No. 22-277

**In the Supreme Court of the United States**

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ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,

*Petitioners*,

v.

NETCHOICE, LLC, ET AL.,

*Respondents.*

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

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# BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, IDAHO, IOWA, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND UTAH IN SUPPORT OF PETITIONERS

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## STATEMENT OF *AMICI* INTEREST*

In seventeenth-century England, those hoping to print a book needed permission from either the Archbishop of Canterbury or the Bishop of London. Those officials censored publications deemed contrary to the public good—for example, books "contrary to morals or to the truth of the Faith." Richard C. Jebb, *Introduction to* John Milton, *Areopagitica*, at xxv (Richard C. Jebb ed., Cambridge Univ. Press 1918).

In twenty-first century America, the First Amendment forbids government officials from engaging in this sort of censorship. Does it also bar the government from *stopping* censorship by private entities? That question arises because social-media companies, which operate largely free of regulatory oversight, exercise immense power to suppress views with which they disagree. For example, Facebook—a platform that reaches more than 70 percent of the U.S. population—will "remove" speech that "undermine[s] the severity of COVID-19." Meta, *COVID-19 and Vaccine Policy Updates & Protections*, https://perma.cc/HC5X-ZELP.

The question whether the First Amendment entitles social-media companies to censor speech is immensely important. The internet is "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Private companies operate that public square. And in doing so, they often de-

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* The *amici* States provided all parties with the notice required by Rule 37.2(a).

cide who may speak, and what ideas users may discuss. When platforms engage in such censorship, they undermine the "free exchange of ideas" that free-speech protections exist to facilitate. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). And they threaten the development of important insights and discoveries, many of which begin as fringe views. *See, e.g.*, *Whole Woman's Health v. Paxton*, 10 F.4th 430, 466 (5th Cir. 2021) (*en banc*) (Ho, J., concurring) (recounting how germ theory, first expounded by Semmelweis and Lister, went from fringe to mainstream). Further, if social-media companies are absolutely entitled to censor unpopular views, what is the limiting principle? May "email providers, mobile phone companies, and banks" claim a constitutional right to "cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business"? *NetChoice, LLC v. Paxton*, — F.4th —, 2022 WL 4285917, No. 21-51178, slip op. 2 (5th Cir., Sept. 16, 2022).

The States are filing this *amicus* brief because they desperately need an answer to the question presented. "The virtue of a democratic system with a First Amendment is that it readily enables the people" to debate difficult issues, to persuade one another, and "to change their laws accordingly." *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). The system cannot work if the public lacks access to the means by which citizens may engage with each other. Censorship by social-media companies thus poses a very real threat to effective self-governance. For that reason, States have passed, or are considering, laws to address the problem. Those state laws implicate the question of

whether, and in what ways, the government may regulate or discourage private censorship. By granting certiorari and deciding this case, the Court will provide guidance regarding which policies States may (and may not) pursue. The Court should do so. And it should make clear that the First Amendment leaves the States with room to address censorship and the threat it poses to open discourse

## SUMMARY OF ARGUMENT

Social-media companies, whose platforms function as the modern public square, censor their users' speech. States have recognized that censorship undermines the marketplace of ideas. So they have begun in earnest to regulate censorship on social-media platforms.

Thoughtful jurists have differed on the question of whether, and to what extent, States may regulate such censorship without running afoul of the Free Speech Clause. But this Court has not yet grappled with the issue. This case provides it with an ideal vehicle for doing so. The Court should grant review. And it should hold that, in at least some circumstances, States may regulate censorship on social-media platforms. True, the Free Speech Clause generally prohibits the government from compelling speech. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). But the government does not compel speech simply by requiring owners of publicly available fora to allow third-parties to speak in those fora. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76 (1980). In many circumstances, that is all that laws regulating censorship on social-media platforms do.

In any event, rules pertaining to common carriers permit the regulation of censorship on social-media platforms. Common carriers are "private enterprises" that "provid[e] essential public services" and that "hold themselves out to serve the public without individualized bargaining." *Net Choice*, slip op. at 44–45, 53 (op. of Oldham, J.). States can require common carriers to supply their services "without discrimination," including discrimination based on viewpoint or ideology. *Id.* at 45. For example, telephone companies are common carriers. And States may lawfully require them to provide services to all prospective customers, without regard to the topics those customers plan to discuss by phone. Many social-media companies are common carriers because they—like telephone companies—provide an essential communication service and hold themselves out to serve the public. Under the common-carrier doctrine, the States can forbid social-media companies from denying service, or from providing inferior service, based on the user's viewpoint.

## ARGUMENT

### I. Social-media companies regularly engage in censorship that impoverishes the free exchange of ideas.

The internet is "the modern public square." *Packingham*, 137 S. Ct. at 1737. But the modern square, unlike its historic predecessor, is controlled by a small number of private companies. Those companies have tremendous power about what is said and what is shown for others to view; they have "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), https://perma.cc/FN7D-BL9T. As a result, these companies "wield enormous power over billions of citizens worldwide." Frederick Mostert & Alex Urbelis, *Social media platforms must abandon algorithmic secrecy*, Financial Times (June 16, 2021), https://perma.cc/GN74-6DDH. Whereas the preacher in early America needed no man's permission to speak in the town square, social-media companies claim an absolute right to forbid today's believers from evangelizing on their networks.

Social-media companies regulate speech in at least two ways. First, they engage in old-fashioned censorship—censoring particular content or speakers. Second, they elevate and depress speech in secret, using proprietary algorithms.

Examples of old-fashioned censorship abound. In the summer of 2021, Senator Rand Paul, a doctor, opined about the relative inefficacy of cloth masks in combating the COVID-19 pandemic. The Senator posted a video explaining his views on the popular video social-media platform YouTube. YouTube promptly removed the video, and then banned the Senator from posting any videos—on any topic—for a week. *See, e.g.*, AP, *YouTube suspends Rand Paul after misleading video on masks,* PBS News Hour (Aug. 11, 2021), https://perma.cc/U2PD-K76U. 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), https://perma.cc/77LD-NL5K. And his perspective might have been immensely important at the time to individuals deciding how best to protect themselves. Nonetheless, YouTube forbade him from discussing the matter on its platform.

One year earlier, a different platform silenced a different set of voices. While the country was still roiling from the protests over George Floyd's murder, Facebook apparently 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), https://perma.cc/6F6S-UL4V.

Another example. Just this year, YouTube censored a video discussing documented instances of voting fraud—including fraud committed through mail-in absentee ballots. YouTube removed the video from public view, even though public records confirm voting-fraud prosecutions arising from mailed absentee ballots. *See* Hans A. von Spakovsky, *YouTube U-Turn: Censors Strike Again for No Good Reason, Just as Inexplicably Reverse Course*, Heritage Foundation (May 2, 2022), https://perma.cc/8PAV-CW25. Not two decades earlier, Justice Stevens cited documented cases of absentee-ballot fraud as proof that "voter fraud" is "real" and "could affect the outcome of a close election." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195–96 (2008) (opinion of Stevens, J.). Today, that view is apparently verboten on YouTube.

A final, very recent, example. After Giorgia Meloni won an election that will make her the Prime Minister of Italy, YouTube scrubbed one of her 2019 speeches espousing traditionalist views on family and marriage. Robby Soave, *YouTube Says Giorgia Meloni Video Was Removed in Error, Restores It After Inquiry*, Reason (Sept. 28, 2022), https://perma.cc/RY3T-7DW3. YouTube reversed course only after facing significant pushback over its apparent censorship. *Id.*

Turning to censorship-by-algorithm, the evidence is harder to unearth because the censorship occurs in secret. Using algorithms, social-media platforms can "amplify—or limit—the dissemination of information to their hundreds of millions of users." Bill Baier & Caitlin Chin, *Addressing Big Tech's power over speech*, Brookings Institute (June 1, 2021), https://perma.cc/Y3Y2-A3DY. These algorithms are not available to the public. They are, instead, tightly guarded trade secrets. As a result, "[c]omputers are in charge of what we see and they're operating without transparency." Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck trying to Stop Them.*, Wall Street Journal (Jan. 17, 2021), https://perma.cc/E3LK-6JNH. These algorithms are so embedded into social-media platforms' operation that they operate like a central decisionmaker; "it is doubtful that there is a department or team with full visibility of a platform's secretive black box of algorithms." Mostert & Urbelis, *Social media platforms must abandon algorithmic secrecy*, Financial Times (internal quotation marks omitted).

Algorithms, of course, are only semi-autonomous. Their operation reflects human decisionmaking regarding which speech to promote and which to suppress. Facebook, for its part, "does extensive internal research on the polarization problem and periodically adjusts its algorithms to reduce the flow of content likely to stoke political extremism and hatred." Paul Barrett, et al., *How tech platforms fuel U.S. political polarization and what government can do about it,* Brookings Institute (Sept. 27, 2021), https://perma.cc/UQ6A-3VP3. What constitutes "extremism"? That is up to Facebook. And that is scary when one accounts for the fact that abolitionism, black equality,

and so many other successful reform movements were initially derided as "extreme."

This semi-autonomous censorship is more pernicious than traditional censorship because its victims often do not know they are victims. Users "often have no way of telling for sure whether they have been shadowbanned or whether their content is simply not popular." Gabriel Nicholas, *Shadowbanning Is Big Tech's Big Problem*, The Atlantic (April 28, 2022), https://perma.cc/MW3Y-LYDZ). Even worse, shadowbanning—the suppressing of information shared by particular users—"can follow the logic of guilt by association." *Id.* One study "found that accounts that interacted with someone who had been shadowbanned were nearly four times more likely to be shadowbanned themselves." *Id.* This geometric censorship poses a unique threat, and a uniquely *effective* threat, to the censorship of unpopular ideas.

Both old-fashioned and algorithm-driven censorship is so well-known that government officials frequently pressure social-media companies to censor speech for political reasons. Over the last several years, federal officials have *encouraged* the major social-media platforms to censor speech. In the lead-up to the 2020 general election, members of one major political party encouraged Twitter to block the account of the sitting President in the midst of his reelection campaign. *See, e.g.*, Sophie Lewis, "*These are blatant threats": Kamala Harris urges Twitter CEO Jack Dorsey to suspend President Trump's account,* CBS Online (Oct. 2, 2019), https://perma.cc/KJ7L-RESB. And right before the 2020 election, Facebook reduced the visibility of stories about candidate Biden's son's emails after an FBI warning to the

company about misinformation. *See* David Malloy, *Zuckerberg tells Rogan FBI warning prompted Biden laptop story censorship*, BBC News (Aug. 26, 2022), https://perma.cc/8QX8-93X9. More recently, members of the party in power have pressured Google to censor results that might discourage abortion. *See, e.g.*, Press Release, Mark R. Warner, *Warner, Slotkin, Colleagues Urge Action on Misleading Search Results About Abortion Clinics* (June 17, 2022), https://perma.cc/3QEW-7U36. And recently disclosed communications show that the federal government colluded with social-media companies to ensure the censorship of disfavored views regarding COVID-19. *See* Attachment to Joint Statement on Discovery Disputes, *Missouri v. Biden*, 3:22-cv-01213, No. 71-3 (Aug. 31, 2022, W.D. La.).

The public is aware of all this. Even two years ago, "[m]ajorities in both major parties believe[d] censorship [was] likely occurring" at the major social-media platforms. Emily Vogels, et al., *Most Americans Think Social Media Sites Censor Political Viewpoints*, Pew Research Center (Aug. 19, 2020), https://perma.cc/X4MG-7Z8R. Not only does the public think the platforms are censoring speech, but the public has "little … confidence that these platforms" can "determine which content should be flagged." *Id.* What is more, "47% of the public thinks the government should be regulating major technology companies more than it is now, while just 11% think these companies should be regulated less." Monica Anderson, *Most Americans say social media companies have too much power, influence in politics*, Pew Research Center (July 22, 2020), https://perma.cc/P55A-A6NG. "It is becoming harder to overlook the reality that some change may be required to address the

power and risks associated with the dominance of social media platforms." Baier & Chin, *Addressing Big Tech's power*, Brookings Institute.

Public perception of these issues is irrelevant to the *legal* question this case presents. The Court decides constitutional questions through the application of legal texts and doctrines, not by public referenda. But public perception is relevant to the issue's importance. If significant percentages of the public want legislation on a particular issue, they are likely to get it. If that legislation is to accomplish anything, legislators must enact laws that comport with the Constitution. This case provides the Court with a chance to provide important guidance regarding what the States can do to discourage or prohibit censorship. The States turn to that issue now.

## II. The States need guidance regarding what they can do to promote the free exchange of ideas on social-media platforms.

Despite social-media platforms' unprecedented power over what billions of people see and hear, the companies that control the new public square are "'limited shockingly little.'" García-Hodges, *Big Tech*, NBC News (quoting UCLA Law Professor Mark Grady). Many States want to change that. But they face deep uncertainty regarding the degree to which the First Amendment limits their authority. With this case, the Court can provide that guidance and clarify that States may experiment with policies that discourage censorship while respecting the limits of the First Amendment.

### A. Most state legislatures have enacted or proposed laws regulating censorship by social-media entities.

Florida and Texas have led the way in responding to online censorship; both have enacted laws that, in one form or another, prohibit social-media platforms from censoring their users' speech based on users' viewpoints. *See* Tx. Civ. Prac. & Rem. Code §143A.002(a); Fla. Stat. Ann. §501.2041(2)(j).

Pending statutes in many other States have a similar aim. In Ohio, for example, the General Assembly is considering a bill regulating censorship by social-media platforms with at least 50 million users. The proposed law would prohibit these platforms from censoring speech on the basis of the speaker or user's viewpoint. And it would create a cause of action for injunctive relief and attorney's fees. *See* Ohio Gen. Assembly, H.B. 441 (introduced Oct. 6, 2021), https://perma.cc/N93F-W8RJ. Along the same lines, a proposed law in Oklahoma would empower Sooners to sue large social-media platforms (those with at least 75 million users) that censor, or that use algorithms to censor, political or religious speech. *See* Oklahoma Legislature, S.B. 383 (introduced Feb. 1, 2021), https://perma.cc/GQW7-FAQZ.

Hawkeye legislators are approaching the same problem in a different way. One proposed bill in Iowa would cancel tax credits and other public benefits for social-media platforms that censor constitutionally protected speech. Iowa General Assembly, S.F. 580 (introduced March 16, 2021), https://perma.cc/WE9H-9GML. Similar legislation elsewhere is stalled based on First Amendment concerns—concerns the Court could use this case to resolve.

*See, e.g.*, New Hampshire H.B. 133 (introduced Jan. 4, 2021), https://perma.cc/28EX-JJ7V; Missouri H.B. 482 (introduced Dec. 14, 2020), https://perma.cc/2XUW-65GV.

Other States have considered or enacted laws addressing another problem that arises from concentrated private control over the public square. One consequence of a public square controlled by a few private hands is that private interests—in order to maximize the value of those private interests—produce silos for ideas rather than a marketplace. In these silos, "[p]eople are shown things that appeal most to them, they click, they read, they watch, they fall into rabbit holes that reinforce their thoughts and ideas, they connect with like-minded people." Stern, *Social-Media Algorithms*, Wall Street Journal. This creates an echo chamber rather than a marketplace of ideas. And these echo chambers breathe life into ideas that would not fare well if subject to challenge in the free marketplace of ideas. "Algorithmic, robotic content has, in large part, assisted and powered election interference, fomented domestic rebellion and facilitated extremism online." Mostert & Urbelis, *Social media platforms must abandon algorithmic secrecy*, Financial Times. To take just one well-known example, many believe that the internet fueled Dylann Roof's racist views. *See, e.g.*, Rebecca Hersher, *What Happened When Dylann Roof Asked Google For Information About Race?*, NPR (Jan. 10, 2017), https://perma.cc/W4P7-6253. So even though "platforms like Facebook, YouTube, and Twitter likely are not the root causes of political polarization, … they do exacerbate it." Barrett, *How tech platforms fuel U.S. political polarization,* Brookings Institute.

New York recently passed a law aimed to counteract some of the polarizing effects of social-media platforms. Its soon-to-be-effective law requires that social-media companies have a "clear and concise policy" addressing how they will "respond and address" reports of "hateful conduct" on their platforms. N.Y. Gen. Bus. Law. §394-ccc (eff. Dec. 3, 2022). New York is thus regulating censorship from a different angle; rather than taking steps to *prohibit* censorship, the State is seeking to *encourage* the removal of certain content.

One can debate the merits of these laws. But everyone must agree that more regulation is on the horizon. All told—by one count—there are over 100 pending bills in 34 States addressing various aspects of social-media censorship and related problems. Rebecca Kern, *Push to reign in social media sweeps the states*, *Politico* (July 1, 2022), https://perma.cc/A8N7-DALS.

### B. The States may constitutionally regulate censorship on social-media platforms.

The previous discussion shows that the public wants, and that States are enacting, laws regulating censorship on social-media platforms. Can they? More precisely: To what extent does the First Amendment entitle social-media platforms to censor users' speech? That question divides the circuits. *Compare* Pet.App.1a; *with NetChoice*, 2022 WL 4285917.

The disagreement is perhaps understandable. "It is not at all obvious how" this Court's "existing precedents, which predate the age of the internet, should apply to large social media companies." *NetChoice,*

*LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., dissenting from order vacating stay). In some contexts, this Court's cases interpret the First Amendment to prohibit requiring private entities to host speech with which they disagree. *See, e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). At the same time, existing precedent supports the argument that compelled hosting for social-media companies "would be constitutionally permissible" in at least some circumstances. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 414 (2021). In the social-media context, as in others, citizens have an important "interest in the functioning of the community in such manner that the channels of communication remain free." *Marsh v. Alabama*, 326 U.S. 501, 508 (1946).

Sooner or later, the Court will "have no choice but to address how [its] legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms." *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring). And sooner would be better than later, given the danger that censorship poses and the attendant demand for legislation in this field.

**1.** "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *N. Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). For that reason, when deciding constitutional cases, this Court does "not mechanically apply the rule used in the predigital era" to technology of today. *Riley v. California*, 573 U.S. 373,

406–07 (2014) (Alito, J., concurring); *see, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018); *Packingham*, 137 S. Ct. at 1736; *Riley*, 573 U.S. at 385; *Missouri v. McNeely*, 569 U.S. 141, 154 & n.4 (2013); *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001); *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring). With respect to the First Amendment in particular, the Court has long recognized that each communication "method tends to present its own peculiar problems." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). For example, when the Court first confronted some of the "unique characteristic[s]" of radio, it concluded that government could restrict "specified network practices" without abridging freedom of speech. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943). Years later, and confronting another new communication technology, the Court approved government regulations that prohibited cable companies from silencing "the voice" of some "speakers with a mere flick of the switch." *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 656 (1994); *see Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997).

As Florida's petition makes clear, there are "important technological difference[s] between" the internet and the mediums of expression that preceded it. *Turner I*, 512 U.S. at 656. Of particular relevance here, social-media companies do not operate like television stations, newspapers, or other businesses that sometimes host third-party speech. For one thing, each platform "has an effective monopoly over its particular niche of online discourse." *NetChoice*, slip op. at 57. "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." *Id.* (quoting *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring)). The unique barriers to entry reduce the risk of meaningful competition, which gives the companies greater ability to control the public discourse on the important matters people use social media to discuss—"civic life, art, culture, religion, science, politics, school, family," "business," and more. *Id.* at 55–56. Just as a "cable operator exercises far greater control over access" compared to a newspaper editor, *Turner I*, 512 U.S. at 656, a social-media company has far more control to promote or suppress speech than a cable operator, *cf. Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring).

What is more, these companies generally do not carefully select or curate the third-party speech they host. For the most part, they "hold themselves out to serve the public." *NetChoice*, slip op. at 54. "They permit any adult to make an account and transmit expression after agreeing to the same boilerplate terms of service." *Id.* While companies *do* block speakers or suppress speech relating to certain ideas, *see above* 4–10, only a tiny fraction of posted "content is meaningfully reviewed or edited." *Net Choice*, slip op. at 31. Further, at all times, the companies maintain that they are *not* editors, and that they are hosting third-party speech—not engaging in speech of their own. *Id.* at 29, 40–44. As a result, no reasonable observer would "construe the act of hosting speech" on a social-media platform "as an expression of support for its message." *Id.* at 30.

**2.** The foregoing shows that social-media companies pose distinctive problems. Does the First

Amendment forbid the States from meaningfully addressing those problems? The Eleventh Circuit apparently thinks so; its decision, which adopts the arguments pressed by social-media companies, leaves the States without practical options for prohibiting censorship. But the Eleventh Circuit erred. While the compelled-speech doctrine prohibits the Government from forcing individuals to speak, laws prohibiting censorship on social-media platforms do not necessarily compel speech. *Contra* Pet.App.25a–30a, 34a–40a. What is more, and contrary to the Eleventh Circuit, *see* Pet.App.41a–46a, many social-media platforms can be regulated as common carriers. And the rules governing common carriers give the States significant leeway to regulate censorship.

***Compelled speech.*** The First Amendment prohibits the government from forcing "individuals to endorse ideas they find objectionable." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). This follows from the Amendment's guaranteeing the "'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796–97 (1988).

Applying this doctrine, the Court has held that the First Amendment sometimes, but not always, prohibits the government from requiring a private actor to host a third party's speech. Of most relevance here, the doctrine prohibits laws that "compel[] the host to speak." *NetChoice*, slip op. at 27.

Determining whether a mandatory-hosting law requires a host to speak depends heavily on context. For example, newspapers exercise close "editorial

control and judgment" when deciding what to publish. *Id.* at 22 (quoting *Miami Herald*, 418 U.S. at 258). And because "a newspaper prints a curated set of material selected by its editors," everything that appears in the paper is, "in a sense, the newspaper's own speech." *Id.* For that reason, the First Amendment forbids laws requiring newspapers to print columns—such laws unconstitutionally compel speech. *See Miami Herald*, 418 U.S. at 258; *see also Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 14–15 (1986) (plurality). Similarly, when a parade organizer selects participants so as to communicate a particular message, a law *mandating* a participant's inclusion may violate the First Amendment by compelling the parade organizer to express a view. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995).

But requiring a private actor to host speech does not *always* require that actor to speak. That is why this Court upheld a law entitling private "individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public [was] invited." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76 (1980). The Court determined that, because private shopping centers are opened to the public, the "views expressed by members of the public in passing out pamphlets or seeking signatures for a petition" would "not likely be identified with those of the owner." *Id.* at 87. As such, the law, though it required the *hosting* of speech, did not violate the First Amendment's prohibition on *compelling* speech. *Id.*; *accord Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64–65 (2006).

The question of how this doctrine applies to social-media platforms divides the circuits. *Compare* Pet.App.37a–40a *with NetChoice*, slip op. at 27–34. The right answer turns on the nature of social-media companies. Are social-media platforms, like the shopping mall in *Pruneyard*, mere fora whose owners are not made to speak themselves when their platforms host the speech of others? Or are they, like newspaper in *Miami Herald*, made to speak when they host such speech?

They are more like mere hosts. One way to approach that question is to ask whether social-media platforms are even speaking at all. They are not. They all but *concede* they are not by embracing the protections included in §230 of the 1996 Telecommunications Act. That provision exempts social-media platforms from liability relating to most content that they host; it says that "[n]o provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). Platforms retain this immunity even if they "voluntarily" and "in good faith" act "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.* at §230(c)(2)(A). Section 230 thus reflects Congress's judgment that online platforms are "*not* … the publisher or speaker of the user-submitted content they host," and that this remains true *even if* the platforms censor objectionable content. *Net Choice*, slip op. 40 (internal quotation marks omitted). And when social-media companies embrace §230's protections—and most, perhaps all,

do—they disclaim any suggestion that the speech they host is their own.

That reflects on-the-ground realities. Again, major social-media companies "hold themselves out to serve the public." *NetChoice*, slip op. at 54. Unlike a newspaper or parade organizer, the forum they provide is generally open to all adults. Unlike a newspaper or parade organizer, social-media companies make no effort to review the vast majority of the material they host. *Id.* at 31. Thus, unlike a newspaper or parade organizer, they do not curate material to make (or preserve) an expressive viewpoint. *Id.* Indeed, the outlets *deny* that they exercise this sort of editorial discretion. *Id.* at 30–31. All told, the companies that run major social-media platforms are mere hosts. What was true of the mall owner in *PruneYard* is true here, too: the "views expressed by members of the public" on social-media platforms would "not likely be identified with those of the owner." 447 U.S. at 87. The companies that host these platforms are thus hosts, not speakers. So they are not made to speak when they are barred from engaging in censorship.

***Common carriers.*** "Where … private parties control the avenues for speech, our law has typically addressed concerns about stifled speech through other legal doctrines, which may have a secondary effect on the application of the First Amendment." *Knight*, 141 S. Ct. at 1222 (Thomas, J, concurring). One of those doctrines relates to common carriers. *See id.*

For centuries, Anglo-American law has imposed on certain businesses "a general requirement to serve all comers." *Id.*; *see also* 3 William Blackstone, *Commentaries on the Laws of England*, 164 (5th ed.

1773) (discussing inn-keepers and "other victuallers"); Telegraph Lines Act, 25 Stat. 382, 383 (1888). These rules grow from the "notion that persons engaged in 'common callings' have a 'duty to serve.'" *Net Choice*, slip op. at 45 (op. of Oldham, J.). The common-carrier doctrine thus applies to "private enterprises" that "provid[e] essential public services" and that "hold themselves out to serve the public without individualized bargaining." *Id.* at 45, 53. These entities must provide these services "without discrimination" and at a "reasonable rate." *Id.* at 45.

Courts have long imposed common-carrier requirements on companies providing important modes of transportations—classic examples include ferries and railroads. *Id.* at 46; *Messenger v. Pennsylvania R. Co.*, 37 N.J.L. 531, 533–35 (1874) (railroads). They have also imposed these obligations on the "communications industry." *Net Choice*, slip op. 47. For example, when "legislators grew 'concerned about the possibility that the private entities that controlled'" the telegraph might "'manipulate the flow of information to the public,'" they enacted laws forbidding discrimination in the transmission of messages. *Id.* at 47 (quoting Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2321 (2021)) (brackets omitted); *see, e.g.*, Telegraph Lines Act §2. Later, courts extended the doctrine to telephone companies. *See, e.g.*, *State ex rel. Webster v. Nebraska Telephone Co.*, 17 Neb. 126 (1885). Similar obligations extend to "cable TV, satellite TV, broadcast, and internet service providers." Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 Minn. J.L. Sci. & Tech. 631, 649 (2017).

The common-carrier doctrine bears on the scope of businesses' First Amendment rights. For example, in the 1980s, the Court contrasted broadcasters with "common carriers" when holding broadcasters had "the widest journalistic freedom." *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (citation omitted). And the "long history" of "restricting the exclusion right of common carriers … may save" laws regulating these entities' speech-related conduct "from triggering heightened scrutiny" under the First Amendment. *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). That makes sense. Imagine what it would mean if the States *lacked* power to prohibit censorship by common carriers. Phone companies, internet providers, and parcel-delivery services could claim a First Amendment right not to serve anyone who supports a disfavored cause. *NetChoice*, slip op. at 2. There is no evidence that the "freedom of speech" was originally understood to vest such immense power in common carriers.

These principles inform the question presented. *Net Choice*, slip op. at 45 (op. of Oldham, J.). Social-media platforms are as essential to communication today as telephones were a few decades back. The "private enterprises" that run these platforms thus "provid[e] essential public services." *Id.* And, as already noted, they "hold themselves out to serve the public without individualized bargaining." *Id.* at 44, 53. Accordingly, they are common carriers. *Id.* at 53–55. It follows that States may pass laws forbidding these entities from engaging in "discrimination." *Id.* That includes censorship based on political viewpoint. While States must abide by the First Amendment themselves, the First Amendment leaves them

leeway to regulate censorship by social-media companies.

"Ownership does not always mean absolute dominion." *Marsh*, 326 U.S. at 506. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* So it is with companies that operate a physical public square. So it is with common carriers. And so it is with social-media platforms that qualify as common carriers.

* * *

Reasonable minds may disagree about the application of these doctrines. Indeed, reasonable minds have disagreed. Both the Fifth Circuit in *NetChoice* and the Eleventh Circuit below issued scholarly, well-reasoned decisions concerning the application of the compelled-speech and common-carrier doctrines in this context. And they reached inconsistent results. When an issue of such importance divides thoughtful jurists, it deserves this Court's attention.

## CONCLUSION

This Court should grant certiorari and reverse.

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