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-00220-RH-MAF

BRIEF OF *AMICUS CURIAE* THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY IN SUPPORT OF PLAINTIFFS–APPELLEES

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Interests of Amicus Curiae

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

Amicus has a particular interest in this case because of the vital role social media platforms play as forums for public discourse. The statute challenged here is the first state law that seeks to constrain social media companies' power to moderate speech on their platforms. The case may have far-reaching implications for the free speech rights of the platforms and their users, and for the ability of government to enact legislation essential to ensuring that the digital public sphere serves democracy.[1]

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of this amicus brief.

Statement of the Issues

Whether the district court correctly enjoined S.B. 7072 because, among other things, Plaintiffs established a likelihood of success on the merits of their First Amendment claim.

Summary of the Argument

S.B. 7072 (the "Act") is unconstitutional because it is designed to punish certain social media companies, selected on the basis of perceived viewpoint, for their exercise of rights protected by the First Amendment. The Court can resolve this case on this narrow and straightforward basis.

Both the parties and some of their *amici*, however, have made further-reaching arguments about the application of the First Amendment to social media platforms. Florida's brief suggests that the Act does not implicate the First Amendment at all, because the platforms do not engage in protected expression when they moderate or curate user content, and because the platforms should be viewed as common carriers. Plaintiffs' brief, by contrast, construes platforms' First Amendment rights in the broadest way, suggesting that any regulation that burdens their exercise of First Amendment rights should be subject to strict scrutiny, and perhaps even viewed as *per se* unconstitutional. In the court below, some *amici* advanced similar arguments. Thus, the parties and some *amici* have offered two theories of the First Amendment, one that would render the First Amendment largely irrelevant to the question of how

governments should regulate social media, and another that would make it nearly impossible for governments to enact even carefully drawn laws intended to ensure that the digital public sphere serves democracy.

As this brief explains, the courts need not choose between "all" or "nothing" in this sphere. Whether a particular activity is covered by the First Amendment in this context turns on whether the activity entails the exercise of "editorial judgment." This label applies to some of the platforms' activities, but it may not apply to others. Perhaps more important, even activities covered by the First Amendment can sometimes be regulated. Whether any particular regulation should be subject to intermediate scrutiny or strict scrutiny will turn on the nature of the regulation, and the mere fact that a regulation implicates editorial judgment does not mean the regulation is unconstitutional. Plaintiffs and some of their *amici* analogize social media platforms to newspapers—and this analogy is useful, to a point. But social media platforms and newspapers are different in important respects, and these differences should matter to the First Amendment analysis, as explained below.

If the Court addresses the parties' further-reaching arguments about the application of the First Amendment to social media platforms, it should reject both Florida's theory of the First Amendment (the "nothing" theory) and Plaintiffs' theory (the "all" theory). It should reject these theories because they are inconsistent with controlling caselaw, but also because neither of them would serve First

Amendment values well in the digital age. Florida's version of the First Amendment would give the government sweeping authority over the digital public sphere and impede social media companies from addressing real harms online. Plaintiffs' theory would make it difficult or impossible for governments to enact even carefully drawn laws intended to protect the free speech, due process, and privacy rights of platforms' users and to ensure that our system of free expression serves democracy. Neither of these theories is defensible, and the Court should reject both of them.

Argument

I. Senate Bill 7072 is unconstitutional because it discriminates among social media platforms on the basis of viewpoint.

As discussed further below, platforms engage in protected expression when they specify "community standards" that restrict what categories of content users can post, and when they remove or attach warning labels to user content. *See* Part II.B *infra*. The Act is unconstitutional because it is designed to punish certain social media companies, selected on the basis of perceived viewpoint, for expression protected by the First Amendment.

That the Act is intended to achieve this end is made evident in a variety of ways. Perhaps most notably, the statutory definition of "social media platform," which is a lynchpin, applies only to a subset of the largest social media companies, expressly excluding any such company under common ownership with a Florida theme park, an obvious reference to Disney. Fla. Stat. § 501.2041(1)(g). A statute

should not necessarily trigger strict scrutiny merely because it regulates only the largest companies—there are obvious reasons why legislatures might legitimately focus on the companies with the most influence over public discourse. Here, however, the definition of "social media platform" appears to have been gerrymandered to ensure that the Act's burdens fall principally on platforms believed to have a liberal bias (e.g., Twitter and Facebook), and not on smaller platforms believed to have a conservative one (e.g., Parler and Gab), and not on Disney, which is not perceived to have a liberal bias and also has significant operations in Florida.

As a result, the Act is underinclusive in reference to its declared purpose. The Act states that it is intended to prevent platforms from "unfairly censor[ing], shadow bann[ing], deplatform[ing], and appl[ying] post-prioritization algorithms to Floridians." 2021 Fla. Sess. Law Serv. Ch. 2021-32 (S.B. 7072) (West). But the Act does not actually take aim at all social media platforms. The Act's underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). Even "where . . . there is no evidence of an improper censorial motive," *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987), a law is subject to strict scrutiny

if it is "structured so as to raise suspicion that it was intended to [interfere with protected speech]." *Leathers v. Medlock*, 499 U.S. 439, 448 (1991).

The legislative history—detailed by Plaintiffs and the district court—confirms that the Act is indeed designed to punish social media platforms believed, rightly or wrongly, to have a liberal bias. Pls. Br. at 15; App. 1719-20. The Act therefore is permissible under the First Amendment only if it satisfies strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It cannot survive this review. Indeed, Florida has not even asserted that the Act serves a compelling governmental purpose. If its purpose here is to eliminate the liberal bias of social media platforms, that is a "decidedly fatal" objective. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) ("produc[ing] speakers free of … biases" toward "certain classes" is not a legitimate government interest). Moreover, the Act's under-inclusiveness means the Act is not narrowly tailored to even that interest. For these reasons, the Act fails strict scrutiny.[2]

II. The Court should reject a construction of the First Amendment that would disable the government from enacting legislation that serves First Amendment values.

The Court can dispose of this case on the narrow ground described above. In their briefs, however, the parties advance broader arguments about the application

[2] *Amicus* takes no position here on whether S.B. 7072 is preempted by Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230.

of the First Amendment to social media. Florida's brief suggests that the Act does not implicate the First Amendment at all, because the platforms do not engage in protected expression when they moderate or curate user content, and because the platforms should be viewed as common carriers. Plaintiffs' brief, by contrast, construes platforms' First Amendment rights in the broadest manner, suggesting that any regulation that burdens their exercise of First Amendment rights should be subject to strict scrutiny. If the Court addresses these arguments, it should reject them.

A. The First Amendment protects the exercise of editorial judgment.

In an important series of cases, the Supreme Court has recognized that the First Amendment protects the exercise of "editorial judgment." In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a statute requiring newspapers that criticized political candidates to afford those candidates an opportunity to reply, in the newspapers' own pages, free of charge and with equal prominence and space. 418 U.S. at 244 & n.2. The Court concluded that the statute "intru[ded] into the function of editors" by compelling them "to publish that which 'reason' tells them should not be published." *Id.* at 257-58.

Observing that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising," the Court held that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and

content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258. In his concurrence, Justice White underscored that "the very nerve center of a newspaper," is "the decision as to what copy will or will not be included," and that the First Amendment prohibits the government from dictating "the contents of [a newspaper's] news columns or the slant of its editorials." *Id.* at 259-61 (White, J., concurring); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) ("editing is what editors are for; and editing is selection and choice of material").

Since *Tornillo*, the Court has held that the First Amendment protects the exercise of editorial judgment in other contexts, and by other kinds of actors. For example, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court considered a state rule that required a public utility to include a third party's opposing views in the utility's billing envelopes. *Id.* at 5-7.[3] The state imposed the rule after finding that the utility's customers "'will benefit . . . from exposure to a variety of views.'" *Id.* at 6 (quoting public utilities commission). The Court invalidated the rule, however, concluding that it impermissibly interfered with the utility's editorial judgment by requiring it to disseminate views opposed to

[3] The billing envelopes already included the utility's own newsletter, which the Court treated as equivalent to a small newspaper. *Id.* at 5, 8.

its own, which in turn forced the utility to respond in order to counter those views and avoid any impression that the utility agreed with them. *Id.* at 14-16. As the Court made clear, "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16.

In *Turner Broadcasting Systems, Inc. v. FCC* (*Turner I*), 512 U.S. 622, 661 (1994), the Court considered must-carry provisions that required cable operators to carry a set number of local broadcast stations. Congress enacted the provisions in order to "correct [a] competitive imbalance" between cable and broadcast television that was "endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues." *Id.* at 633. Invoking *Tornillo*, the Court held that a cable operator "exercis[es] editorial discretion over which stations or programs to include in its repertoire." *Id.* at 636. While the Court ultimately upheld the must-carry provisions, as discussed further below, it did so only after recognizing that the "provisions interfere[d] with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations." *Id.* at 643-44.

The Supreme Court's nearly contemporaneous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), conferred First Amendment protection on yet another form of editorial judgment. In *Hurley*, a gay rights group challenged its exclusion from a parade under the state

court's interpretation of Massachusetts' public accommodations law. *Id*. at 566. There was no dispute that gays and lesbians could participate in the parade as members of individual parade units. *Id.* at 572. The dispute arose because the state court applied the public accommodations law to require that the gay rights group be admitted "as its own parade unit carrying its own banner." *Id.*

The Court held that the parade organizer exercised editorial judgment in excluding the gay rights group, likening the organizer's selection of participants to a newspaper's selection of news stories and editorials. *Id.* at 570. The participation of the gay rights group in the parade, the Court reasoned, would signify the parade organizer's endorsement of the group's message, which would alter the parade's expressive content and thus the organizer's own message to parade spectators. *Id.* at 572-75. Invoking *Tornillo* and *Pacific Gas*, the Court explained that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576.

The protection that the Court conferred on editorial judgment in *Tornillo*, *Pacific Gas*, *Turner*, and *Hurley* is vital for more than one reason. Protecting editorial discretion in these contexts was a way of recognizing and affirming speakers' autonomy by giving them control over their message. It was also a way of protecting public discourse from government intervention that might have distorted

democratic self-governance. The regulated entities in these cases were disseminating protected expression to broad audiences, and thus were playing an essential role in the marketplace of ideas. Protecting editorial discretion in these contexts served interests that are at the heart of the First Amendment.

B. Some of what social media platforms do reflects the exercise of editorial judgment—but not all of it does.

Social media companies exercise editorial discretion in at least two contexts—when they specify "community standards" that restrict what categories of content users can post; and when they remove or attach warning labels to user content.

When social media companies specify community standards, they make decisions roughly analogous to the ones the Supreme Court held to be protected in *Turner*, *Hurley*, and *Pacific Gas*. They decide what categories of content will appear on their platforms and what categories will not. Their decisions reflect judgments about the relative value of those categories of content. And collectively, these decisions determine the expressive character of the product they provide to their users.[4] In *Tornillo*, the Court observed that "[t]he choice of material to go into a newspaper" is at the core of editorial judgment. *Tornillo*, 418 U.S. at 258; *see also*

[4] *See* Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. Free Speech L. 71, 76 (2021) (observing that social media platforms, like twentieth-century mass media, "set boundaries on permissible content" and thereby "curate public discourse").

id. at 259 ("the decision as to what copy will or will not be included" is "the very nerve center of a newspaper") (White, J., concurring*); Ark. Educ. Television Com'n v. Forbes*, 523 U.S. 666, 673 (1998) (rejecting First Amendment challenge to broadcaster's exclusion of political candidate from debate because excluding candidate was in "the nature of editorial discretion"). Here, too, decisions about what content to include or exclude are properly characterized as editorial in nature.

Social media platforms' attachment of labels to third-party content also reflects the exercise of editorial judgment. Platforms deploy these labels for a variety of reasons, including to alert users to content that may be disturbing and to flag content that platforms believe to be misleading or false.[5] Whereas most content posted on social media platforms is generated by users, labels are distinctive in that they are generated by the platforms themselves.[6] They are roughly analogous to newspaper editorials, in which newspapers speak directly to matters of public concern. As such, they fall comfortably within the scope of "editorial judgment" as the Supreme Court has defined the concept. As the Court made clear in *Tornillo*, editorial judgment encompasses the "treatment of public issues," which the

[5] Yoel Roth & Nick Pickles, *Updating our approach to misleading information*, Twitter Blog (May 11, 2020), https://perma.cc/9JJ7-JDBM.

[6] *E.g.,* Eugene Volokh, *Treating Social Media Like Common Carriers?*, 1 J. Free Speech L. 377, 433 (2021) (acknowledging that "posting fact-checks or warnings" is platform speech).

attachment of warning labels generally is. 418 U.S. at 258. And attaching labels to content also reflects decisions about the value of the speech to which the labels are attached, just as specifying community standards does. Even if the attachment of a warning label did not entail the exercise of editorial judgment, it would still constitute speech protected by the First Amendment, for the same reasons that an editorial constitutes speech.

That social media companies' exercise editorial judgment in these two contexts does not mean, of course, that all of their business practices fall within the scope of the First Amendment. The relevant inquiry is not whether a regulated entity exercises editorial judgment in *some* context, or even as a general matter, but whether the entity exercises editorial judgment in the specific context addressed by the regulation.[7] Although the case was decided decades before *Tornillo*, the Supreme Court said essentially this in *Associated Press v. NLRB*, 301 U.S. 103 (1937). There, the Court upheld a National Labor Relations Board order directing the Associated Press ("AP") to reinstate an editor fired for his union activity. 301 U.S. at 124. The Court rejected the argument that the AP was "immune from regulation because it is an agency of the press." *Id.* at 131. "The publisher of a newspaper has no special

[7] Mailyn Fidler, *The New Editors: Refining First Amendment Protections for Internet Platforms*, 2 Notre Dame L. Sch. J. on Emerging Tech. 241, 243 (2021) ("The fact that an internet platform exercises [editorial judgment] at one moment or on one part of its site does not mean it does so in all instances.").

immunity from the application of general laws," the Court wrote, and "has no special privilege to invade the rights and liberties of others." *Id.* at 132-33. The Court emphasized that the NLRB's order did not in any way limit the AP's freedom to publish the news as it saw fit, or to enforce editorial policies, such as by firing editors who violated those policies. *Id.* at 133.[8]

C. Some laws that implicate editorial judgment are consistent with the First Amendment.

As discussed above, some of the platforms' activities entail editorial judgment. Even regulations that implicate editorial judgment, however, can be constitutional in some contexts. Content-based regulations will be constitutional if they satisfy strict scrutiny. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) ("even

[8] The First Amendment also poses no impediment to the regulation of common carriers. Such regulation does not implicate the First Amendment because it concerns only the "neutral transmission of others' speech, not a carrier's communication of its own message." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016).

One prominent First Amendment scholar has suggested that platforms may be regulated as common carriers when they host content, but not when they curate content, such as the content that platforms arrange in users' feeds (e.g., Facebook's News Feed). Volokh, *supra* at 408-09. He argues that hosting content does not implicate platforms' First Amendment rights but that curating content does. *Id*. Whatever arguments the Court addresses in this case, the Court need not address this one. The provisions of the Act concerning user content regulate the full range of content curation, not only hosting. In addition, the Act is not a conventional common carrier regulation because it lacks "a general requirement to serve all comers." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021) (Mem.) (Thomas, J., concurring).

when we consider a regulation . . . that is subject to 'strict scrutiny,' we sometimes find the regulation to be constitutional after weighing the competing interests involved."). And content-neutral laws will be constitutional if they satisfy intermediate scrutiny. Content-neutral laws are reviewed less stringently because they "do not pose the same inherent dangers to free expression, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 213 (1997) (internal quotation marks and citation omitted).

Tornillo, *Pacific Gas*, and *Hurley* show that content-based laws that interfere with editorial judgment are subject to strict scrutiny. The right-of-reply statute in *Tornillo* was content-based because it "was triggered by a particular category of newspaper speech," and awarded access "only to those who disagreed with the newspaper's views." *Pacific Gas*, 475 U.S. at 13. Although the forced-access rule in *Pacific Gas* was not triggered by any speech of the utility, the Court found that it was nonetheless content-based because it provided access only to a third party with opposing views. *Id.* at 12-14. The Court in *Hurley* did not expressly state that it was applying strict scrutiny, but it suggested as much by emphasizing that the parade organizer, like the newspaper in *Tornillo* and the utility in *Pacific Gas*, was forced to "disseminat[e] a view contrary to [its] own," which "compromised" its "right to autonomy over [its] message." *Id.* at 576.

In *Turner*, by contrast, the Court applied only intermediate scrutiny because it concluded that the challenged provisions were content-neutral. In that case, again, the Supreme Court considered provisions that required cable operators to carry local broadcast stations. The Court concluded that the provisions burdened the cable operators' exercise of editorial judgment but upheld them anyway. It did so after concluding that the "overriding objective … was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646.

The Court expressly rejected the cable operators' argument that *Tornillo* and *Pacific Gas* required strict scrutiny because the must-carry provisions compelled the "operators to transmit speech not of their choosing." *Id.* at 653. The Court explained that the must-carry provisions were content-neutral, unlike the regulations at issue in *Tornillo* and *Pacific Gas*, because they were not triggered "by any particular message spoken by cable operators," and they were not an attempt to "counterbalance the messages" of the regulated entity. *Id.* at 655. The Court also noted that cable operators would not need to alter their own messages to disavow the content of broadcasts, because cable operators' subscribers would not associate those companies with the content of broadcast channels in the first place. *Id.*

In distinguishing *Tornillo* and *Pacific Gas*, the Court also emphasized a key technological difference between newspapers and cable television. Unlike newspapers, the Court noted, cable had "bottleneck, or gatekeeper, control" over the content delivered to subscribers by virtue of "the physical connection between the television set and the cable network." *Id.* at 656. Because this "bottleneck monopoly power . . . over a central avenue of communication" could be abused, the Court concluded that the First Amendment does not prevent the government from "tak[ing] steps to ensure . . . the free flow of information and ideas." *Id.* at 657, 661.

Having concluded that the must-carry provisions were content-neutral, the Court applied intermediate scrutiny and upheld the provisions. *Turner II*, 520 U.S. 180. The Court found that the provisions were "designed to address a real harm"—the likelihood that the 40 percent of Americans without cable would be deprived of access to broadcast television. *Id.* at 195. These households relied on over-the-air broadcast stations as their sole source of television programming, and competition from the cable industry—including cable operators' decisions to drop broadcast stations from their repertoire—threatened broadcasters' continued access to an audience and advertising revenues, and thus threatened their very existence. *Id.* at 190-213. The Court found that the must-carry provisions alleviated this harm because the provisions "ensured that a number of local broadcasters retain[ed] cable carriage, with the concomitant audience access and advertising revenues needed to

support a multiplicity of stations." *Id.* at 213. As to narrow tailoring, the Court found that Congress took steps to lessen the must-carry provisions' burden on cable operators, and concluded that "the burden imposed by must-carry is congruent to the benefits it affords." *Id.* at 215-16.

D. The analogy of social media companies to newspapers is helpful only to a point.

Social media platforms are like newspapers in that some of their activities involve the exercise of editorial judgment. But social media platforms are different from newspapers in important ways. In any particular context, those differences might matter to whether a particular activity entails the exercise of editorial judgment, how significantly a regulation burdens that judgment, and the strength of the government's interest in imposing the burden.[9] As the Supreme Court has emphasized, "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 595 (2002) ("The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.").

[9] *See generally* Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, Knight First Amendment Institute at Columbia University (Feb. 27, 2018), https://perma.cc/C4DY-4W7G.

Social media platforms differ from newspapers in the following ways, among others:

First, whereas newspapers are comprised mainly of content they themselves create or specifically solicit, most content posted on social media platforms is generated by the platforms' users.[10] Newspapers are highly selective in what they publish; they exercise close curatorial control over their pages. Social media companies have community standards that place broad limits on what content can be published on their platforms, but within these limits—and to a significant extent outside them due to imperfect enforcement—they publish virtually everything that users submit to them. All of this means that newspapers are directly and intimately engaged with the content they publish in a way that social media platforms are not.

Second, there is an incredible disparity in scale between newspapers and social media platforms. The *New York Times* online edition "publishes roughly 150 articles a day."[11] Over the same period, Facebook users share more than 1 billion stories and 100 billion messages.[12] This disparity exists because platforms and newspapers have different business models; because to some extent they use

[10] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1660 (2018).

[11] Robinson Meyer, *How Many Stories Do Newspapers Publish Per Day?* The Atlantic (May 26, 2016), https://perma.cc/Q6TQ-GEHE.

[12] Meta, *Who We Are: Company Info*, https://perma.cc/2WFD-Z9KV.

different media; and because they operate under different legal regimes (or, perhaps more accurately, because they benefit to different extents from the same legal regime). *See* 47 U.S.C. § 230 (immunizing online services from civil liability for content posted by third parties).

Third, newspapers are coherent speech products in a way that social media platforms are not. By affirmatively selecting the subjects and viewpoints that will make it into the paper, newspapers communicate their own message to readers by "combining multifarious voices." *Hurley*, 515 U.S. at 569.[13] Most social media platforms are not coherent speech products because they are not curated in the same granular way, and because they are simply too sprawling, diverse, and incoherent (in the literal sense of the word) to be understandable as single expressive products. Again, social media companies do set community standards that delineate the outer boundaries of permissible speech on their platforms, and they do enforce these community standards to one extent or another. But specifying and enforcing community standards is not the same thing as selecting individual articles, and it does not have the same results. This is why newspapers' readers tend to attribute

[13] *See also* Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 Fordham L. Rev. 1629, 1651 (2014) (describing newspapers as producing "an integrated expressive whole with which [the newspaper] is associated."); Volokh, *supra* at 405 (describing newspapers as providing a "coherent speech product").

newspapers' content to the newspapers' publishers, whereas platforms' users do not generally attribute the content on the platforms to the platforms' owners.[14]

Fourth, newspapers generally do not remove content once it has been published, whereas removing content after publication is a major part of social media platforms' operations. Newspapers do issue corrections and editors' notes, but they almost never take down content once it is published.[15] Social media companies devote immense resources to after-the-fact removal of content that violates their community standards. Indeed, Facebook apparently employs 15,000 content moderators, who review 3 million pieces of content each day to determine if any should be removed.[16]

Finally, newspapers rely mainly on human decision-making in order to moderate and curate content, whereas social media companies increasingly rely on

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[14] Bracha, *supra* at 1647-48; Genevieve Lakier, *The Problem Isn't the Use of Analogies but the Analogies Courts Use*, Knight First Amendment Institute at Columbia University Blog (Feb. 26, 2018), https://perma.cc/WDT7-EY4J; Ramya Krishnan, *The Pitfalls of Platform Analogies in Reconsidering the Shape of the First Amendment*, Knight First Amendment Institute at Columbia University Blog (May 19, 2021), https://perma.cc/QHD8-7JLS.

[15] Rogene Jacquette, *We Stand Corrected: How The Times Handles Errors*, N.Y. Times (June 7, 2018), https://perma.cc/VY25-P5RP.

[16] John Koetsier, *Report: Facebook Makes 300,000 Content Moderation Mistakes Every Day*, Forbes (June 9, 2020), https://www.forbes.com/sites/johnkoetsier/2020/06/09/300000-facebook-content-moderation-mistakes-daily-report-says/?sh=d3fdd854d03d.

machine-learning algorithms that are generally opaque even to their creators.[17] As a consequence, newspapers' decisions are explainable in a way that platforms' decisions often are not.[18]

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These differences between social media companies and newspapers should inform any First Amendment analysis. Some regulations that would burden editorial judgment if imposed on newspapers might not burden editorial judgment if imposed on social media companies. Even regulations that would burden social media companies' editorial judgment might not burden that judgment to the same extent as they would burden newspapers' editorial judgment if the regulations were imposed on them. And the government may have different reasons, and perhaps stronger ones, for imposing certain kinds of regulatory burdens on social media companies. The analogy of social media companies to newspapers is helpful—but only to a

[17] Deepa Seetharaman, The Facebook Files: *Facebook Says AI Will Clean Up the Platform. Its Own Engineers Have Doubts*, Wall Street Journal (Oct. 17, 2021), https://perma.cc/PCM8-BJD8; Lawrence Lessig, *The First Amendment Does Not Protect Replicants*, Harv. Public Law Working Paper No. 21-34 (September 10, 2021), https://perma.cc/B29P-ATS2.

[18] *E.g.*, Anna Kramer, *Twitter's own research shows that it's a megaphone for the right. But it's complicated*, Protocol (Oct. 21, 2021) ("When algorithms get put out into the world, what happens when people interact with it, we can't model for that. We can't model for how individuals or groups of people will use Twitter, what will happen in the world in a way that will impact how people use Twitter"), https://perma.cc/4BZT-CKW4.

point. The similarities between platforms and newspapers are important, but, in any particular context, the differences might be important, too.[19]

E. Construing platforms' rights too broadly would impede government from enacting laws that would serve First Amendment values.

The protection that the Supreme Court has afforded to editorial judgment is essential to our society. It recognizes and affirms the expressive autonomy of individual speakers. It also serves as a crucial bulwark against government efforts to distort and control public discourse—as this case reminds us. But giving editorial judgment too broad a scope, or shielding it altogether from regulatory burden, would be a mistake, especially in an era in which so much speech that is essential to our democracy takes place on private platforms. Indeed, doing so would undermine interests that the First Amendment was intended to protect.

For example, it would make it exceedingly difficult for the government to address the challenges identified below, even through regulation that is carefully drawn and sensitive to First Amendment interests:

Platform transparency. Social media platforms shape public discourse in a variety of ways—including through their design choices, their community standards and enforcement, and their content curation, including the algorithmic prioritization

[19] *See generally* Whitney, *supra*.

and deprioritization of user-generated content.[20] Public understanding of how platforms are shaping public discourse is very limited, however, for multiple reasons. Platforms have declined to share information with researchers and the public.[21] Some platforms have leveraged their terms of service to interfere with journalists and researchers who study issues like misinformation and discrimination online.[22] And because they rely on machine-learning algorithms that are black boxes even to the engineers who designed them, the social media companies themselves do not fully understand how their platforms work.[23]

In response to all of this, researchers, advocates, and regulators have proposed that the platforms be required to share certain categories of information with credentialed researchers or the public.[24] The Knight Institute has proposed that

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[20] *See generally* Jameel Jaffer & Katy Glenn Bass, Opinion, *Facebook's 'Supreme Court' Faces Its First Major Test*, N.Y. Times (Feb. 17, 2021), https://perma.cc/27K9-LPS2.

[21] Laura Edelson, Opinion, *How Facebook Hinders Misinformation Research,* Scientific American (Sept. 22, 2021), https://perma.cc/6V2Y-AGQ8.

[22] Charlie Savage, *Facebook Is Asked to Change Rules for Journalists and Scholars*, N.Y. Times (Aug. 7, 2018), https://perma.cc/BP3M-U4CN.

[23] Kramer, *supra*.

[24] *See, e.g.*, *The Disinformation Black Box: Researching Social Media Data: Hearing Before the H. Subcomm. on Investigations and Oversight of the H. Comm. Sci., Space, and Tech.* (2021) (statement of Laura Edelson, NYU Cybersecurity for Democracy), https://science.house.gov/imo/media/doc/Edelson%20Testimony.pdf; Shirin Ghaffary, *How to fix Facebook: Can Facebook be redeemed? Twelve leading experts share bold solutions to the company's urgent problems*, Vox (Nov. 8, 2021) (interview with Professor Nathaniel Persily), https://perma.cc/YA54-NZG7.

Congress create a legal safe harbor that would protect certain kinds of journalism and research from interference by the platforms.[25] Whether these proposals are sensible, go too far, or fail to go far enough can be debated, of course. An overbroad understanding of "editorial judgment," however, would render this debate entirely academic, because it would turn the First Amendment into a major obstacle to all of these proposals. It would mandate the application of strict scrutiny where intermediate scrutiny would be more appropriate. And it would mean that regulations that might otherwise survive constitutional scrutiny would fail it instead.

Due process. When the government excludes a person from a traditional public forum, like a school board meeting, it must explain why, and it must afford the person an opportunity to challenge the exclusion. The same is true when the government excludes a person from a social media account used for official purposes. When a social media company excludes a user from its platform, by contrast, it is not legally obliged to provide notice or an opportunity to be heard.[26] Some scholars and legislators have proposed that platforms should be required to provide users with due process, because being excluded from major social media

[25] Ramya Krishnan & Alex Abdo, *How Do You Solve A Problem Like Facebook?*, Knight First Amendment Institute at Columbia University Blog (Oct. 14, 2021), https://perma.cc/MAG5-RJEJ.

[26] *See* Oversight Board, *Oversight Board demands more transparency from Facebook* (Oct. 2021), https://perma.cc/T4N7-R98K.

platforms means being excluded from a large part of public discourse.[27] Here, too, there is room for debate about exactly what kinds of obligations should be imposed on platforms—and Plaintiffs make a strong argument that the burdens associated with the due process provisions of the Florida law are disproportionate in relation to the government's asserted justification for them. But even if Plaintiffs are correct, it is important to recognize that due process protections might be implemented in other ways, including in ways that are less burdensome. An overbroad conception of editorial judgment, or an insistence that editorial judgment must be categorically immunized from regulatory burden, or an unqualified endorsement of the equation between platforms and newspapers, would render the whole debate beside the point. It would make it nearly impossible for governments to establish due process protections that are important to free speech online.

Privacy. Social media platforms collect staggeringly large amounts of sensitive information about their users—and, indeed, about their non-users as well. They use this information to target online advertisements and other content to individual users.[28] Targeting and "micro-targeting" can create echo chambers in which misinformation and conspiracy theories sometimes flourish. It can also have

[27] Volokh, *supra* at 403; Balkin, *supra* at 85; Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. Free Speech L. 97, 126 (2021).

[28] *See, e.g.*, Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. Times (April 18, 2018), https://perma.cc/3CJ6-HFF3.

the effect of insulating speech from counterspeech and correction, effectively undermining a process that the First Amendment was meant to safeguard. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Scholars, advocates, and others have proposed that legislatures restrict what platforms can collect about their users, and limit how the information they collect can be used.[29] But the same is true in this context as is true in the two contexts addressed above: an overly sweeping conception of platforms' First Amendment rights would preempt this legislative debate. It would disable legislatures from enacting laws that may be important to protecting free speech online.

* * * * *

It is worth emphasizing again that the protection the courts have accorded to editorial discretion is essential. This protection has limits, however, and these limits help ensure that the protection serves, rather than undermines, First Amendment interests. The Court should not interpret the First Amendment in a way that would preclude legislatures from enacting carefully drawn laws, sensitive to First Amendment interests, that may be necessary to protect free speech online.

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[29] Farhad Manjoo, Opinion: *OK, but What Should We Actually Do About Facebook? I Asked the Experts,* N.Y. Times (Nov. 4, 2021), https://perma.cc/3GSD-WB72.

Conclusion

For the foregoing reasons, *amicus* respectfully urges this Court to affirm.

November 15, 2021

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This brief complies with: the type-volume limitation of Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i), and 32(g)(1), because it contains 6,474 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11 Cir. R. 32-4.

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I hereby certify that on November 15, 2021, I caused the foregoing Brief of *Amicus Curiae* the Knight First Amendment Institute at Columbia University in Support of Plaintiffs-Appellees to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

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