Nos. 22-277 & 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL
OF FLORIDA, ET AL., *Petitioners*,
v.
NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Respondents,

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Petitioners,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent,

On Writs of Certiorari to the United States Court of Appeals for the Eleventh and Fifth Circuits

BRIEF OF AMICUS POPULI AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NO. 22-277 AND RESPONDENT IN NO. 22-555

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STATEMENT OF INTEREST[*]

Amicus Populi is a coalition of former prosecutors who advocate for laws promoting public safety and effective crime prevention. The most vulnerable members of society deserve a voice in shaping the law on this subject, so criminal justice policies should be the product of democratic decisionmaking, as both Justice Scalia observed in his concurrence in *Glossip v. Gross*, 576 U.S. 863, 899 (2015), and Justice Kagan recognized in *Kahler v. Kansas*, 140 S.Ct. 1021, 1037 (2020). The quality of that decisionmaking depends on robust debate in the most useful forum: the online marketplace of ideas. Censoring information distorts the debate that is essential for self-government. Amicus Populi therefore seeks to keep the internet safe for democracy.

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[*] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Throughout the fall, many people added speech by putting up posters of hostages kidnapped by Hamas, and others subtracted speech by tearing them down. Do these respective acts of adding and subtracting speech warrant equal First Amendment protection? The Eleventh Circuit held they do: "[R]emoving . . . posts constitute[s] 'speech' within the meaning of the First Amendment." *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1223 (11th Cir. 2022) (*NetChoice I*). The Fifth Circuit held they do not: "We reject the Platforms' attempt to extract a freewheeling censorship right from the Constitution's free speech guarantee . . . .Their censorship is not speech." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022) (*NetChoice II*). At a time when two-thirds of college students find it acceptable to shout down speakers to prevent them from speaking,[1] and many contend such shoutdowns are themselves a form of "exercising our 1st Amendment rights,"[2] this Court must side with the Fifth Circuit.

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[1] College Pulse, 2021 Free Speech Rankings, https://reports.collegepulse.com/college-free-speech-rankings-2021

[2] Greta Reich, Judge Kyle Duncan's visit to Stanford and the aftermath, explained, The Stanford Daily, (Apr. 5, 2023), https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained/

Free speech is both an end and a means (to the discovery and spread of political truth). *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023), citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). The *end* is individuals' self-determination as to which ideas and beliefs deserve expression, consideration, and adherence (*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994), and silence can ensure this autonomy as well as speech. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Free speech's *means* are the robust exchanges of ideas needed for self-government. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Unlike the autonomy function, the civic self-government function is not neutral between silence and speech: the civic response to falsehood "is more speech, not enforced silence." *Whitney*, 274 U.S. at 377 (Brandeis, J. concurring); see also *United States v. Alvarez*, 567 U.S. 709, 726 (2012): "[T]he dynamics of free speech, counterspeech, of refutation, can overcome the lie."

Democratic self-government depends on expressing ideas, not suppressing them: "[T]he best means to [good decisionmaking] is to open the channels of communication rather than to close them." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578 (2011). This civic preference for speech over silence explains why the government generally may participate in public debate by speaking but not by silencing other speakers. That same contrast governs nongovernmental actors: "Freedom to publish is guaranteed by the Constitution, but freedom to . . . keep others from publishing is not." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The freedom to speak/publish deserves more protection than the freedom to keep others from speaking/publishing; subtracting speech imperils democratic decisionmaking far more than adding it. Though wealthy corporations may spend disproportionate sums on public advertising to influence policy and elections, voters remain the critical decisionmakers; speech is effective "only to the extent that it brings to the people's attention ideas which . . . strike them as true." *Austin v. Michigan Chamber of Com.*, 494 U.S. 652, 684 (1990) (Scalia, J. dissenting), overruled in *Citizens United v. FEC*, 558 U.S. 310 (2010). But when a handful of tech oligarchs conspire to suppress speech, they shut the public out of the debate altogether and distort the search for truth.

The decision in *Marsh v. Alabama*, 326 U.S. 501, 506-508 (1946), provides two enduring lessons. First, adding speech is more valuable than subtracting it in enabling self-government: As citizens "must make decisions which affect the welfare of community and nation . . . . they must be informed." Second, property ownership does not create an "absolute dominion" to enable suppression, as the Court rejected the notion that owning a highway created a license "to obstruct through traffic or to discriminate against interstate commerce." A fortiori, ownership of today's "information superhighway" infrastructure does not confer a license to obstruct the traffic of ideas. See *Turner*, 512 at 657 [the government may "ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."]

Marsh reflected the principles embodied in Norman Rockwell's iconic *Freedom of Speech*, which depicts a Vermont town hall meeting. As a blue-collared man in a leather jacket speaks, two white-collared men in ties turn their heads to pay attention. The picture conveys more than a thousand words about the importance of including all speakers, regardless of wealth, in democratic decisionmaking. This imperative endures, whether the speech occurs on a 1940's sidewalk, in a 1970's shopping mall, or in today's digital public square. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); *PruneYard Shopping Ctr. v. Robins* 447 U.S. 74 (1980).

Vindicating Judge Learned Hand's observation that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection" (*United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943)), the suppression of heterodox voices during the pandemic generated policies that were, in retrospect, objectively erroneous. And the costs of these policies landed disproportionately on those who could least bear them: while 68 percent of workers with a graduate degree could work from home and thus lost their commute, only 17 percent of those who never attended college could work from home, and they lost their jobs.[3]

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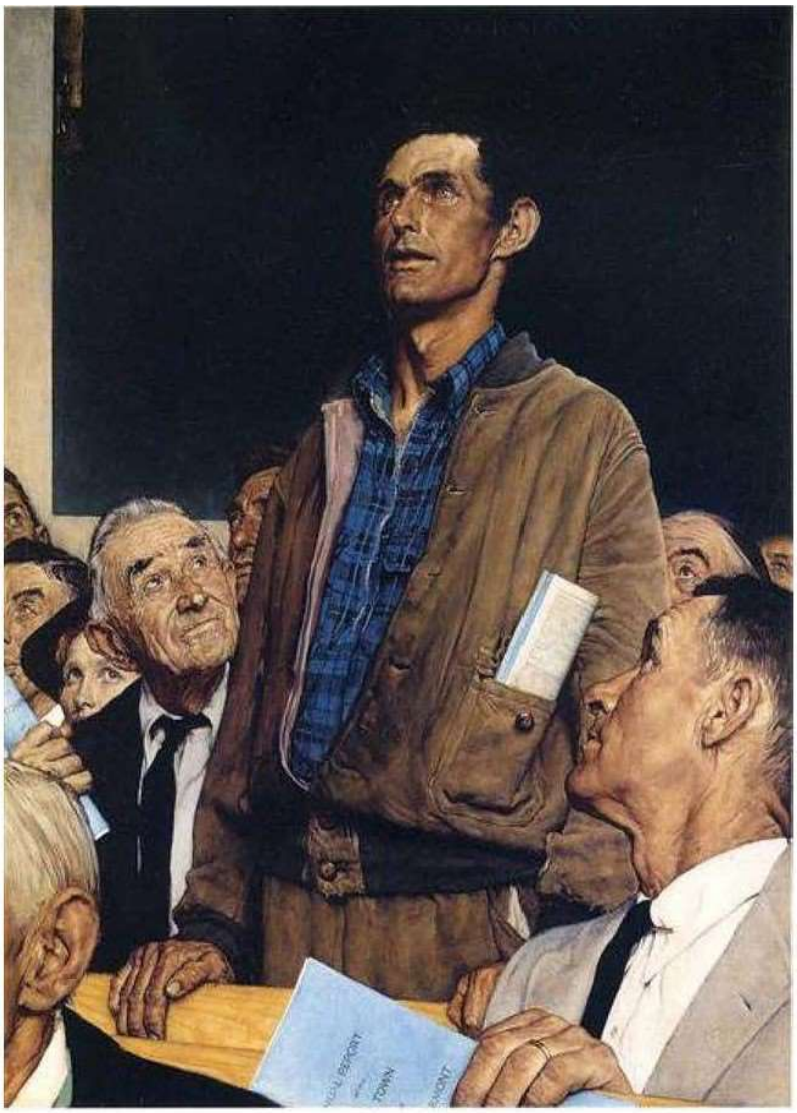
[3] Pew Research Center, *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, 8 (Dec. 9. 2020) (Pew Research).
https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/



Freedom of Speech, 1943

The challenged statutes not only further the discovery of right conclusions and optimal public policy but conform to the original premises underlying the First Amendment's Freedom of the Press Clause. As if anticipating the contemporary power of individuals like Mark Zuckerberg and Jack Dorsey, William Blackstone observed the danger of subjecting a right to publish to the "prejudices of one man," which would render him the "arbitrary and infallible judge of all controverted points in learning, religion, and government." 4 William Blackstone, Commentaries 152. Benjamin Franklin recognized private bottlenecks could achieve comparable effect, branding "unreasonable" the contention that

> Printers ought not to print any Thing but what they approve; since if all of that Business should make such a Resolution, and abide by it, and End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinions of Printers.

Benjamin Franklin, Apology for Printers, Pa. Gazette, June 10, 1731, reprinted in 1 The Papers of Benjamin Franklin 194-99 (Leonard W. Labaree ed., 1959) (Franklin).

For this reason, *Marsh* recognized the public has "an identical interest" in ensuring the "channels of communication remain free," regardless of whether the public square is owned by the government or a corporation. *Id.* at 507. And the interest is identical regardless of whether the square is physical or virtual. *Packingham*, 582 U.S. 98, 107.

While compelled speech can so infringe personal autonomy as to violate the First Amendment, this is not such a case. The Platforms' authorities are inapposite.

Janus v. AFSCME, 138 S.Ct. 2448 (2018), is inapt because the Illinois law there forced workers to violate their conscience by sponsoring *particular speech* they opposed. Because the instant statutes prescribe viewpoint-neutral access to all speakers, the more apposite precedent is *Board of Regents of Univ. of Wisconsin Sys. v. Southworth,* 529 U.S. 217 (2000). *Southworth* unanimously held the civic imperative of fostering debate justified the compulsion, and there was no infringement of conscience because viewpoint-neutrality ensured the students were essentially sponsoring a forum for exchanging ideas generally, not any in particular. Likewise, *Marsh* and *PruneYard*, which protected viewpoint-neutral access to a publicly accessible forum, resemble this case far more than *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), *and PG & E v. Public Util. Comm'n*, 475 U.S. 1 (1986), where laws compelled parties to print and distribute a single view—because it contradicted the parties' own.

A fortiori, the Platforms' citation to cases like *Nat'l Inst. of Fam. and Life Advocates v. Beccera*, 138 S.Ct. 2361 (2018) (*NIFLA*), and *Wooley v. Maynard*, 430 U.S. 705 (1977), must also fail. Whereas the *Janus* law compelled *subsidizing* disfavored messages, the *Wooley* and *NIFLA* laws compelled the *direct expression* of messages violating the speaker's conscience: the California law in *NIFLA* forced pro-life clinics to post on their walls speech promoting and facilitating

abortion. But the instant statutes simply let Facebook users post *what they want* on their own wall. *NIFLA* would resemble this case if the clinic's landlord contended its ownership of the interior wall gave it "absolute dominion" and entitled it to enter and remove the clinic's posted speech as it wished.

To the contrary, *Shurtleff v. City of Boston*, 596 U.S. 243, 248, 256 (2022), concluded that because Boston "opened the flagpole for citizens to express their own views" and did "not at all" shape these messages, the flags reflected the users' own speech, even though the City owned the physical infrastructure on which it was expressed. Accordingly, the Platforms may own the websites but the speech posted there is the users' own.

That was the Platforms' position—until now. Though the Platforms now compare themselves to the New York Times or Wall Street Journal, they formerly insisted otherwise: "Section 230 forbids . . . treat[ing] Google as the 'publisher or speaker' of content posted by others." Ans. Br. of Appellee 11, *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), rev'd on other grounds by *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (per curiam) (Apr. 5, 2019) Dkt. 27. The Platforms had a reason to assert this, lest they bear responsibility for posts by ISIS fomenting terrorism. And there was a reason for the Court to find Platforms are not the speakers of content they host, as more than 99 percent of the content on a site never gets reviewed and is "invisible to the provider." *NetChoice II*, 49 F.4th at 459. Because the Platforms do not provide "much (if any) advance screening," and "once the "algorithms were up and running, defendants at most

allegedly stood back and watched," this Court accepted that the Platforms do not "speak" the unreviewed, invisible content they passively host. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023). The terrorism-planning speech was ISIS', not Google's.

The invisibility of the speech to the Platform renders the host less like the New York Times and more like T-Mobile, and the law does not impose liability on cell service providers when their users commit crimes in phone conversations. *Twitter*, 598 U.S. at 499; *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003). But if, as the Platforms now contend, that when they host speech on their site they "convey a message about the type of speech the websites find acceptable and the communities they hope to foster" (Pet'r NetChoice Br. 36), what message do they convey when they host ISIS videos?

ARGUMENT

I. Expressing ideas deserves more protection than suppressing them.

The First Amendment " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *New York Times v. Sullivan*, 376 U.S. 254, 269 (1963). But the interchange has become increasingly fettered, by both the Platforms' frequent "flick[s] of the switch" (*Turner*, 512 U.S. at 656), and the veto exercised by aggressive hecklers. The proportion of college students who believe it is "always or sometimes acceptable" to shout down speakers to prevent them from expressing their views has risen from 37 percent in 2017, to 51 percent in 2018, to 66 percent in 2021.[4] Because our constitutional tradition favors more speech over enforced silence, this Court should confirm the constitutionality of Ch. 2021-32, Laws of Fla. (S.B. 7072) and 2021 Tex. Gen. Laws 3904 (HB20).

A. Opening channels of communication serves the public interest more than closing them.

Speech regarding public affairs is more than self-expression, it is the "essence of self-government." *Garrison*, 379 U.S. 64, 74-75. John Milton explained the civic justification for speech: "Let [Truth] and Falsehood grapple; whoever knew Truth put to the

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[4]College Pulse; Daniel Burnett, Survey: Speaker shutdown gets double-digit boost in one year, (FIRE May 20, 2019), https://www.thefire.org/survey-speaker-shoutdown-support-gets-double-digit-boost-in-one-year/

worse in a free and open encounter?" John Milton, Areopagitica 78, 126 (J. C. Suffolk ed. 1968). And the more grappling, the better: "The premise of our system is that there is *no such thing as too much speech*—that the people are not foolish but intelligent, and will separate the wheat from the chaff. *Austin*, 494 U.S. 652, 695 (Scalia, J. dissenting) (emphasis added); see also Lyrissa Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. Ill. L. Rev. 799, 810-11 (2010) [First Amendment rests on premise that audiences can rationally evaluate speech's merits and [therefore] "more speech is better than less."].

Speech thus provides the public with the opportunity to distinguish Truth from Falsehood, or the "wheat" from the "chaff," as silence cannot. The marketplace of ideas thus benefits from more vendors rather than fewer. The Eleventh Circuit cited *Sorrell*, 564 U.S. at 552, and *Buckley v. Valeo*, 424 U.S. 1 (1976), to reject Florida's supposed attempt to "restrict[] the speech of some . . . to enhance the relative voice of others." *NetChoice I*, 34 F.4th at 1228. But these cases involved unconstitutional regulations that *subtracted* speech from public consideration, and their reasoning supports the instant measures, which promote its addition. *Buckley* observed the First Amendment was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " (*Buckley*, at 49, citing *Sullivan*, 376 U.S. 254, 266, citing *Associated Press*, 326 U.S. 1, 20), so the Court invalidated a regulation that restricted candidates' speech and subtracted the amount and range of information available to voters.

Sorrell similarly involved (content-based) restrictions on the disclosure of information, which had the effect of preventing communication. *Sorrell*, at 563-64. *Sorrell* expressly favored adding speech over subtracting it: "[T]he best means to [good decisionmaking] is to open the channels of communication rather than to close them." *Sorrell,* at 578.

Even *Miami Herald*, 418 U.S. 241, and *PG & E*, 475 U.S. 1, confirmed a structural preference for more speech over less. The right-of-reply provision in *Miami Herald* would not generate more speech; due to the finite space of (and expense of printing) a newspaper, the candidate's reply would simply replace the speech the paper wished to make (concerns that are absent here). "[I]f a newspaper is forced to publish a particular item, it must as a practical matter, omit something else." *Miami Herald* at 257 n.22. The same was true in *PG & E*: "By appropriating . . . the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant's use of its own forum." *PG & E*, 475 U.S. 1, 24 (Marshall, J. concurring). The subtracted speech would offset the added speech.

The provisions would actually result in less net speech. Like *Buckley* and *Sorell*, *Miami Herald* and *PG & E* involved provisions that singled out particular speakers/speech for special treatment, and threatened to "reduc[e] the free flow of information." *PG & E*, 475 U.S. at 14, citing *Miami Herald*, 418 U.S. at 257. Unlike S.B. 7072 and HB20, the regulations at issue in *Miami Herald and PG & E* did not enable open, viewpoint-neutral access to all comers; they singled out

one particular speaker—*due to that speaker's viewpoint* (opposing the host newspaper/utility)—for exclusive access. It was such favoritism (absent here) that served to "tilt public debate in a preferred direction." *NetChoice I*, 34 F.4th at 1228, quoting *Sorrell*, 568 U.S. at 578-79.[5]

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[5]The Platforms deem the connection between the viewpoint discrimination in *PG & E* and the reduction of speech there to be a "post-hoc gerrymander." (Pet'r NetChoice Br. 28.) But the Court's own words made that connection: "[*B*]*ecause access is awarded only to those who disagree with appellant's views* and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views. Appellant 'might well conclude' that, under these circumstances, 'the safe course is to avoid controversy,' thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *PG & E*, 475 U.S. at 15 (emphasis added), citing *Miami Herald*, 418 U.S. at 257.

NetChoice may advocate for *extending* that reasoning to cases involving open, nondiscriminatory access. However, *PruneYard*, 447 U.S. 74, 88, and *Turner*, 512 U.S. 622, 655, signaled a disinclination to do so. *PruneYard* cited factors that distinguish the instant, viewpoint-neutral regulations from the law struck down in *Miami Herald*: the mall was "open to the public," the speech was unlikely to be attributed to the host, and there was no danger of dampening the vigor and limiting the variety of public debate.

The Court again distinguished *Miami Herald* in *Turner*. The first distinction noted was that "unlike the access rules struck down in [*Miami Herald* and *PG & E*], *the must-carry rules are content neutral* in application. They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty." *Turner*, 512 U.S. at 655 (emphasis added). With reasoning applicable here, *Turner* further observed that cable's long history of serving as a conduit for signals precluded a risk that viewers would attribute the messages to the cable

The Fifth Circuit correctly affirmed a preference for addition over subtraction. "[T]he 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*." *NetChoice II*, 49 F.4th 439, 455.

B. Ownership of physical infrastructure does not grant "absolute dominion" to suppress speech.

Democratic self-government so requires a robust exchange of ideas that this Court has upheld speech even on property whose owners oppose hosting it. First Amendment rights are too fundamental to depend on who owns the public square. *Marsh*, 326 U.S. 501. *Marsh* left no doubt that speaking fulfills a civic function that removing speech does not. *Id.* at 508. A property owner's unwillingness to host speech again yielded to speech in *PruneYard*, 447 U.S. 74. Because publicly accessible shopping centers can provide "an essential and invaluable forum" for exchanging ideas, the California Supreme Court held "the public interest in peaceful speech outweighs the desire of property owners" to prevent the speech. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

The Eleventh Circuit declined to follow these precedents protecting speech on another's property

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operator. *Id.* Finally, whereas newspapers cannot obstruct readers' access to competing publications, cable systems (like internet Platforms) can "restrict the circumstances under which it allows others also to use its system." *Id.* at 656, n.8, internal citation omitted.

because website users have no "vested right" to their social-media account. *NetChoice I*, 34 F.4th at 1228. Needless, to say, Grace Marsh had no "vested right" to the property of the company-owned town, and Michael Robins had no "vested right" to the table in the mall's courtyard. Access to speak in a forum, however, does not turn exclusively on ownership: "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." *Marsh*, 326 U.S. 501, 506.

First Amendment rights therefore do not depend on property ownership, whether private or public. *Marsh*, 326 U.S. at 509.

> Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

Id. at 507.

A contrary conclusion would return our democracy to the time when property ownership was a qualification for participation in democratic self-government.

C. Suppressing heterodox voices produced profound costs during the pandemic, which disproportionately harmed the poor and vulnerable.

It is especially necessary to review (and reject) a nascent constitutional right to censor because corporations (and government officials) are so eager to exercise it—with potentially calamitous consequences for public policy. In the early days of the pandemic, YouTube adopted a policy of forbidding any speech contradicting the World Health Organization, even though the WHO itself had erroneously informed the public into early 2020 that there was no clear evidence of human-to-human transmission of coronavirus.[6] Similarly, when leading scientists from Stanford, Harvard, and Oxford promoted the Great Barrington Declaration, favoring narrower restrictions, Facebook censored mention of the document, at the urging of governmental officials. *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023). As Justice Brandeis would have predicted, censorship of speech questioning the prevailing COVID orthodoxy led to policies that

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[6] Sanchez, *YouTube to Ban Content That Contradicts WHO on COVID-19, Despite the UN Agency's Catastrophic Track Record of Misinformation (Foundation for Economic Education*, Apr. 23, 2020),
https://fee.org/articles/youtube-to-ban-content-that-contradicts-who-on-covid-19-despite-the-un-agency-s-catastrophic-track-record-of-misinformation/

produced far more harm than otherwise would have occurred.[7]

Former National Institutes of Health director Francis Collins recently admitted the Institute's errors in prescribing severe lockdowns.[8] He deemed a "mistake" the decision to attach "infinite value" to reducing transmission and "zero value to whether this actually totally disrupts people's lives, ruins the economy, and has many kids kept out of school in a way that they never quite recovered."[9] Proving Learned Hand's observations about the value of a "multitude of tongues" as compared to "authoritative selection" (*United States v. Associated Press*, 52 F.Supp. 362, 372), Collins's 2023 epiphany had been reached by others in early 2020.[10] A broader, uncensored exchange

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[7] See e.g. Yanovskiy & Socol, *Are Lockdowns Effective in Managing Pandemics*?, 2022 Jul 29;19(15):9295. doi: 10.3390/ijerph19159295. PMID: 35954650; PMCID: PMC9368251; Knapton, "*Wildly incorrect' Covid modelling bounced Boris Johnson into second lockdown, MPs told*, (The Telegraph, Jan. 18, 2022), https://www.telegraph.co.uk/politics/2022/01/18/wildly-incorrect-covid-modelling-caused-boris-johnson-bounce/

[8] The Editorial Board, *Francis Collins Has Regrets, but Too Few: The former NIH chief and promoter of Covid lockdowns now says his view was too 'narrow*.', (Wall St. J, Dec. 29, 2023) https://www.wsj.com/articles/francis-collins-covid-lockdowns-braver-angels-anthony-fauci-great-barrington-declaration-f08a4fcf?page=1

[9] *Id.*

[10] See J.D. Tuccille, *We Need Economists, Civil Libertarians, and Epidemiologists in the COVID-19 Discussion*: *The tradeoffs among*

of views that included educators and economists would have produced a more optimal policy.

And the costs of policy mistakes were imposed on the most vulnerable in our society. Families with spacious backyards and pools hardly noticed shuttered playgrounds and beaches, but families in cramped apartments suffered physical and psychological harm. Public school closures did not affect families whose private schools remained open. And almost 70 percent of the workforce with a postgraduate degree could work from home, so they avoided a commute, but only 17 percent of those who never went to college could, so they lost their jobs.[11]

Adding speech serves the public interest more than subtracting it. S.B. 7072 and HB20 facilitate the search for truth and optimize public policy.

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considerations of health, prosperity, and liberty are catching up with us even if we don't want to acknowledge them, Reason (May 8, 2020) https://reason.com/2020/05/08/we-need-epidemiologists-economists-and-civil-libertarians-in-the-covid-19-discussion/: "[T]he danger of a new, deadly, and highly contagious virus [must be] balanced with the risk of poverty and despair from shutting down societies in order to battle that virus, and considering the peril inherent in turning the world into a vast prison in order to enforce a shutdown."

[11] Pew Research 8.

II. The Freedom of the Press Clause was designed to prevent information bottlenecks.

The concern in *Turner*, 512 U.S. 622, 656-57, over "bottleneck" control over a "central avenue of communication" is not new: This Court has long construed freedom of the press to protect adding speech, not subtracting it: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press*, 326 U.S. 1, 20.

This concern underlay the original conception of the Free Press Clause, which addressed concentrations of power that stifled the free flow of information. Ariana S. Wilner, *The Constitutionality of Platform Content Moderation Bans from a Historical Perspective*, 17 N.Y.U. J. of L & L 83, 97 (2023): "The Free Press Clause was understood to protect the people's right to express their views through the press, not to protect large companies when they limit the people's right to express their views through the press." An originalist analysis supports legislation like S.B. 7072 and HB20.

William Blackstone described the danger posed to free speech when a single individual could determine the permissible range of discourse. "To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." 4 William Blackstone, Commentaries at 152. And to paraphrase *Marsh*, the public's interest in ensuring "the channels of communication remain free" from the prejudices of one man does not turn on

whether he is a governmental or corporate official. *Marsh*, 326 U.S. 501, 507.

Benjamin Franklin recognized the bottleneck effect could harm the public even if it was the product of private parties. He deemed

> unreasonable what some assert, That Printers ought not to print any Thing but what they approve; since if all of that Business should make such a Resolution, and abide by it, an End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinions of Printers.

Franklin 195.

This would harm not only the writers denied publication but the public as a whole, which would lose the opportunity to consider their ideas. Franklin struck a Miltonian tone in advocating a marketplace of ideas to discover truth.

> Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play, the former is always an overmatch for the latter: Hence, they chearfully serve all contending writers that pay them well, without regard on which side they are of the Question in Dispute.

Id.

Though Franklin did not used the term "common carrier status," he expressed sympathy with the concept. He envied other tradesmen who could happily serve any customer without giving offense to others.

> [T]he Smith, the Shoemaker, the Carpenter, or the Man of any other Trade, may work indifferently for People of all Persuasions, without offending any of them: and the Merchant may buy and sell with Jews, Turks, Hereticks, and Infidels of all sorts, and get Money by every one of them, without giving Offense to the most orthodox, of any sort; or suffering the least Censure or Ill-will on the Account from any Man whatever.

Franklin at 194.

This contrasted with the "peculiar Unhappiness" of printing, as printers are "scarce able to do anything . . . which shall not probably give Offense to some, and perhaps to many." *Id.* Franklin denied that printers were advocates for the content they published, and characterized them more as conduits: "[I]t is unreasonable to imagine Printers approve of every thing they print, and to censure them on any particular thing accordingly; since in the way of their Business they print such great variety of things opposite and contradictory." *Id.* at 195.

Printers like Franklin and Peter Timothy were often careful about what they published; they had little desire to suppress material but preferred to avoid liability for libel. Franklin at 196; Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early

American Journalism 126 (1988) (Smith). They achieved the best of both worlds by enabling the distribution of potentially libelous content while taking care to prevent its attribution to themselves. Timothy "distance[d]" himself from controversial content by presenting it as an advertisement, while Franklin published "Libelling and Personal Abuse" only "separately," not in his own newspaper. Smith at 126; Franklin at 196 n.2. Today, 47 U.S.C. § 230 serves the same function as these "advertisements" and "separate" publications, shielding websites from liability for another party's content.

The Platforms make much of the observation that Franklin's newspaper was not a "stagecoach," with seats for everyone who would pay. (Pet'r NetChoice Br. 22; Resp't NetChoice Br. 49, citing *Manhattan Cmty Access Corp. v. Halleck*, 139 S.Ct 1921, 1931 (2019). This overlooks the fundamental distinction between Franklin's newspaper and today's Platforms. Franklin published "Libelling and Personal Abuse" separately rather than in his own newspaper because having "contracted with [his] subscribers to furnish them" in the newspaper with desired content, it would breach that contract and harm his reputation to provide them with undesired content. See also Eugene Volokh, *Treating Social Media Platforms Like Common Carriers*, 1 J. Free Speech L. 377, 380 (2021): "People read the *Times* in part precisely because they trust its editorial judgment—they believe its editors will winnow the good and sensible views out of the vast mass of nonsense and folly."

Social media function very differently. Franklin's newspaper was the producer of content and the reader was the consumer, but social media serve to let the user produce the content. And the Platforms do not contract to perform a winnowing function. To the contrary, they inform users that they "try to explicitly views ourselves as not editors. . . . We don't want to have editorial judgment over your feed." *NetChoice II*, 49 F.4th 439, 460, internal citations omitted. They "do not endorse" or "take responsibility for" the content on their sites and "simply 'serve as conduits for other parties' speech.' " *Id.*, internal citations omitted. Accordingly, the stagecoach metaphor fits the Platforms better than it fits newspapers.

The self-publishing function of social media likewise shows why the Platforms cannot successfully rely on *303 Creative*, 600 U.S. 570. The Court held Colorado could not force Lorie Smith to speak by personally creating an original, customized creation. *Id.* at 586-88. See Argument IIIB, *infra*. The case would have been different—and analogous to this case—if Ms. Smith did not compose the content herself but leased to customers an instrument with which they could produce their own content. In the past this would have been a printing press or typewriter, and today it would be desktop publishing software. With such a factual predicate, the Platforms might still argue that, having enabled the customer's self-publication through an instrument she owned, Ms. Smith should have a right to remove from circulation any publication that violated her beliefs, but this Court has never so held.

In sum, Franklin's writings expressed a desire for "fair Play" where "both Sides" could be heard when "Men differ in Opinion"; protection for liability for questionable content; and an opportunity to serve the full spectrum of opinions without their being attributed to the printer. Combined with Section 230, S.B. 7072 and HB20 achieve all these goals.

III. The open, viewpoint-neutral access prescribed by S.B. 7072 and HB20 would not unconstitutionally infringe the Platforms' "intellect and spirit."

Notwithstanding the public benefits of more speech over less, they may not be achieved through compelled speech that infringes the speaker's conscience. As the First Amendment's purpose is to protect the "sphere of intellect and spirit" from "all official control," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), the State may not compel an individual to create speech she does not believe, or to express a message contrary to her deepest convictions. *303 Creative*, 600 U.S. 570, 577; *NIFLA*, 138 S.Ct. 2361, 2379 (Kennedy. J. concurring). Even compelling individuals to "furnish contributions of money" to propagate such ideas, as Thomas Jefferson insisted, is "sinful and tyrannical." *Janus*, 138 S.Ct. 2448, 2464, internal citation omitted). But the open access furthered by the S.B. 7072 and HB20 does not effect such infringement. As this Court found (and the Platforms agree), it is agnostic algorithms that filter content, as the Platforms "st[and] back and watched," *Twitter*, 598 U.S. 471, 499, and the First Amendment

was not adopted to shield the conscience of an algorithm.

A. Because S.B. 7072 and HB20 are viewpoint-neutral, *Southworth* is more apposite than *Janus*.

The Platforms cite *Janus*, where public employees were compelled to contribute to a union and support particular policies it advocated. *Janus*, 138 S.Ct. 2448, 2459-2461. The Court cited Jefferson's dictum in finding a "significant impingement on First Amendment rights," which rendered the compelled support unconstitutional. *Id.* at 2464, 2478. But the result was different where the program did not support only particular ideas but a forum for speech generally. In *Southworth*, 529 U.S. 217, the University of Wisconsin imposed fees on students to support organizations that engaged in political speech. *Id.* at 221. Though the Seventh Circuit had cited Jefferson in finding the program unconstitutional, the Supreme Court upheld the funding plan. See *Southworth v. Grebe*, 151 F.3d 717, 730 (7th Cir. 1998), rev'd in *Southworth*, 529 U.S. 717. This Court found the program could achieve the civic benefits of speech without the costs of infringing conscience by distributing the funds on a viewpoint-neutral basis.

Three months after *Southworth*, the Court clarified that "neutral eligibility criteria" also shapes Establishment Clause analysis. *Mitchell v. Helms*, 530 U.S. 793, 810 (2000). Viewpoint neutrality justified distributing materials to the "religious, irreligious, and areligious" on an equal basis. *Id.* Because funding followed the "principle of neutrality," the relevant

autonomy was that of the parent choosing the school, not the government (*id.* at 810-11), just as the relevant autonomy here is exercised by the parties posting (and consuming) the content, not the website hosting it.

The Platforms dispute S.B. 7072 is viewpoint-neutral and contend it imposes "actual viewpoint discrimination." Resp't NetChoice Br. 32. This supposedly occurs, even though the measure protects access for all speakers without regard for viewpoint, because it was purportedly designed to assist one side in political debate more than another. Resp't NetChoice Br. 35. But the law is judged on its own substance, not how it altered the status quo ante. For example, the State of Ohio created subsidy program to provide educational choices to parents, and extended its benefits to students attending both religious and nonreligious schools. *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002). Because students already could receive funding to attend nonreligious schools, the law had the effect of expanding access to religious education, shifting the law in that direction. The Court nonetheless upheld the law as "neutral in all respects toward religion." *Id.* at 653.

B. The difference between speaking, and owning property where speech occurs, renders *Wooley*, *NIFLA*, and *303 Creative* inapposite.

The Platforms cite cases like *303 Creative*, 600 U.S. 570, *Wooley*, 430 U.S. 705, and *NIFLA*, 138 S.Ct. 2361, in contending S.B. 7072 and HB20 impose a comparable infringement of speaker conscience. These cases are inapposite, due to the fundamental difference

between speaking (posting) and owning property where speech occurs (hosting).

New Hampshire required George Maynard to drive his car bearing a message he abhorred. *Wooley*, 430 U.S. at 707, 713. The Court found the law infringed his conscience by forcing him to publicize the objectionable message. *Id.* at 717. Because an automobile is "readily associated with its operator," the compulsion "invade[d] his sphere of intellect and spirit." *Id.* at 715, citing *Barnette*, 319 U.S at 642. But no such association exists here. *Wooley* would more closely resemble this case's facts if Maynard had leased a car from a dealer for a monthly fee and then placed a sticker on his car's bumper (whether "Black Lives Matter," "Make America Great Again," or "Boston Red Sox: 2018 World Series Champions"), only to have the dealer learn of the sticker and demand Maynard remove it, because Maynard merely leased the car, and the dealer owned it. Just as it is operator of a vehicle, not the titleholder, who is readily associated with the speech on its bumper, it is the user of a social media page who is associated with the speech presented there, not the corporation that owns the site.

NIFLA, 138 S.Ct. 2361, is distinguishable for the same reason. California forced pro-life clinics to post on their walls information that essentially advertised and facilitated abortions. *Id.* at 2368-69. *NIFLA* would more closely resemble this case if the clinic posted messages favoring childbirth over abortion on its wall, only to have the landlord take down the posters on the ground that the clinic merely rented the wall, which the landlord owned. But just as speech on a vehicle is

associated with its operator and not its owner, the speech on an office's interior wall is associated with the occupant, not the building owner. For similar reasons, the speech in *Marsh*, 326 U.S. 501, or *Prune Yard*, 447 U.S. 74, would be associated with the person distributing pamphlets, not the property's titleholder.

C. As in *Shurtleff*, where the flagpoles belonged to Boston but the flags belonged to private speakers, the websites belong to the Platforms but the speech conveyed there belongs to the users.

The analysis of *Shurtleff*, 596 U.S. 243, should govern here. Boston owned a flagpole and allowed private groups to raise flags of their choosing. *Id.* at 247. If Boston reserved the flagpole to communicate governmental messages, it could constitutionally control that messaging by choosing which flags to fly (and which not to fly). *Id.* at 248. But if it "opened the flagpole for citizens to express their own views," they could express their speech without viewpoint discrimination, because it was their own speech, not the City's. *Id.*

The Court held the flags presented by private groups reflected their own speech, not the host's. The most salient factor driving this determination was that Boston did "not at all" control these flag raisings or shape their messages. *Shurtleff*, 598 U.S. at 256. The speech, therefore, belonged to the private speakers, even though they used Boston's property as the vehicle for presenting it to the public.

Likewise, the Platforms do "not at all" control users' posts or shape their messages. The Platforms do not provide "much (if any) advance screening" of posted content, and more than 99 percent of the content on a site never gets reviewed and is "invisible to the provider." *Twitter*, 598 U.S. 471, 499; *NetChoice II*, 49 F.4th at 459. They do not exercise editorial judgment over the content or take responsibility for it, but just stand back and watch, and thus "simply 'serve as conduits for other parties' speech.' " *Twitter*, at 499; *NetChoice II*, at 460.

As Boston owned the flagpole in *Shurtleff*, the Platforms own the websites' infrastructure. But in both cases, the speech is the users'.

D. The Platforms have agreed they are not the speaker or publisher of their users' views, and are now estopped from contending otherwise.

The Platforms now ask to eat their cake and have it too. To enable them to evade liability, they disclaimed any responsibility for posted content: "Section 230 forbids . . . treat[ing] Google as the 'publisher or speaker' of content posted by others." Ans. Br. of Appellee 11, *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), rev'd on other grounds by *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (per curiam) (Apr. 5, 2019) Dkt. 27. Now, to enable them to censor user speech, they demand the same legal treatment enjoyed by publishers like the New York Times or Wall Street Journal. This Court should reject this "switch in time" as a matter of law. *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) [after successfully asserting one position, party may not assert contradictory position to

obtain unfair advantage]. It is risible that the Platforms insist that if this Court does not strike down the challenged statutes, the Platforms will have no choice but to disseminate pro-ISIS videos, when last year they excused themselves for doing just that.

The Court got it right in *Twitter*, 598 U.S. 471. There is no affirmative conduct in the Platforms' hosting submitted content, merely passive nonfeasance. *Id.* at 500. The apposite analogue, therefore, is not the decision of the New York Times to present an editorial but the passive transmission by T-Mobile of telephone conversations. *Id.* at 499. The challenged laws do not effect an unconstitutional infringement of the Platforms' consciences.

IV. *Marsh* and *PruneYard* are more apposite precedents than *Miami Herald* and *PG & E*.

This case presents the competing imperatives of a robust exchange of ideas, which requires adding speech, and autonomy, which may justify silence. The four decisions of this Court that have addressed this balance most thoroughly are *Marsh*, 326 U.S. 501; *Miami Herald*, 418 U.S. 241; *PruneYard*, 447 U.S. 74; and *PG & E*, 475 U.S. 1. The first and third of these precedents are most apposite here.

Reason for hosting. A major distinction concerns why would-be speakers have access to the host's property. "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." *Marsh*, 326 U.S. 501, 506 (emphasis added). The

community shopping center in *Marsh* was freely accessible and open to the people in the area and those passing through, just as the *PruneYard* mall was "open to the public to come and go as they please[d]." *PruneYard*, 447 U.S. 74, 87; *Marsh*, at 508. Visitors were welcome because their presence served their hosts' economic self-interest. By contrast, neither the newspaper in *Miami Herald* nor the billing envelope in *PG & E* was open to the public. As Justice Marshall explained, unlike the *PruneYard* mall, where people "routinely gathered . . . at the owner's invitation, and engaged in a wide variety of activities," the utility "issued no invitation to the general public to use its billing envelope for speech or for any other purpose." See *PG & E*, 475 U.S. 1, 23 (Marshall, J. concurring).

Respondents clearly fall on the *PruneYard/Marsh* side of the line, not the *Miami Herald/PG & E* side. In fact, they do more than open their site to visitors, they design them to be addictive.[12] It is as if the *PruneYard* mall gave shoppers free snacks to maximize the time they spent on the premises.

Means of transmission. The hosts in *Marsh* and *PruneYard* played no role in transmitting the speech: the company town did nothing to distribute the speaker's religious literature, nor did the mall assist the speakers in distributing their pamphlets. But the newspaper in *Miami Herald* had to insert the replying candidate's text into their publication, print those

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[12] Kelsey Gripenstraw, *Our Social Media Addiction*, (Harv. Bus. Rev. (Nov.-Dec. 2022), https://hbr.org/2022/11/our-social-media-addiction.

words, and distribute them to readers. Likewise, the utility in *PG & E* needed to insert their opponent's message into the billing envelopes and distribute them to all the company's customers.

Respondents' role in presenting the speakers' messages more closely resembles that of the *Marsh* and *PruneYard* hosts. Speakers directly enter their own content and post it for public transmission, usually without any conscious awareness by the hosts; more than 99 percent of material is never reviewed by human eyes and is essentially "invisible to the [Platform]." *NetChoice II*, 49 F.4th 439, 459. Whereas the provision in *PG & E* "compel[led] Pacific to mail messages," respondents need not take any action at all.

Imprimatur. Because the mall was open to many visitors, including (but not limited to) speakers, their speech would "not likely be identified with those of the owner." *PruneYard*, 447 U.S. at 87. Identification was more likely in *Miami Herald*; even if the replying editorial was published only due to the statutory command (and included a disclaimer to that effect), a reader might remember the article's appearance (but not the disclaimer) weeks later, and conclude the editorial must have had some validity due to its appearance in a publication to which the reader subscribed. See Volokh, *supra*, at 377, 380: "People read the *Times* in part precisely because they trust its editorial judgment—they believe its editors will winnow the good and sensible views out of the vast mass of nonsense and folly." The Platforms do not convey the same imprimatur: "Who thinks, 'Oh, that's

probably a credible argument, because someone shared it on Facebook'?" *Id.* at 385 n. 22.

Reason for speaker's access. The most important distinction concerns the reason for why the specific speech appeared. In *PruneYard* and *Marsh* (and the instant cases), access was available to all: the compelled access did not favor or oppose any viewpoint. Even the *Turner* dissent (which opposed that compulsory access provision) accepted that Congress could compel cable companies to operate as common carriers because "such an approach would not suffer from the defect of preferring one speaker to another." *Turner*, 512 U.S. at 685 (O'Connor, dissenting). But *Miami Herald* and *PG & E* involved such preference; only one speaker was selected, and that selection was precisely *because the speaker opposed the host's own view*. See *PG & E*, 475 U.S. at 14: "[A]ccess is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests." As noted, this penalized the hosts and could "reduc[e] the free flow of information and ideas." *Id.*

The instant statutes do not single out any speaker for compelled access, let alone an opponent for the purpose of presenting an opposing view. Notwithstanding the Platforms' allegation of viewpoint discrimination, the law is viewpoint-neutral, protecting access without regard for the speaker's viewpoint as in *PruneYard* and *Marsh* but not *Miami Herald* or *PG & E.* It therefore does not substantially infringe the host's autonomy as in *NIFLA or Wooley*—nor will it penalize speech and thereby lead to its reduction.

This Court should follow *Marsh* and *Prune Yard* and uphold S.B. 7072 and HB20.

CONCLUSION

At a time when student mobs insist removing speech deserves the same protection as posting it, this Court should confirm the superiority of adding speech over subtracting it in the constitutional hierarchy. Favoring "more speech' over "enforced silence" enables all citizens to participate in democratic self-government. By contrast, equating suppressing ideas with expressing them enables corporate gatekeepers to extinguish debate on any subject they wish, with potentially calamitous consequences for public policy, especially as experienced by the least advantaged in our society. This Court has long recognized viewpoint neutrality sufficiently addresses unwilling hosts' legitimate autonomy concerns, while enabling the debate needed to ensure Truth can prevail over Falsehood. This Court should affirm the constitutionality of the equal-access provisions.

Respectfully submitted,

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