No. 21-12355

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NetChoice LLC, et al.,
Plaintiffs-Appellees,

v.

Attorney General, State of Florida, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida, No. 4:21-cv-220

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAW PROFESSORS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case, and were omitted from the Certificates of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

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November 15, 2021

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INTEREST OF AMICI CURIAE

Amici curiae First Amendment Law Professors have expertise in First Amendment doctrine and its intersection with new technologies, including social media companies. Amici have authored many articles and opinion pieces analyzing the application of First Amendment principles to the Internet.

Amici write to assist the Court by providing important context for the constitutional analysis of S.B. 7072. S.B. 7072 implicates multiple doctrinal areas, both constitutional and statutory, and its First Amendment deficiencies are obvious. Amici specifically write to highlight how S.B. 7072 impermissibly regulates social media platforms' editorial discretion — long treated as First Amendment protected speech by the Supreme Court. S.B. 7072 cannot pass constitutional scrutiny because, amongst other failings, it constitutes state management of private entities' content policies, a type of editorial discretion that social media companies enjoy. The district court thus properly enjoined the law's enforcement, and this court should affirm the district court's ruling.

SUMMARY

In 2021, Florida enacted S.B. 7072, a law regulating large social media companies and their content policies. Among other provisions, S.B. 7072 prevents social media companies from removing political candidates from their services;

prohibits regulated social media companies' use of "post-prioritization or shadow banning algorithms"; prohibits "censorship" of "journalistic enterprises" by social media companies; and creates an exception for social media companies operated by companies that own theme parks within the state. Fla. Stat. § 501.2041.

S.B. 7072 presents a panoply of constitutional and statutory issues; two trade associations filed a pre-enforcement challenge to the law, successfully obtaining a preliminary injunction. Florida now appeals, arguing that the law satisfies constitutional scrutiny and is not preempted by 47 U.S.C. § 230, which immunizes interactive community services from almost all liability and preempts contrary state law. For a number of reasons explained by appellees and other amici, Florida's claims must fail.

Specifically, Amici First Amendment Law Professors argue that S.B. 7072 unconstitutionally infringes social media platforms' editorial discretion. S.B. 7072 does not present a difficult or novel question: it infringes on core editorial discretion rights, and thus core speech rights. S.B. 7072 crudely mandates content choices by private entities: a classic First Amendment violation that cannot satisfy strict scrutiny, and would be unlikely to satisfy even less stringent First Amendment review.

Amici contend that Florida's justifications for S.B. 7072 fail to comport with long-settled First Amendment doctrine. Though the state has attempted to reconcile

S.B. 7072 with the Supreme Court's precedents, its theory flies in the face of clearly established doctrinal principles. Whatever Florida's policy goals were in enacting S.B. 7072, the law's constitutional infirmities are blatant and irreparable. S.B. 7072, facially deficient as it is, cannot satisfy constitutional scrutiny. Thus, this court should uphold the district court's injunction.

ARGUMENT

I. The First Amendment Protects Editorial Discretion, Which S.B. 7072 Impermissibly Regulates.

A. Social Media Platforms Have First Amendment Protection for Content Policy Decisions, Which Requires a Strict Scrutiny Analysis.

S.B. 7072 constitutes an extreme and unconstitutional effort by Florida to regulate the speech practices of a private entity — precisely the type of governmental action the First Amendment disfavors, as it amounts to state management of private platforms' editorial discretion. Such management unconstitutionally regulates platform speech.

For nearly fifty years, courts have held that private entities such as newspapers have First Amendment rights in their choices regarding what content to publish, often referred to as editorial discretion. In overturning a Florida "right of reply" statute governing newspapers, the U.S. Supreme Court held in *Miami Herald v. Tornillo*:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Co. v. Tornillo, 418 U.S. 241, 258 (1974). Lower courts have ratified the Supreme Court's reasoning in *Tornillo*, including as applied to newspaper advertising. *See, e.g., Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) ("Maryland's law 'intru[des] into the function of editors' and forces news publishers to speak in a way they would not otherwise… the First Amendment applies in full force to all 'news, comment, and advertising.'") (internal citations omitted); *Memphis Pub. Co. v. Leech*, 539 F.Supp. 405, 411 (W.D. Tenn. 1982) ("[A Tennessee statute] therefore violates the First Amendment by intruding impermissibly into the editorial discretion involved in accepting and preparing the copy for commercial advertising.").

Tornillo's holding extends to Internet companies. The Supreme Court held in *Reno v. ACLU* that the historical and technical justifications for radio and broadcast regulation do not apply to the Internet. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 869 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."). Subsequent cases expanded the strict scrutiny analysis to the analogous context of content-based

Internet regulations; since 2004 courts have required that the government demonstrate that it has a compelling interest, that the regulation is narrowly tailored, and that it is the least restrictive means of regulating content. *See, e.g. Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665–66 (2004).

Because S.B. 7072 regulates content in the form of social media platforms' editorial discretion, and because social media platforms are not subject to a more deferential standard of review than other media, it must satisfy strict scrutiny as a content-based restriction. As appellee observes, it cannot. Brief of Appellee at 31–46, *NetChoice v. Moody*, No. 21-12355 (11th Cir. Nov. 8, 2021).

B. S.B. 7072 Impermissibly Interferes with Editorial Discretion

Amici emphasize how S.B. 7072, in its regulations of platform content policies, impermissibly regulates editorial discretion. The district court properly analyzed existing Supreme Court cases that appellant and appellee proffered by holding that S.B. 7072 burdened social media platforms' speech, though it improperly emphasized an "invisible-to-the-provider" argument irrelevant to the analysis.

As the district court correctly observed, multiple Supreme Court cases — *Tornillo*, *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* — demonstrate why the government cannot seek to "balance the discussion" on private

social media platforms. These three cases emphasize that the government cannot create mandates regulating private entities engaging in First Amendment-covered editorial discretion. *Tornillo*, as discussed *supra*, concerned a Florida statute that interfered with the editorial choices of newspapers. *PG&E* and *Hurley* show that the principles of editorial discretion extend to "less-traditional" media or settings such as envelopes and parades. While social media companies are most properly compared to newspapers, *PG&E* and *Hurley* demonstrate how editorial discretion rights apply in a variety of settings.

In *PG&E*, the Supreme Court held that a mandated right of access to "extra space" within a privately-owned utility company's billing envelopes violated the First Amendment rights of the company to choose what messages it disseminated. In his controlling plurality opinion, Justice Powell noted "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 9 (1986). Importantly, *Pacific Gas & Electric* noted that the *Tornillo* rule applied to situations that did not involve the "institutional press." *Id.* at 11 ("The concerns that caused us to invalidate the compelled access rule in Tornillo apply to appellant as well as to the institutional press."). Put simply, because the regulation required PG&E to "associate with

speech with which [it] may disagree," it was impermissible and triggered strict scrutiny. *Id.* at 15.

Hurley addressed a type of editorial discretion in a venue even further afield from the regulation of newspapers in *Tornillo*: a regulation requiring that parade organizers include a group they disagreed with in their parade. The Supreme Court noted that the parade operator "had no written criteria" for inclusion and "did not generally inquire into the specific messages or views" of participants. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 562 (1995). Despite this comparatively minor editorial effort, the Court recognized a protected speech right in the operator's choices about which messages to include or exclude. The parade's heterogeneity and general (though not absolute) openness to marchers was irrelevant: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id*. at 569–70.

Moreover, the fact that participants in a parade have distinct messages from the parade itself is of no consequence to the First Amendment protections afforded to the parade organizers' choice to exclude. *Id.* at 570 ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication."). Explaining this point, the *Hurley* court drew a direct comparison to *Tornillo* and newspaper editorial pages, which often run

editorials from contributors and receive protection for their editorial discretion. *Id.* ("[T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security.... The selection of contingents to make a parade is entitled to similar protection.") (internal citations omitted).

Taken together, *Tornillo*, *PG&E*, and *Hurley* set forth some underlying principles governing First Amendment protection of editorial discretion. First, private entities — including non-traditional modes of media — that choose to exclude other voices retain First Amendment protection. The state cannot force private entities to carry or host content contrary to their desired message. Second, the private entity need not create the content it hosts to receive First Amendment protection, and the content it hosts can be multifaceted, diverse, and potentially even contrary to the stated preferences of the entity (as when a newspaper prints a letter to the editor criticizing the paper's editorial perspective). Third, a regulation that requires a private entity to carry unwanted commentary cannot survive merely because the private entity can "respond" to that which it would otherwise decline to publish. *See Pac. Gas & Elec. Co.*, 475 U.S. at 16 ("[F]orced response is antithetical to the free discussion that the First Amendment seeks to foster.")

S.B. 7072 flatly violates all these principles. It requires social media platforms to host users it disagrees with; manages the methods by which a platform can display

and rank content; and prevents platforms from labeling user speech that it disagrees with. Effectively, Florida has taken its unconstitutional *Tornillo* statute and added even more blatantly unconstitutional provisions. Since *Reno*, the Supreme Court has analogized First Amendment regulation of the Internet to regulation of newspapers, and that analogy remains the most apt comparison in this case. In its unbridled, excessive interference with private parties' editorial discretion, S.B. 7072 violates First Amendment freedoms; the district court thus properly enjoined the law's enforcement.

C. The District Court's "Invisible to the Provider" Analysis Is Irrelevant

Though the district court correctly determined that social media platforms' editorial discretion receives First Amendment protection and that S.B. 7072 unconstitutionally interferes with such discretion, it incorrectly employed an "invisible to the provider" standard in its analysis. Amici urge this court to disregard that component of the district court's analysis, as it introduced unnecessary and irrelevant complexity into a straightforward question: whether social media platforms exercise constitutionally protected editorial discretion. Editorial operations can take a variety of forms across different types of media, and the constitutional protections for editorial discretion apply regardless of implementation.

The district court observed that this case presents issues distinct from *Tornillo*, *PG&E*, and *Hurley* because social media companies present content that may be "invisible to the provider." Despite this, the district court still determined that S.B. 7072 regulates speech, not conduct, and was thus subject to First Amendment scrutiny. *NetChoice v. Moody,* No. 21-cv-220-MAF, 2021 WL 2690876, *7–9 (N.D. Fla. June 30, 2021). The district court then properly applied strict scrutiny to S.B. 7072 as a content-based restriction, finding that it failed that test.

Because the "invisible to the provider" construction proved immaterial to the district court's strict scrutiny analysis, and because of its lack of connection to existing doctrine, this court need not employ that element in upholding the district court's ruling that S.B. 7072 regulates content by regulating editorial discretion. None of the relevant cases (*Tornillo*, *PG&E*, and *Hurley*) reference such a factor. Indeed, the record in *Hurley* suggested that the messages espoused by potential parade participants were similarly obscure to the operator. Whether the private party exercising editorial control saw all the content it published or approved was irrelevant to the Supreme Court's analysis in each of the cases. The Supreme Court has never equated editorial *review* with editorial *discretion* in finding the latter protected by the First Amendment. Similarly, no court has held that a content provider must preclear third-party content to establish First Amendment protection for its editorial discretion. Even if such preclearance or "visibility" were necessary,

it could be circumvented (as in a parade). The visibility or certainty of what a hosted speaker says, or will say, is thus irrelevant in determining whether a platform exercises editorial discretion rights.

Whether the district court meant to imply that an "invisible to the provider" analysis was relevant to finding that social media platforms' editorial discretion was protected speech, such an analysis creates an irrelevant variable inconsistent with existing caselaw. As the "invisible to the provider" frame finds no antecedent in First Amendment doctrine, and unnecessarily complicates the legal analysis, this court should disregard it in finding that social media platforms' editorial discretion receives First Amendment protection.

II. The State's Construction of First Amendment Doctrine Ignores Key Doctrinal Tenets

A. Florida Misconstrues Relevant Case Law on Editorial Discretion

At the district court and now in this court, Florida constantly insists that S.B. 7072 regulates conduct, not speech, and that Supreme Court precedent justifies its choices to regulate social media providers. The district court correctly rejected these arguments, though Florida continues to proffer them in this appeal. Florida's view of the editorial discretion rights of social media platforms is unnecessarily cramped, and the state misconstrues all relevant Supreme Court cases in its quest to save S.B. 7072.

Florida unjustifiably limits the nature of editorial discretion rights in order to squeeze S.B. 7072 into constitutionality. In its appeal, Florida claims that S.B. 7072's mandates do not interfere with editorial discretion because the principles underlying *Tornillo*, *PG&E*, and *Hurley* do not apply to social media platforms. Opening Brief of Appellant at 20–34, *NetChoice v. Moody*, No. 21-12355 (11th Cir. Sept. 7, 2021). Florida reasons that S.B. 7072 complies with the First Amendment because platforms can still speak in opposition to "must-carry" speech; their users are unlikely to be confused by the speech S.B. 7072 forces platforms to carry; and the platforms fail to offer a "unified" speech product. *Id.* at 24–33. Regardless of the accuracy of these arguments, they are irrelevant for the purposes of considering editorial discretion.

Florida misconstrues *Tornillo*, *PG&E*, and *Hurley* by selectively interpreting those cases to assert that a platform that fails to promulgate a "unified speech product," has unlimited space to rebut mandated speech, and can avoid consumer confusion can be regulated as the state as attempted to do here. In attempting to establish the "unified speech product" claim, Florida cites *Hurley* to argue that a social media company, as it only consists of "individual, unrelated segments that happen to be transmitted together," does not receive the same type of treatment as *Hurley*. *Id.* at 30. By quoting language from *Hurley* referencing *Turner Broadcasting*

System v. FCC, Florida implicitly argues that S.B. 7072 should be compared to the cable television regulations upheld by the Court in *Turner*. *Hurley*, 515 U.S. at 576.

There are multiple failures with this argument. First, the regulations in *Turner* were held to be content-neutral (warranting intermediate scrutiny); while S.B. 7072, despite Florida's protestations, is clearly content-based. As the district court correctly described, S.B. 7072 is "about as content-based as it gets." *NetChoice* at *10. *Turner* applied intermediate scrutiny, a more deferential analysis than what the court must apply in this case.

Second, nothing in the *Turner* plurality opinion suggests that cable operators' editorial speech interests were diminished because cable carries individual, unrelated segments. The referenced discussion in *Turner* concerned the degree to which the *content-neutral* regulations in that case would force cable operators to "alter their own messages" — a change that clearly is contemplated by S.B. 7072's *content-based* provisions. *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 655–56 (1994).

Lastly, social media platforms' editorial discretion cannot be properly described as "individual, unrelated segments that happen to be transmitted together." Social media platforms develop extensive content moderation policies and guidelines to govern what types of content they allow and disallow, with wide variations in those policies. It is precisely these policies which Florida seeks to override. The platforms make choices about what content to publish and present to

their users based on the specific audience they hope to reach, and those audiences vary widely just as there are differences among newspapers and periodicals. Facebook, for example, has much stricter provisions surrounding nudity than Twitter, just as *The Nation* chooses different content than the *Wall Street Journal*.

Platforms use content moderation policies to shape what kinds of content they host on their platform in much the same way as a newspaper chooses freelance pieces, letters to the editor, and advertisements. And merely because the content on social media companies might contradict the company's own speech preferences, or other user-generated content, does not mean that the company itself lacks protection; as the court noted in *Hurley*, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. *Hurley* at 569–570. *Hurley* itself thus undercuts the "unified speech product" argument by acknowledging the diversity of views within a setting that retains editorial discretion.

Florida's contention that the statutes in *Tornillo*, *PG&E*, and *Hurley* only apply in situations in which the private entity lacks infinite space to host content and distance itself from the mandated content that they disagree with also lacks merit. Indeed, the state's argument is difficult to reconcile with *Turner*, which expressly declined to apply any scarcity-based rationale, noting that there soon may be "no practical limitation on the number of speakers who may use the cable medium."

Turner at 638. Under Florida's logic, the state could enact a statute identical to the one at issue in *Tornillo* but only have it apply to the *Miami Herald*'s website, rather than its physical edition. Because MiamiHerald.com theoretically could host unlimited content, there would be no issue under this theory in mandating that the *Herald*'s website carry editorial content it disagreed with. Of course, such a result would be patently absurd and contravene *Tornillo*. Even social media providers have some physical limitations in the content they can host; they cannot extend infinitely onto the horizon and incur significant operational costs.

Finally, Florida argues that because users of social media platforms are unlikely to confuse the speech S.B. 7072 mandates platforms carry, interference with the platforms' speech rights is constitutional. In making this assertion, Florida cites to *PruneYard Shopping Center v. Robins* and *Rumsfeld v. Forum for Academic and Institutional Rights* which, as discussed *infra* Part II.B, are inapposite to this case. Florida can find no grounding for this assertion in *Tornillo*, *PG&E*, or *Hurley*; those cases do not reference potential confusion as relevant to the contours of protected editorial discretion.

S.B. 7072 also limits the ability for platforms to actually label speech that it disagrees with; the statute limits a platform's ability to "censor" user content, which includes "posting an addendum to any content or material posted by a user." §501.2041(b); *see* §501.2041(2)(a),(b),(d), (j). If a platform cannot necessarily post

addenda to user speech it disagrees with under the statute, its ability to prevent consumer confusion is a dead letter. Florida's insistence that platforms can reduce the possibility that a user might conflate mandated content with its own preferences thus rings hollow.

B. *FAIR* and *PruneYard* are Inapposite

Florida relies upon two cases — *PruneYard Shopping Center v. Robins* and *Rumsfeld v. Forum for Academic and Institutional Rights* — to prop up its claims that S.B. 7072 appropriately regulates private entities. These cases, one concerning a shopping mall and the other concerning law schools, are easily distinguishable from the current case and bear no relevance in analyzing the constitutionality of S.B. 7072.

PruneYard upheld the California Supreme Court's interpretation of the California Constitution's free speech clause as allowing for an affirmative right for speakers to enter a private shopping mall to distribute political materials (despite the shopping mall's opposition) as not conflicting with the First Amendment. The Supreme Court held that because *Tornillo* addressed a statute that was an "intrusion into the function of editors" — a factor not present in *PruneYard*, in which the mall could hardly be said to have any kind of editorial perspective — it did not apply. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (internal citations omitted). The *PruneYard* analysis is irrelevant in this case because, as discussed

supra, platforms *do* have an editorial perspective in their content moderation policies and in the enforcement of such policies. No one would establish a shopping mall for the purposes of hosting speakers, just as no one would establish a social media platform without considering what type of content to host.

Florida's reliance on other statements from *PruneYard* — that the mall was free to dissociate itself from the activists, that no speech was compelled by the mall, and that the activists' message was unlikely to confuse mall customers — are irrelevant. Social media platforms (unlike the PruneYard mall) *do* have an editorial perspective. Moreover, as discussed *supra*, S.B. 7072 interferes with private entities' ability to speak and to label mandated content, and social media platforms could not speak out against the mandated speech under the law.

Florida's reliance on *Rumsfeld v. FAIR* is also misguided, because the law challenged there — the Solomon Amendment, which required law schools to host military employers to receive federal funding — governed entities that lacked editorial discretion. Law schools' speech rights in hosting employers are quite different from social media platforms which, again, primarily exist to make choices about what types of content to host. Whatever editorial discretion rights a law school may have, they do not attach to the presence of potential employers for their students. *Rumsfeld v. Forum for Acad. and Inst. Rights*, 547 U.S. 47, 64 (2006) ("[A]ccommodating the military's message does not affect the law schools' speech,

because the schools are not speaking when they host interviews and recruiting receptions…. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper"). In *FAIR*, the Court held that what distinguished that case from *Tornillo*, *PG&E*, and *Hurley* was that in those cases "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63. That was not true for the institutions in *FAIR*, but is true in this case for the foregoing reasons.

Florida has tried valiantly to equate social media platforms with malls and law schools, but the most obvious comparison has always been to newspapers and thus to *Tornillo* and its progeny. As the Supreme Court observed in *Reno v. ACLU*, the Internet is much more readily compared to historical media like newspapers and pamphlets. *Reno*, 521 U.S. at 870 ("This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue."). This court should follow that precedent in finding that *Tornillo* controls in defining the nature of social media platforms' editorial discretion.

CONCLUSION

Nearly fifty years after *Tornillo*, Florida has once again attempted to defend a statute that interferes with the speech rights of private parties. As in that historic case, the statute at issue here is so flagrantly unconstitutional as to defeat any of

Florida's weak and incorrect explanations. Florida may fear or resent private companies' ability to regulate speech. But it cannot interfere with private entities' First Amendment rights to address whatever social problems it seeks to solve. S.B. 7072 constitutes an unprecedented and excessive overreach into private entities' editorial discretion rights, and the district court properly enjoined its enforcement to protect those rights. This court should thus affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,188 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14-point Times New Roman font.

November 15, 2021

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CERTIFICATE OF SERVICE

On November 15, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the clerk of the court.

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