Amendment rights that they currently possess and exercise. Neither law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier. Quite the contrary, if social-media platforms currently possess the First Amendment right to exercise editorial judgment, as we hold it is substantially likely they do, then any law infringing that right—even one bearing the terminology of "common carriage"—should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity.

* * *

The State's best rejoinder is that because large social-media platforms are clothed with a "public trust" and have "substantial market power," they are (or should be treated like) common carriers. These premises aren't uncontroversial, but even if they're true, they wouldn't change our conclusion. The State doesn't argue that market power and public importance are alone sufficient reasons to recharacterize a private company as a common carrier; rather, it acknowledges that the "basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately." The problem, as we've explained, is that social-media platforms *don't* serve the public indiscriminately but, rather, exercise editorial judgment to curate the content that they display and disseminate.

The State seems to argue that even if platforms aren't currently common carriers, their market power and public importance might justify their "legislative designation ... as common carriers." That might be true for an insurance or telegraph company, whose only concern is whether its "property" becomes "the means of

rendering the service which has become of public interest." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring) (quoting *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 408, 34 S. Ct. 612, 58 L. Ed. 1011 (1914)). But the Supreme Court has squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the marketplace and hits it big. *See Miami Herald*, 418 U.S. at 251, 258.

In short, because social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren't common carriers, and a state law can't force them to act as such unless it survives First Amendment scrutiny.

C ...

S.B. 7072's content-moderation restrictions all limit platforms' ability to exercise editorial judgment and thus trigger First Amendment scrutiny. The provisions that prohibit deplatforming candidates (§ 106.072(2)), deprioritizing and "shadow-banning" content by or about candidates (§ 501.2041(2)(h)), and censoring, deplatforming, or shadow-banning "journalistic enterprises" (§ 501.2041(2)(j)) all clearly restrict platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable. ...

III

A

Having determined that it is substantially likely that S.B. 7072 triggers First Amendment scrutiny, we must now determine the level of scrutiny to apply—and to which provisions. [The court held that those of S.B. 7072's content-moderation restrictions discussed above were content based, while others not discussed here (e.g. a requirement of consistency in moderation) were either content-based or content-neutral.]

B

At last, it is time to apply the requisite First Amendment scrutiny. We hold that it is substantially likely that none of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny. ...

1

We'll start with S.B. 7072's content-moderation restrictions. While some of these provisions are likely subject to strict scrutiny, it is substantially likely that none survive even intermediate scrutiny. When a law is subject to intermediate scrutiny, the government must show that it is narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech. Narrow tailoring in this context means that the regulation must be no greater than is essential to the furtherance of the government's interest.

We think it substantially likely that S.B. 7072's content-moderation restrictions do not further any substantial governmental interest—much less any compelling one. ...

The State might theoretically assert some interest in counteracting "unfair" private "censorship" that privileges some viewpoints over others on social-media platforms. *See* S.B. 7072 § 1(9). But a state "may not burden the speech of others in order to tilt public debate in a preferred direction," *Sorrell*, 564 U.S. at 578-79, or "advance some points of view," *Pacific Gas*, 475 U.S. at 20 (plurality op.). Put simply, there's no legitimate—let alone substantial—governmental interest in leveling

the expressive playing field. Nor is there a substantial governmental interest in enabling users—who, remember, have no vested right to a social-media account—to say whatever they want on privately owned platforms that would prefer to remove their posts: By preventing platforms from conducting content moderation—which, we've explained, is itself expressive First-Amendment-protected activity—S.B. 7072 "restrict[s] the speech of some elements of our society in order to enhance the relative voice of others"—a concept "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). At the end of the day, preventing "unfair[ness]" to certain users or points of view isn't a substantial governmental interest; rather, private actors have a First Amendment right to be "unfair"—which is to say, a right to have and express their own points of view. *Miami Herald*, 418 U.S. 258.

The State might also assert an interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner*, 512 U.S. at 662. Just as the *Turner* Court held that the must-carry provisions served the government's substantial interest in ensuring that American citizens were able to access their "local broadcasting outlets," *id.* at 663-64, the State could argue that S.B. 7072 ensures that political candidates and journalistic enterprises are able to communicate with the public, *see* Fla. Stat. §§ 106.072(2); 501.2041(2)(f), (j). But it's hard to imagine how the State could have a "substantial" interest in forcing large platforms—and only large platforms—to carry these parties' speech: Unlike the situation in *Turner*, where cable operators had "bottleneck, or gatekeeper control over most programming delivered into subscribers' homes," 512 U.S. at 623, political candidates and large journalistic enterprises have numerous ways to communicate with the public besides any particular social-media platform that might prefer not to disseminate their speech—*e.g.*, other more-permissive platforms, their own websites, email, TV, radio, etc. *See Reno*, 521 U.S. at 870 (noting that unlike the broadcast spectrum, "the internet can hardly be considered a 'scarce' expressive commodity" and that "[t]hrough the use of Web pages, mail exploders, and newsgroups, [any] individual can become a pamphleteer"). Even if other channels aren't as *effective* as, say, Facebook, the State has no substantial (or even legitimate) interest in restricting platforms' speech—the messages that *platforms* express when they remove content they find objectionable—to "enhance the relative voice" of certain candidates and journalistic enterprises. *Buckley*, 424 U.S. at 48-49. ...

Moreover, and in any event, even if the State could establish that its content-moderation restrictions serve a substantial governmental interest, it hasn't even attempted to—and we don't think it could—show that the burden that those provisions impose is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. For instance, §§ 106.072(2) and 501.2041(2)(h) prohibit deplatforming, deprioritizing, or shadow-banning candidates regardless of how blatantly or regularly they violate a platform's community standards and regardless of what alternative avenues the candidate has for communicating with the public. These provisions would apply, for instance, even if a candidate repeatedly posted obscenity, hate speech, and terrorist propaganda. The journalistic-enterprises provision requires platforms to allow any entity with enough content and a sufficient number of users to post *anything* it wants—other than true "obscenity"—and even prohibits platforms from adding disclaimers or warnings. *See* Fla. Stat. § 501.2041(2)(j). As one amicus vividly described the problem, the provision is so broad that it would prohibit a child-friendly platform like YouTube Kids from re-

moving—or even adding an age gate to—soft-core pornography posted by Porn-Hub, which qualifies as a "journalistic enterprise" because it posts more than 100 hours of video and has more than 100 million viewers per year. That seems to us the opposite of narrow tailoring. …