IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 2022-1

NETCHOICE, LLC, d.b.a. NetChoice, **Plaintiff-Appellee** **v.** DON REDBEARD, ATTORNEY GENERAL, STATE OF RED, in his official capacity; COMMISSIONERS OF THE RED STATE ELECTIONS COMMISSION, in their official capacities, **Defendants-Appellants**	**Appeal from the U.S. District Court for the Northern District of Red State**

OPINION OF THE COURT

Before BRUNETTE, BLOND, and GREY Circuit Judges. BRUNETTE, Circuit Judge:

Can a state prohibit YouTube, Tik-Tok, Facebook, or Twitter[1] from removing a political candidate from its platform because it believes this constitutes "censorship?" In addressing this question, we focus on two issues. When social media platforms curate the content they disseminate, do they engage in activity the First Amendment protects against state regulation? Or do social media platforms lack First Amendment protection because they are hosts or "common carriers" whose conduct the government may freely regulate?

I A.

We begin with three important points about social media platforms. First platforms are private enterprises, not governmental. No one is obligated to contribute to or consume the content the platforms make available. And correlatively, while the Constitution protects citizens from governmental efforts to restrict their access to social media, *Pa a . N Ca a*, 137 S. Ct. 1730, 1737 (2017), no one has a vested right to force a platform to allow her to contribute to or consume social media content.

[1] Twitter changed its name to X while this appeal was pending. To remain consistent with the briefing, we will continue to use the original name.

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

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

Accordingly, a social media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby participate in the community it has created. In that way, the platform creates a virtual space in which every user can be both speaker and listener. In playing this role, the platforms invest significant time and resources into editing and organizing—essentially curating—users' posts into collections of content they then disseminate to others. By engaging in this

7072 § 1(5), (6). That, the Act says, is because platforms "have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Redstaters" and because "[t]he state has a substantial interest in protecting its residents from [the platforms'] inconsistent and unfair actions." *Id.* § 1(9), (10).

To these ends, S.B. 7072 contains several new statutory provisions applicable to "social media platforms." The term "social media platform" is defined using size and revenue thresholds that appear to target the "big tech oligarchs" about whose "narrative" and "ideology" the bill's sponsor and Governor Redhead had complained. But the definition's broad conception of what a "social media platform" sweeps in other popular websites, like crowdsourced reference tool Wikipedia and virtual craft market Etsy:

> [A]ny information service, system, Internet search engine, or access software provider that:
>
> 1. Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
> 2. Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
> 3. Does business in the state; and
> 4. Satisfies at least one of the following thresholds:
>   a. Has annual gross revenues in excess of $100 million
>   b. Has at least 100 million monthly individual platform participants globally.

Red Stat. § 501.2041(1)(g).

The provisions of S.B. 7072 at issue here are the "content-moderation" restrictions:

- **Candidate deplatforming:** A social media platform "may not willfully deplatform a candidate for office." Red Stat. § 106.072(2). The term "deplatform" is defined to mean "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c).
- **Posts by or about candidates:** "A social media platform may not apply or use shadow banning algorithms for content and material posted by or about . . . a candidate." *Id.* § 501.2041(2)(h). "Shadow banning" refers to any action to "limit or eliminate the exposure of a user or content or material posted by a user to other users of [a] . . . platform." *Id.* § 501.2041(1)(f).
- **"Journalistic enterprises":** A social media platform may not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." *Id.* § 501.2041(2)(j). The term "journalistic enterprise" is defined broadly to include any entity doing business in Red State that either (1) publishes in excess of 100,000 words online and has at least 50,000 paid subscribers or 100,000 monthly users, (2) publishes 100 hours of audio or video online and has at least 100 million annual viewers, (3) operates a cable channel that provides more than 40 hours of content per week to more than 100,000

cable subscribers, or (4) operates under an FCC broadcast license. *Id.* § 501.2041(1)(d). The term "censor" is also defined broadly to include not only actions taken to "delete," "edit," or "inhibit the publication of" content, but also any effort to "post an addendum to any content or material." *Id.* § 501.2041(1)(b). The only exception to this provision's prohibition is for "obscene" content. *Id.* § 501.2041(2)(j).

- **Consistency:** A social media platform must "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." *Id.* § 501.2041(2)(b). The Act does not define "consistent."

The Red State Elections Commission enforces § 106.072 that contains the candidate-deplatforming provision. They may impose fines of up to $250,000 per day for violations involving candidates for statewide office and $25,000 per day for those involving candidates for other offices. *Id.* § 106.072(3). Section 501.2041—which contains S.B. 7072's remaining provisions—may be enforced either by state governmental actors or by private parties filing civil suits. *Id.* § 501.2041(5),(6). Private actions under this section can yield up to $100,000 in statutory damages per claim, actual damages, punitive damages, equitable relief, and, sometimes, attorneys' fees. *Id.* § 501.2041(6).

C.

The plaintiff, NetChoice LLC, is a trade association representing social media companies like Facebook, Twitter, Google (YouTube's owner), and TikTok. NetChoice sued the Red State officials charged with enforcing S.B. 7072, seeking to enjoin enforcement of the content-moderation provisions because they violate the social media companies' right to free speech under the First Amendment. The district court preliminarily enjoined enforcement of all the content-moderation provisions.

The State appeals, arguing S.B. 7072 doesn't violate the First Amendment because the platforms aren't engaged in protected speech. Rather, the State asserts that the Act merely requires platforms to "host" third parties' speech, which, it says, they may constitutionally be compelled to do under two Supreme Court decisions—*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). Alternatively, the State says, the Act doesn't trigger First Amendment scrutiny because it reflects the State's permissible decision to treat social media platforms like "common carriers."

NetChoice responds that platforms' content-moderation decisions – i.e., their decisions to remove or deprioritize posts or deplatform users, and thereby curate the material they disseminate – are "editorial judgments" the First Amendment protects under longstanding Supreme Court precedent, including *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"), *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner*"), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). NetChoice says the law fails any form of heightened scrutiny because there is no legitimate state interest in equalizing speech

and because the law isn't narrowly tailored. NetChoice contends, a First Amendment violation is a quintessential irreparable injury for injunctive-relief purposes.

D.

In assessing whether S.B 7072 likely violates the First Amendment, we must initially consider whether it triggers First Amendment scrutiny—i.e., whether it regulates "speech" within the meaning of the Amendment. *S C a R M M a, I . . A a . , I .*, 6 F.4th 1247, 1254 (14th Cir. 2021). In other words, we must determine whether social media platforms engage in First-Amendment-protected activity. If they do, we must then determine what level of scrutiny applies and whether the Act's provisions survive that scrutiny. *S F La a F N B . C F La a* , 11 F.4th 1266, 1291 (14th Cir. 2021) ("FLFNB II").

II A.

Social media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights, *F Na Ba B . . B* , 435 U.S. 765, 781–84 (1978), and when they (like other entities) "disclos[e]," "publish[]," or "disseminat[e]" information, they engage in "speech within the meaning of the First Amendment," *S . IMS H a I .*, 564 U.S. 552, 570 (2011). More particularly, when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site. As the officials who sponsored and signed S.B. 7072 recognized when alleging "Big Tech" companies harbor a "leftist" bias against "conservative" perspectives, the companies that operate platforms express themselves through their content-moderation decisions. When a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message thereby engaging in "speech" within the meaning of the First Amendment. Laws restricting platforms' ability to speak through content moderation therefore trigger First Amendment scrutiny.

1.

We turn first to editorial-judgment cases. The Supreme Court has repeatedly held that a private entity's choices about whether, to what extent, and in what manner it will disseminate speech—even speech created by others—constitute "editorial judgments" the First Amendment protects. In *M a H a* the Court held that a newspaper's decisions about what content to publish and its "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment" the First Amendment was designed to safeguard. 418 U.S. at 258. Florida passed a statute requiring any paper that ran a piece critical of a political candidate to give the candidate equal space in its pages to reply. *I .* at 243. Despite the contentions (1) that economic conditions had created "vast accumulations of unreviewable power in the modern media empires" and (2) that those conditions had resulted in "bias and

manipulative reportage" and massive barriers to entry, the Court concluded that the state's attempt to compel the paper's editors to "publish that which reason tells them should not be published is unconstitutional." *I .* at 250–51, 256 (quotation marks omitted). The Court held that the First Amendment bars Florida's "intrusion into the function of editors." *I .* at 258.

The Court subsequently extended *M a H a* protection of editorial judgment beyond newspapers. In *PG&E*, the Court invalidated a state agency's order that would have required a utility company to include in its billing envelopes the speech of a third party with which the company disagreed. 475 U.S. at 4, 20. A plurality of the Court reasoned the concerns underlying *M a H a* applied to a utility company in the same way they did to the institutional press. *I .* at 11-12. The challenged order required the company "to use its property as a vehicle for spreading a message with which it disagree[d]" and therefore was subject to (and failed) strict First Amendment scrutiny. *I .* at 17-21.

So too, in *T* , the Court held that cable operators – companies that own cable lines and choose which stations to offer their customers – "engage in and transmit speech." 512 U.S. at 636. "[B]y exercising editorial discretion over which stations or programs to include in [their] repertoire," the Court said, they "seek to communicate messages on a wide variety of topics and in a wide variety of formats." *I .* (quotation marks omitted); *a A . E . TV C . F* , 523 U.S. 666, 674 (1998) ("Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."). Because cable operators' decisions about which channels to transmit were protected speech, the challenged regulation requiring operators to carry broadcast TV channels triggered First Amendment scrutiny. 512 U.S. at 637.[2]

Most recently, the Court applied the editorial-judgment principle to a parade organizer in *H . I A a Ga , L a & B a G B* , explaining that parades (like newspapers and cable TV packages) constitute protected expression. 515 U.S. at 568. The Supreme Judicial Court of Massachusetts had attempted to apply the state's public accommodations law to require the organizers of a privately run parade to allow a gay pride group to march. *I .* at 564. Citing *M a H a* , and using words equally applicable here, the Court observed that "the presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First Amendment security" and that the "selection of contingents to make a parade is entitled to similar protection." *I .* at 570. The Court concluded it didn't matter that the state was attempting to apply a public accommodations statute because "once the expressive character of both the parade and the marching [gay rights] contingent [was] understood, it bec[ame] apparent that the state courts' application of the statute had the effect of declaring the [parade] sponsors' speech itself to be the public accommodation," which "violates the fundamental rule of . . . the First Amendment, that a speaker has the

[2] In *Turner,* the Court applied intermediate scrutiny because the law was content-neutral. *See* 512 U.S. at 662. The point for present purposes is that the Court held that the must-carry provision triggered First Amendment scrutiny.

autonomy to choose the content of his own message." *I .* at 573. Nor did it matter, the Court explained, that the parade didn't produce a "particularized message": The parade organizer's decision to "exclude a message it did not like from the communication it chose to make" was "enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another"—a choice "not to propound a particular point of view" that is "presumed to lie beyond the government's power to control." *I .* at 574-75.

Together, *M a H a* , *PG&E*, *T ,* and *H* establish that a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are First-Amendment-protected editorial judgments. Social media platforms' content-moderation decisions constitute the same sort of editorial judgments and thus trigger First Amendment scrutiny.

2.

Separately, we might also assess social media platforms' content-moderation practices against our general standard for what constitutes inherently expressive conduct protected by the First Amendment:

> In determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message. If we find that the conduct in question is expressive, any law regulating that conduct is subject to the First Amendment.

C a R , 6 F.4th at 1254.

In *C a R* , a Christian ministry and media organization sued Amazon.com, alleging Amazon's decision to exclude the organization from the company's "AmazonSmile" charitable-giving program—based on the Southern Poverty Law Center's designation of the organization as a "hate group"—constituted religious discrimination in violation of Title II of the Civil Rights Act of 1964. *I .* at 1250-51. We held that "Amazon's choice of what charities are eligible to receive donations through AmazonSmile" was expressive conduct – and notably, in so holding, we analogized Amazon's determination to the parade organizer's decisions in *H* about which groups to include in the march. *I .* at 1254-55. "A reasonable person would interpret" Amazon's exclusion of certain charities from the program based on the SPLC's hate-group designations, we said, "as Amazon conveying 'some sort of message' about the organizations it wishes to support." *I .* (quoting *F La a F N B . C F La a* , 901 F.3d 1235, 1240 (14th Cir. 2018) ("*FLFNB I*")).

The *C a R* case built on our earlier decision in *FLFNB I*. That case concerned a non-profit organization that distributed free food in a city park to communicate its view that society should end hunger and poverty by redirecting resources away from the military. 901 F.3d at 1238-39. When the city enacted an ordinance that would have

prohibited distributing food in parks without prior authorization, the organization sued, arguing that its food-sharing events constituted inherently expressive conduct protected by the First Amendment. *I . .* at 1239-40. We held that given the surrounding context, the organization's food-sharing events would convey "some sort of message" to the reasonable observer—and were therefore "'a form of protected expression.'" *I . .* at 1244-45 (quoting *S . Wa* , 418 U.S. 405, 410 (1974)).

3.

Social media platforms exercise editorial judgment that is inherently expressive. When platforms remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity. Platforms' content-moderation decisions are closely analogous to the editorial judgments the Supreme Court recognized in *M a H a* , *PG&E, T* , and *H* . Like parade organizers and cable operators, social media companies are in the business of delivering curated compilations of others' speech. Just as the parade organizer exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social media platforms regularly make choices "not to propound a particular point of view." *H* , 515 U.S. at 575. Platforms use editorial judgment to convey some messages but not others and cultivate different communities that appeal to different groups. For example:

- YouTube seeks to create a "welcoming community for viewers" and, to that end, prohibits a wide range of content, including spam, pornography, terrorist incitement, election and public-health misinformation, and hate speech.[3]
- Facebook engages in content moderation to foster "authenticity," "safety," "privacy," and "dignity," and accordingly, removes or adds warnings to a wide range of content—for example, posts of what it considers to be hate speech, fraud or deception, nudity or sexual activity, or public-health misinformation.[4]
- Twitter aims "to ensure all people can participate in the public conversation freely and safely" by removing content, among other categories, that it views as embodying hate, glorifying violence, promoting suicide, or containing election misinformation.[5]

Some platforms exercise editorial judgment to promote explicitly political agendas. On the right, ProAmericaOnly promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS."[6] And on the left, The Democratic Hub says its "online community is for

[3] Policies and Guidelines, YouTube, https://www.youtube.com/creators/how-things-work/policies-guidelines

[4] Facebook Community Standards, Meta, https://transparency.fb.com/policies/community-standards

[5] The Twitter Rules, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-rules

[6] ProAmericaOnly, https://proamericaonly.org

liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology."[7] All such decisions about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on each platform's own values and views—fit comfortably within the Supreme Court's editorial-judgment precedents.

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

Attempting to rebut this point, the State responds that because most content that makes it onto platforms is never reviewed – let alone removed or deprioritized – platforms aren't engaged in conduct of sufficiently expressive quality to merit First Amendment protection. The State's argument misses the point. The "conduct" the challenged provisions regulate – what this entire appeal is about – is the platforms' "censorship" of users' posts—i.e., the posts platforms do review and remove or deprioritize.[8] The question, then, is whether that conduct is expressive. For reasons we've explained, we think it unquestionably is.[9]

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[7] The Democratic Hub, https://www.democratichub.com.

[8] That some social media platforms choose to allow most content doesn't undermine their claim to First Amendment protection. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (explaining that platforms "have not been aggressively exercising their editorial discretion does not mean that they have no right to exercise their editorial discretion").

[9] Texas and other amici insist that platforms' "censorship, deplatforming, and shadow banning" activities aren't inherently expressive conduct for First Amendment purposes because the platforms don't "inten[d] to convey a particularized message." States' Amicus Br. at 6-7 (quoting *FLFNB I*, 901 F.3d at 1240). They note that the platforms' most prominent CEOs have denied accusations that their content rules are based on ideology or political perspective. But while an "intent to convey a particularized message" was once necessary to qualify as expressive conduct, *FLFNB I* explained that "[s]ince then . . . the [Supreme] Court has clarified that a 'narrow, succinctly articulable message is not a condition of constitutional protection' because 'if confined to expressions conveying a "particularized message" [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.'" *FLFNB I*, 901 F.3d at 1240 (last alteration in original) (quoting *Hurley*, 515 U.S. at 569)). Instead, we require only that a "reasonable person would interpret [the conduct] as some sort of message." Id. (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (14th Cir. 2004)).

B.

In the face of the editorial-judgment and expressive-conduct cases, the State insists S.B. 7072 doesn't even implicate, let alone violate, the First Amendment. The State's first argument relies on two cases – *P Ya a* *FAIR* in which the Supreme Court upheld government regulations that effectively compelled private actors to "host" others' speech. See 447 U.S. 74; 547 U.S. 47. The State's second argument seeks to evade—or at least minimize—First Amendment scrutiny by labeling social media platforms "common carriers." Neither argument convinces us.

1.

First, we address the "hosting" cases. *P Ya ,* is readily distinguishable. There, the Supreme Court affirmed a state court's decision requiring a privately owned shopping mall to allow members of the public to circulate petitions on its property. 447 U.S. at 76-77, 88. However, the only First Amendment interest the mall owner asserted was the right "not to be forced by the State to use [its] property as a forum for the speech of others." *I* . at 85. The Supreme Court's subsequent decisions in *PG&E* and *H* distinguished and cabined *P Ya* . The *PG&E* plurality explained that "[n]otably absent from *P Ya* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets." 475 U.S. at 12 (plurality op.); *a* . at 24 (Marshall, J., concurring in the judgment) ("While the shopping center owner in *P Ya* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest."); *H* , 515 U.S. at 580 (noting that the "principle of speaker's autonomy was simply not threatened in" *P Ya*). Because NetChoice asserts S.B. 7072 interferes with the platforms' own speech rights by forcing them to carry messages that contradict their community standards and terms of service, *P Ya* is inapposite.

FAIR may be a bit closer, but it, too, is distinguishable. There, the Supreme Court upheld a federal statute—the Solomon Amendment—that required law schools, as a condition to receiving federal funding, to allow military recruiters the same access to campuses and students as any other employer. 547 U.S. at 56. The schools, which had restricted recruiters' access because they opposed the military's "Don't Ask, Don't Tell" policy regarding gay servicemembers, protested that requiring them to host recruiters and post notices on their behalf violated the First Amendment. *I* . at 51. But the Court

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To the extent that the states argue social media platforms lack the requisite "intent" to convey a message, we find it implausible platforms would define detailed community standards, identify offending content, and remove or deprioritize that content if they didn't intend to convey "some sort of message." Unsurprisingly, the record in this case confirms platforms' intent to communicate messages through their content-moderation decisions—including that certain material is harmful or unwelcome on their sites. *See, e.g.,* Doc. 25-1 at 2 (declaration of YouTube executive explaining its approach to content moderation "is to remove content that violates [its] policies (developed with outside experts to prevent real-world harms), reduce the spread of harmful misinformation . . . and raise authoritative and trusted content"); Facebook Community Standards, *supra* (noting Facebook moderates content "in service of" its "values" of "authenticity," "safety," "privacy," and "dignity").

held the law didn't implicate the First Amendment because it "neither limit[ed] what law schools may say nor require[d] them to say anything." *I .* at 60. In so holding, the Court rejected two arguments for why the First Amendment should apply – (1) that the Solomon Amendment unconstitutionally required law schools to host the military's speech, and (2) that it restricted the law schools' expressive conduct. *I .* at 60-61.

With respect to the first argument, the Court distinguished *M a H a* , *PG&E*, and *H* because in those cases, "the complaining speaker's own message was affected by the speech it was forced to accommodate." *I .* at 63. The Solomon Amendment's requirement that schools host military recruiters did "not affect the law schools' speech," the Court said, "because the schools [were] not speaking when they host[ed] interviews and recruiting receptions": Recruiting activities, the Court reasoned, simply aren't "inherently expressive"—they're not speech—in the way editorial pages, newsletters, and parades are. *I .* at 64. Therefore, the Court concluded, "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *I .* Nor did the Solomon Amendment's requirement that schools send notices on behalf of military recruiters unconstitutionally compel speech, the Court held, as it was merely incidental to the law's regulation of conduct. *I .* at 62.

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

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

First, S.B. 7072 interferes with social media platforms' own "speech" within the meaning of the First Amendment. Social media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech. A social media platform that "exercises editorial discretion in the selection and presentation of" the content it disseminates to its users "engages in speech activity." *A . E . TV C* , 523 U.S. at 674; *S* , 564 U.S. at 570 (explaining that the "dissemination of information" is "speech within the meaning of the First Amendment"); *Ba . V* , 532 U.S. 514, 527 (2001) ("If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category.") Just as the must-carry provisions in *T* "reduce[d] the number of channels over which cable operators exercise[d] unfettered control" and therefore triggered First Amendment scrutiny, 512 U.S. at 637, S.B. 7072's content-moderation restrictions reduce the

number of posts over which platforms can exercise their editorial judgment. Because a social media platform itself "spe[aks]" by curating and delivering compilations of others' speech—speech that may include messages ranging from Facebook's promotion of authenticity, safety, privacy, and dignity to ProAmericaOnly's "No BS | No LIBERALS"—a law that requires the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights.

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

Unlike the law schools in *FAIR*, social media platforms' content-moderation decisions communicate messages when they remove or "shadow-ban" users or content. Explanatory speech isn't "necessary for the reasonable observer to perceive a message from," for instance, a platform's decision to ban a politician or remove what it perceives to be misinformation. *I . .* at 1244. Such conduct—the targeted removal of users' speech from websites whose primary function is to serve as speech platforms—conveys a message to the reasonable observer "due to the context surrounding" it. *I . .* at 1245; *a C a R* , 6 F.4th at 1254. Given the context, a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval.[10] Thus, social media platforms engage in content moderation that is inherently expressive notwithstanding *FAIR*.

[10] One might object that users know social media platforms remove content, deplatform users, or deprioritize posts only because of the platforms' speech explaining those decisions—so the conduct itself isn't inherently expressive. *See FAIR*, 547 U.S. at 66. But unlike the person who observes military recruiters interviewing away from a law school and has no idea whether the school is thereby expressing a message, we find it unlikely a reasonable observer would think the reason he rarely or never sees pornography on Facebook is that none of Facebook's billions of users ever posts any. The more reasonable inference to draw from the fact that certain types of content rarely or never appear on a platform—or why certain posts disappear, or prolific Twitter users vanish from the platform after making controversial statements—is that the platform disapproves.

It might be, we suppose, some content-moderation decisions – for instance, to prioritize or deprioritize individual posts – are so subtle users wouldn't notice them but for the platforms' speech explaining their actions. But even if some subset of content-moderation activities wouldn't count as inherently expressive conduct under *FAIR* and *FLFNB I*, many are sufficiently transparent that users would likely notice them and, in context, infer from them "some sort of message" – even in the

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The State asserts *P a* and *FAIR* establish three "guiding principles" that should lead us to conclude S.B. 7072 doesn't implicate the First Amendment. We disagree.

The first principle—that a regulation must interfere with the host's ability to speak to implicate the First Amendment— does find support in *FAIR*. *S* 547 U.S. at 64. Even so, the State's argument—that S.B. 7072 doesn't interfere with platforms' ability to speak because they can still affirmatively dissociate themselves from the content they disseminate—encounters two difficulties. As an initial matter, in at least one key provision, the Act defines the term "censor" to include "posting an addendum," i.e., a disclaimer—and thereby explicitly prohibits the very speech by which a platform might dissociate itself from users' messages. Red Stat. § 501.2041(1)(b). Moreover, and more fundamentally, if the exercise of editorial judgment—the decision about whether, to what extent, and in what manner to disseminate third-party content—is itself speech or

what it perceives to be hate speech, there's a real risk that a viewer might erroneously conclude the platform doesn't consider those posts to constitute hate speech.

The State's final principle—that to receive First Amendment protection a platform must curate and present speech so that a "common theme" emerges—is also flawed. *H* held, "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." 515 U.S. at 569-70; *FLFNB I*, 901 F.3d at 1240 (citing *H* for the proposition that a "particularized message" isn't required for conduct to qualify for First Amendment protection). And even if one could theoretically attribute a common theme to a parade, *T* makes clear that no such theme is required: It is inconceivable that one could ascribe a common theme to the cable operator's choice to carry hundreds of disparate channels, but the Court said the First Amendment protected the operator's editorial discretion. 512 U.S. at 636. The State's reliance on *P Ya* and *FAIR* and its attempts to distinguish the editorial-judgment line of cases are unavailing.

2.

The State also seeks to evade (or at least minimize) First Amendment scrutiny by labeling social media platforms "common carriers."[11] The crux of the State's position is that "[t]here are certain services that society determines people shouldn't be required to do without," and that this is "true of social media in the 21st century." Oral Arg. at 18:37

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

[11] We say "or at least minimize" because it's not entirely clear what a common carrier designation would do to First Amendment analysis. The Supreme Court has suggested common carriers "receive a lower level of First Amendment protection than other forms of communication" but has never explained the precise level of protection they do receive. Christopher S. Yoo, The First Amendment, Common Carriers, and Public Accommodations, 1 J. Free Speech L. 463, 480–82 (2021); *see also FCC v. League of Women Voters,* 468 U.S. 364, 378 (1984) (noting only that "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties"). Moreover, at common law, even traditional common carriers like innkeepers were allowed to exclude drunks, criminals, diseased persons, and others who were "obnoxious to [ ] others," and telegraph companies weren't required to accept "obscene, blasphemous, profane or indecent messages." *See* 1 Bruce Wyman, The Special Law Governing Public Service Corporations, and All Others Engaged in Public Employment §§ 632–33 (1911). Because S.B. 7072 prevents platforms from removing content regardless of its impact on others, it appears to extend beyond the historical obligations of common carriers.

a.

The first version of the argument fails because, in fact, social media platforms are not currently common carriers. That is so for at least three reasons.

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

Second, Supreme Court precedent strongly suggests that social media platforms aren't common carriers. While the Court has applied less stringent First Amendment scrutiny to television and radio broadcasters, the *T* Court cabined that approach to "broadcast" media because of its "unique physical limitations"—chiefly, the scarcity of broadcast frequencies. 512 U.S. at 637-39. Instead of "comparing cable operators to electricity providers, trucking companies, and railroads—all entities subject to traditional economic regulation"—the *T* Court "analogized the cable operators [in that case] to the publishers, pamphleteers, and bookstore owners traditionally protected by the First Amendment." *U.S. T A ,* 855 F.3d at 428 (Kavanaugh, J., dissenting); see *T* , 512 U.S. at 639. And the Court explicitly distinguished online from broadcast media in *R . A a C L U* , emphasizing that the "vast democratic forums of the Internet" have never been "subject to the type of government supervision and regulation that has attended the broadcast industry." 521 U.S. 844, 868-69 (1997). These precedents demonstrate that platforms should be treated more like cable operators, which retain their First Amendment right to exercise editorial discretion, than traditional common carriers.

Finally, Congress has distinguished internet companies from common carriers. The Telecommunications Act of 1996 explicitly differentiates "interactive computer services"—like social media platforms—from "common carriers or telecommunications servicesoIN Eu,IstaocttDtttDoRcasosochW[2In,btaoaoImp,boIro,btbtaoIa,aoIe,btoV8yWDaoIa,btpDtttD

recognition and protection of social media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights.

b.

If social media platforms are not common carriers either in fact or by law, the State is left to argue that it can force them to become common carriers, abrogating or diminishing the First Amendment rights that they currently possess and exercise. Neither law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier. Quite the contrary, if platforms currently possess the First Amendment right to exercise editorial judgment, as we hold it is substantially likely they do, then any law infringing that right—even one bearing the terminology of "common carri[age]"—should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity. *S D A a E . T . C , I . . FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Labeling leased access a common carrier scheme has no real First Amendment consequences."); *Ca S . C . . FCC*, 597 F.3d 1306, 1321–22 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (explaining that because video programmers have a constitutional right to exercise editorial discretion, "the Government cannot compel [them] to operate like 'dumb pipes' or 'common carriers' that exercise no editorial control"); *U.S. T A* , 855 F.3d at 434 (Kavanaugh, J., dissenting) ("Can the Government really force Facebook and Google . . . to operate as common carriers?").

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The State's best rejoinder is that because large social media platforms are clothed with a "public trust" and have "substantial market power," they are (or should be treated like) common carriers. Br. of Appellants at 35–37; *B . K F A . I* ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). These premises aren't uncontroversial, but even if they're true, they wouldn't change our conclusion. The State doesn't argue that market power and public importance are alone sufficient reasons to recharacterize a private company as a common carrier; rather, it acknowledges that the "basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately." Br. of Appellants at 35 (quoting *U.S. T . A . FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016)); *K* , 141 S. Ct. at 1223 (Thomas, J., concurring). The problem, as we've explained, is that social media platforms serve the public indiscriminately; they exercise editorial judgment to curate the content that they display and disseminate.

The State seems to argue that even if platforms aren't currently common carriers, their market power and public importance might justify their "legislative designation . . . as common carriers." Br. of Appellants at 36; *K* , 141 S. Ct. at 1223 (Thomas, J., concurring) (noting that the Court has suggested that common carrier regulations "may be justified, even for industries not historically recognized as common carriers, when a

business . . . rises from private to be a public concern" (quotation marks omitted)). That might be true for an insurance or telegraph company, whose only concern is whether its "property" becomes "the means of rendering the service which has become of public interest." *K* , 141 S. Ct. at 1223 (Thomas, J., concurring) (quoting *G a A . I . C . . L* , 233 U.S. 389, 408 (1914)). But the Supreme Court has squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the marketplace and hits it big. *S M a H a* , 418 U.S. at 251, 258.

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

C.

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

In summary, we conclude that social media platforms' content-moderation activities—permitting, removing, prioritizing, and deprioritizing users and posts—constitute "speech" within the meaning of the First Amendment.

III.

Having determined that it is substantially likely S.B. 7072 triggers First Amendment scrutiny, we must now determine the level of scrutiny to apply and apply it. "[A] content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny." *FLFNB II*, 11 F.4th at 1291; *a T* , 512 U.S. at 643-44, 662 (noting that although the challenged provisions "interfere[d] with cable operators' editorial discretion," they were content-neutral and so would be subject only to intermediate scrutiny). We do not believe it prudent to spend time discussing which level of scrutiny the various content-moderation provisions deserve because we believe it is substantially likely that none of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny.

When a law is subject to intermediate scrutiny, the government must show that it "is narrowly drawn to further a substantial governmental interest . . . unrelated to the suppression of free speech." *FLFNB II*, 11 F.4th at 1291. Narrow tailoring in this context means that the regulation must be "no greater than is essential to the furtherance of [the government's] interest." *O B* , 391 U.S. at 377.

We think it substantially likely that S.B. 7072's content-moderation restrictions do not further any substantial governmental interest—much less any compelling one. Nor can we discern any substantial or compelling interest that would justify the Act's significant restrictions on platforms' editorial judgment.

The State might assert some interest in counteracting "unfair" private "censorship" that privileges some viewpoints over others on social media platforms. *S* S.B. 7072 § 1(9). But a state "may not burden the speech of others in order to tilt public debate in a preferred direction," *S* , 564 U.S. at 578-79, or "advance some points of view," *PG&E*, 475 U.S. at 20 (plurality op.). Put simply, there's no legitimate—let alone substantial—governmental interest in leveling the expressive playing field. Nor is there a substantial governmental interest in enabling users—who have no vested right to a social media account—to say whatever they want on privately owned platforms that would prefer to remove their posts. By preventing platforms from conducting content moderation—which is itself expressive First-Amendment-protected activity—S.B. 7072 "restrict[s] the speech of some elements of our society in order to enhance the relative voice of others"—a concept "wholly foreign to the First Amendment." *B . Va* , 424 U.S. 1, 48-49 (1976). At the end of the day, preventing "unfair[ness]" to certain users or points of view isn't a substantial governmental interest; instead, private actors have a First Amendment right to be "unfair"— a right to have and express their own viewpoints. *M a H a* , 418 U.S. 258.

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

There is also a substantial likelihood that the consistency provision fails to advance substantial governmental interests. It is substantially unlikely that the State will be able to show an interest sufficient to justify requiring private actors to apply their content-moderation policies—to speak — "consistently." *S* § 501.2041(2)(b). Is there any interest that would justify a state forcing, for instance, a parade organizer to apply its criteria for participation in a manner that the state deems "consistent"? Could the state require the organizer to include a group that it would prefer to exclude because it allowed similar groups in the past, or vice versa? We think not. *S* *H* , 515 U.S. at 573-74. Because social media platforms exercise analogous editorial judgment, the same answer applies to them.

Even if the State could establish that its content-moderation restrictions serve a substantial governmental interest, it hasn't even attempted to and could not show that the burden that those provisions impose is "no greater than is essential to the furtherance of that interest." *O B* , 391 U.S. at 377. For instance, §§106.072(2) and 501.2041(2)(h) prohibit deplatforming, deprioritizing, or shadow-banning candidates regardless of how blatantly or regularly they violate a platform's community standards and regardless of what alternative avenues the candidate has for communicating with the public. These provisions would apply, for instance, even if a candidate repeatedly posted obscenity, hate speech, and terrorist propaganda. The journalistic-enterprises provision requires platforms to allow any entity with enough content and enough users to post anything it wants—other than true "obscen[ity]"— and prohibits platforms from adding disclaimers or warnings. *S* Red Stat. § 501.2041(2)(j). As one amicus described the problem, the provision is so broad that it would prohibit a child-friendly platform like YouTube Kids from removing—or even adding an age gate to—soft-core pornography posted by PornHub, which qualifies as a "journalistic enterprise" because it posts more than 100 hours of video and has more than 100 million viewers per year. *S* Chamber of Progress Amicus Br. at 12.[12] That seems to us the opposite of narrow tailoring.

We conclude that NetChoice has shown a substantial likelihood of success on the merits of its claim that S.B. 7072's content-moderation restrictions violate the First Amendment. Accordingly, we AFFIRM the district court's preliminary injunction.

[12] Even worse, S.B. 7072 would prohibit Facebook or Twitter from removing a video of a mass shooter's killing spree if an entity that qualifies for "journalistic enterprise" status reposted it.

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 2022-1

NETCHOICE, LLC, d.b.a. NetChoice, **Plaintiff-Appellee** **v.** DON REDBEARD, ATTORNEY GENERAL, STATE OF RED, in his official capacity; COMMISSIONERS OF THE RED STATE ELECTIONS COMMISSION in their official capacities, **Defendants-Appellants**	**Appeal from the U.S. District Court for the Southern District of Red State**

DISSENT

Grey, J., Circuit Judge, dissenting.

I part ways with my colleagues in the majority on three key issues. First, unlike the majority I do not think the platforms' censorship of certain users' posts constitutes First-Amendment-protected speech. Second, I believe the common carrier doctrine supports the constitutionality of imposing nondiscrimination obligations on the platforms. Finally, I disagree with the way the majority applies standards of scrutiny. The District Court erred in granting an injunction. Red State should be allowed to enforce S.B. 7072. I dissent.

IA.

My colleagues first erroneously conclude that the hosting regulations – the "content-moderation restrictions" – in S.B. 7072 trigger heightened First Amendment scrutiny. At its core, S.B. 7072 requires platforms to host certain speech they might otherwise prefer not to host. But mandatory hosting regulates conduct, not speech, and therefore, "does not violate [the] freedom of speech." *FAIR*, 547 U.S. at 68; *a P Ya a* 88. First principles support this rule. The First Amendment says that "Congress shall make no law" "abridging the freedom of speech." U.S. Const. amend. I. "At the Founding and

'[f]or most of our history, speech and press freedoms entailed two common law rules—first, a prohibition on prior restraints and, second, a privilege of speaking in good faith on matters of public concern.'" Jud Campbell, The Emergence of Neutrality, 131 Yale L.J. 861, 874–75 (2022). Hosting rules don't implicate those restrictions; they permit the host to say whatever it likes; it just can't remove protected third-party speech. *S I .*

The Supreme Court's cases support the view that hosting regulations do not trigger First Amendment scrutiny. The *P Ya* Court held that the First Amendment permitted California to require the owner of a shopping center to allow handbillers to collect signatures and distribute handbills on shopping center property. 447 U.S. at 86-88. The Court explained its holding with three facts: (1) the shopping center was "open to the public to come and go as they please," which mattered because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner;" (2) the California law did not "dictate[]" a "specific message"; and (3) the mall owners could "expressly disavow any connection with the message by simply posting signs." *I .* at 87.

In *FAIR* the Court extended *P Ya* , holding that a speech-hosting requirement regulated the host's "conduct, not speech." 547 U.S. at 60. Specifically, the Court examined the Solomon Amendment, which required universities to host military recruiters on the same terms that they hosted other employers. *I .* at 55-58. The Court rejected the law schools' First Amendment claim because the Solomon Amendment "d[id] not sufficiently interfere with any message of [a] school" to trigger First Amendment scrutiny. *I .* at 64. The law schools' hosting obligation instead "affect[ed]" only "what law schools must do—afford equal access to military recruiters—not what they may or may not say." *I .* at 60.

S.B. 7072 is akin to the laws upheld in *P Ya* and *FAIR*. As in *P Ya* , there is little likelihood that the public will misattribute a user's speech to the platform. Platforms are designed with usernames, pages, and the like so that user's speech is identified with the user. To reduce any minimal risk of misattribution, platforms make clear that they do not endorse their users' speech. *S , , .,* Twitter, Terms of Service § 3, https://twitter.com/en/tos. Nor does S.B. 7072 require platforms to host any particular message; it requires platforms to host all candidates and journalists—regardless of message. *S* Red Stat. § 106.072(2); *.* § 501.2041(2)(h), (j). And for other users, it merely demands they be treated consistently. Red Stat. § 501.2041(2)(b). S.B. 7072 is less intrusive than the law upheld in *FAIR*. There, the Solomon Amendment required law schools to speak affirmatively—law schools could be required to "send e-mails or post notices on bulletin boards on an employer's behalf." *FAIR*, 547 U.S. at 61. The same is not true of S.B. 7072's hosting regulations; they only require platforms to refrain from squelching user posts under limited circumstances.[1]

[1] The addendum provision works like the Solomon Amendment. Just as it would have violated the equal access requirement for a law school dean to enter a military recruiting session and shout down the recruiter, it is also censorship for a platform to bury a user's speech in a wall of addenda.

B.

In finding a First Amendment violation, the majority relies on another line of Supreme Court cases – *M a H a* , *PG&E*, *T* , and *H* that they believe establish an "editorial-judgment principle" under which a private entity has a First Amendment right to control "whether, to what extent, and in what manner to disseminate third-party-created content to the public." But the cases the majority relies on do not mention this purported rule, and other Supreme Court cases flatly contradict it.

First, none of the cases the majority rely on recognize an "editorial-judgment principle" or a distinct category of First Amendment protection for "editorial judgment." Instead, each case explains how the challenged regulation either compelled or restricted . In *M a H a* , for example, Florida's right-of-reply law both forced the *M a H a* to implicitly convey an editorial endorsement of speech it opposed and limited its opportunity to engage in other speech it would have preferred. *S* 418 U.S. at 256-58. Likewise in *T* , the Court explained that "must-carry rules regulate cable speech" because they obstruct cable operators' ability to express or convey the messages or programs they've chosen. 512 U.S. at 636-37.

If the rule my colleagues in the majority purport to follow existed, then all those cases would have been easy analytical softballs. The Court would have merely needed to explain that the cases involved a private entity that wanted to exercise "editorial judgment" over speech it hosted. And that would have been the end of each case. But that's not the route the Supreme Court took. Instead, it focused on whether the challenged regulation either compelled or restricted the private entity's own speech—and explained at length why the regulations in *M a H a* , *PG&E*, *T* , and *H* did so. Put another way, as the Supreme Court stated in *FAIR*, cases like *M a H a* , *PG&E, T* , and *H* are better categorized as "compelled speech" cases because the rules examined there "interfere[d] with a speaker's desired message." *S FAIR*, 547 U.S. at 64. That feature is absent here. Hosting others' speech does not interfere with the platforms' own message because the platforms have no message.

Second, the majority's "editorial judgment principle" conflicts with *P Ya* and *FAIR.* The majority tries to square its rule with *P Ya* by noting that there, the forum owner didn't make an editorial judgment argument. Perhaps, although that writes *P Ya* out of the U.S. Reports by making the precedent irrelevant so long as a speech host chants the magical incantation "editorial judgment!" But then we get to *FAIR*, where the forum owner *a* the editorial-judgment argument: The law schools claimed a "First Amendment right to decide whether to disseminate or accommodate a military recruiter's message" in their forum. 547 U.S. at 53. Yet the Supreme Court unanimously rejected the claimed right to choose who speaks in the law schools' forum because "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything." *I .* at 60.

The majority tries to square its "editorial-judgment principle" with *FAIR* by asserting, "platforms, unlike law-school recruiting services, are in the business of disseminating

curated collections of speech." The majority thus relies on the fact that social media platforms' is disseminating users' speech, whereas law schools' core business is not disseminating job recruiters' speech. On the majority's reasoning, the business of disseminating speech is protected editorial judgment even if casual dissemination is not.

This distinction turns law, logic, and history on their heads. First, law: The Supreme Court's cases have never stated or implied that this distinction is dispositive. If they had, phone companies and shipping services would be free to discriminate, while PG&E (whose primary business is providing electricity, not disseminating speech) would have no First Amendment right to decline to share its billing envelope space with a third party.

Next, logic: If a firm's core business is disseminating others' speech, then that should weaken, not strengthen, the firm's argument that it has a First Amendment right to censor that speech. In *P Ya* , for example, the shopping mall was open to the public—but for the purpose of shopping, not sharing expression. So, it was perhaps tenuous for the State to use the public nature of the mall to justify a -hosting requirement. *C . P Ya* , 447 U.S. at 95 (White, J., concurring in part) (noting California's hosting requirement involved communication "about subjects having no connection with the shopping centers' business"). But here, the platforms are open to the public of disseminating the public's speech. It's rather odd to say a business has more rights to discriminate when it's in the speech business than when it's in some altogether non-speech business (like shopping or teaching law).

Last, history: Communications firms have historically been the principal targets of laws prohibiting viewpoint-discriminatory transmission of speech. *S a Pa 3.* By contrast, if an entity carried speech, people, or other goods only "as a casual occupation, common carrier obligations could not be imposed." *S* Joseph Story, Commentaries on the Law of Bailments § 495 (9th ed. 1878).

C.

The foregoing explains why the majority's articulation of its "editorial-judgment principle" conflicts with Supreme Court precedent. But even if editorial judgment was a freestanding category of First-Amendment-protected expression, the majority's explanation of why the platforms' censorship falls into that category is unpersuasive.

The majority does not discuss the glaring distinctions between the platforms' censorship and the editorial judgment described in *M a H a* and *T* . For example, cable operators "exercise substantial editorial discretion in the selection and presentation of their programming"—that is, they select (with great care) *a* a limited repertoire of channels to transmit. *A . E* ., 523 U.S. at 673. Newspapers similarly publish a narrow "choice of material" that's been reviewed and edited beforehand, and they are subject to legal and reputational responsibility for that material. *S M a H a* , 418 U.S. at 258; *a .* at 261–62 (White, J., concurring). The majority does not, and cannot, suggest the platforms operate similarly.

Instead, the majority tries to equate the platforms' censorship with the editorial processes of newspapers and cable operators reasoning, "platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities." For example, YouTube censors some content to create a "welcoming community"; and Facebook censors to "foster authenticity, safety, privacy, and dignity." Because the platforms censor speech to further these amorphous goals, my colleagues hold, the First Amendment protects their censorship.

Recall that under the majority's framework, the presence of editorial judgment generates a First Amendment right to censor. But now, censorship itself—if it's explained by a generalized appeal to some attractive value—constitutes editorial judgment. This is circular: The platforms have a right to censor because they exercise editorial judgment, and they exercise editorial judgment because they censor. The only arguably non-circular part of this framework is the apparent requirement that the censorship be justified by appealing to something like a "welcoming community" (as opposed to, say, an "unwelcoming one"). But the majority gives this requirement no meaningful content: The platforms may establish a First Amendment right to censor by invoking any generalized interest, like "fostering authenticity," without even explaining how viewpoint-based censorship furthers that interest. The practical upshot is that telephone companies, email providers, shipping services, or any other entity engaged in facilitating speech can acquire a First Amendment license to censor disfavored viewpoints by merely gesturing towards "safety" or "dignity." That is not the law, as *M a H a* and *T* illustrate and *P Ya* and *FAIR* confirm.

II.

Next, the majority erroneously concludes Red State cannot not regulate social media platforms as common carriers. I disagree. The majority quickly dismisses the common carrier doctrine without addressing its history or propounding a test for how it should apply. I fill in the gaps here.

A.

The common carrier doctrine's roots lie in the notion that persons engaged in "common callings" have a "duty to serve." This principle has been part of Anglo-American law for more than half a millennium. For early English courts, this principle meant that private enterprises providing essential public services must serve the public, do so without discrimination, and charge a reasonable rate.

The common carrier's duty to serve without discrimination came to America along with the rest of the common law. *S* Charles M. Haar & Daniel Wm. Fessler, *T W S T a : A R a R C La T a Fa S A a I a* 109-40 (1986). It got its first real test with the rise of railroad empires in the second half of the nineteenth century. Rail companies became notorious for using rate differentials and exclusive contracts to control industries dependent on cross-country shipping, often structuring contracts to give allies

(like the Standard Oil Company) impenetrable monopolies. *S . at* 112–15, 129. American courts, however, often found that these discriminatory practices violated the railroads' common carrier obligations. *S , . .*, *M . Pa. R.R. C .*, 37 N.J.L. 531, 534 (1874) (refusing to enforce rate differentials because "the carrier cannot discriminate between individuals for whom he will render the service"); *N E a E C . . M . C . R.R. C .*, 57 Me.188, 196 (1869) (rejecting exclusive contract because "[t]he very definition of a common carrier excludes the idea of the right to grant

transportation and communications firms, courts focused on two things. *F* , did the carrier hold itself out to serve any member of the public without individualized bargaining? As Justice Story had explained in the transportation context, "[t]o bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation." Story, Commentaries on the Law of Bailments § 495.

Courts applied this same holding-out test to novel communications enterprises. For example, in *S a . W . N a a T C .*, 22 N.W. 237 (Neb. 1885), a Nebraska lawyer sought a writ of mandamus to compel a telephone company to put a telephone in his office. The Supreme Court of Nebraska granted the writ, explaining that the company "ha[d] undertaken with the public to send messages from its instruments, one of which it propose[d] to supply to each person or interest requiring it." *I .* at 239. Because the company had "so assumed and undertaken to the public," it could not arbitrarily deny the lawyer a telephone. *I .* Other courts agreed and clarified that telephone companies owed this common carrier obligation even though they also imposed "reasonable rules and regulations" upon their customers. *C a a & P a T . C . . Ba . & O T . C .*, 7 A. 809, 811 (Md. 1887); *a , . .*, *Wa . S a* , 93 S.E. 857, 858 (N.C. 1917) (describing this rule as "well settled").

S , courts considered whether the transportation or communications firm was "affected with a public interest." This test might appear unhelpful, but it was "quickened into life by interpretation" over centuries of common law decisions. *S* Walton H. Hamilton, *A a P I* , 39 Yale L.J. 1089, 1090 (1930). Courts applying this test looked to whether a firm's service played a central economic and social role in society. For example, the Indiana Supreme Court called the telephone "one of the remarkable productions of the present century" that had "become as much a matter of public convenience and of public necessity as were the stagecoach and sailing vessel a hundred years ago" and identified it as "an indispensable instrument of commerce." *H . I a a*, 5 N.E. 178, 182 (Ind. 1886). The *H* Court concluded that the "relations which [the telephone] has assumed towards the public make it a common carrier of news. . . and impose upon it certain well-defined obligations of a public character."). *I .*; *a , . .*, *W* , 22 N.W. at 239 ("That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned.").

In determining whether a communications firm was "affected with a public interest," courts also considered the firm's market share and the relevant market dynamics. A railroad, telegraph, or telephone company's status as the only provider in a region heavily suggested it was affected with the public interest. *S , . .*, *W* , 22 N.W. at 238 ("While there is no law giving [the phone company] a monopoly[,] . . . the mere fact of this territory being covered by the 'plant' of [the company], from the very nature and character of its business, gives it a monopoly of the business which it transacts.").

When state legislatures imposed new common carrier requirements, affected firms often challenged them, filing constitutional claims in federal court. The landmark case is *M . I* , 94 U.S. 113 (1876). Illinois passed a statute regulating railroads and grain elevators. The statute regulated grain elevators' rates and prohibited rate discrimination. *S .* at 117. Munn & Scott, proprietors of a Chicago grain elevator, argued that the statute violated the Commerce and Port Preference Clauses of Article I, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *S .* at 119-20. The thrust of the challenge was that Illinois's law subverted private property rights without compensation or sufficient justification. *S .* at 133.

The Supreme Court rejected Munn & Scott's claims and held state legislatures may constitutionally regulate private firms if the service they provide is "affected with a public interest." *I .* at 130. The Court explained that the Illinois legislature could have reasonably determined grain elevators were affected with a public interest because they were enormously important to the agriculture and shipping industries. They stood in the "gateway of commerce" and provided an indispensable link between western grain and eastern markets. *I .* at 132. And while nine firms controlled a total of fourteen grain elevators in Chicago, the market was small and interconnected enough to be abused if state regulation was prohibited. *S .* at 131.

After *M* , the Supreme Court repeatedly upheld common carrier regulations against constitutional challenges. The same year, for example, it easily rejected a railroad's challenge to Iowa rate regulation and nondiscrimination requirements. *S C ., B & Q R.R. C . . I a*, 94 U.S. 155, 161 (1876) (holding that railroads are "engaged in a public employment affecting the public interest, and, under [*M . I* , are] subject to legislative control as to their rates of fare and freight, unless protected by their charters"). It similarly rejected a constitutional challenge to a state legislature's imposition of a duty on telegraph companies to deliver messages with "impartiality and good faith." *W. U T . C . . Ja* , 162 U.S. 650, 651 (1896).

B.

The majority errs in determining the platforms are not common carriers subject to nondiscrimination regulation. My colleagues first "confess some uncertainty" as to whether the State's position is "(a) that platforms are *a a* common carriers" or "(b) that the State can, by dint of ordinary legislation, *a* them common carriers." And then it rejects each position in turn.

1.

First, the majority says social media platforms are not already common carriers because they don't currently follow common carrier obligations. In other words, they don't "act[] like common carriers." According to the majority, while platforms "generally hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by their community standards." Accordingly, they are purportedly not "acting like common carriers." But violating

common carrier obligations has never been sufficient to exempt a firm from common carrier obligations. The dominant telegraph companies, for example, offered discriminatory services before states regulated them as common carriers. Similarly, most or all modern common carriers have terms of service—for example, one must accept FedEx's terms to ship a package—and common carriers retain the right to remove unruly passengers or obscene transmissions. The relevant inquiry isn't whether a company *a* terms and conditions; it's whether it offers the "*a* terms and conditions [to] any and all groups." *S . R a I . C .*, 279 F.2d 737, 739 (5th Cir. 1960) (emphasis added). Put differently, the test is whether the company "make[s] individualized decisions, in particular cases, whether and on what terms to deal." *FCC . M V C .*, 440 U.S. at 701 (quotation omitted). Here, the platforms apply the same terms and conditions to all existing and prospective users.

The second reason the majority gives is that platforms are not common carriers because pre-existing law has not regulated them as such. The majority focuses on *T* , analogizing social media platforms to cable broadcasters. But nothing in *T* suggests that regulating platforms as common carriers would be unconstitutional. The opposite is true: Even the *T* dissenters—the Justices who were protective of cable operators' speech rights—strongly suggested the First Amendment would not prevent regulating cable operators as common carriers. *S* 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part) ("Congress might also conceivably obligate cable operators to act as common carriers for some of their channels . . . . [I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies.").

Third, the majority reasons that federal law does not regulate social media companies as common carriers, so the State should not treat them as such. *S* 47 U.S.C. § 223(e)(6) (clarifying that certain provisions of federal law should not "be construed to treat interactive computer services as common carriers"). But this is beside the point. No party is arguing either that the platforms' common carrier obligations stem from federal law, or that § 223(e)(6) preempts state common carrier regulation.

2.

The majority also finds Red State can't regulate the platforms as common carriers because they are not already common carriers: That would give the "government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier."

As I understand the majority's view, a firm can't become a common carrier unless the law already recognizes it as such, and the law may only recognize it as such if it's already a common carrier. That's circular. And it's inconsistent with the common-law history and tradition discussed above, where common carrier nondiscrimination obligations were extended from railroads, to telegraphy, to telephony, and so on. The majority doesn't purport to reconcile its approach with this history. The implication is that history doesn't matter because SB 7072 is unconstitutional under the majority's

"editorial-judgment principle." But the majority offers no persuasive justification for reading that principle into the Constitution, especially when it would contravene a deeply rooted common law nondiscrimination doctrine that's centuries older than the Constitution itself.

3.

Finally, the common carrier doctrine supports the constitutional holding that the platforms' censorship is not First-Amendment-protected speech.

The majority essentially says Red State can't regulate the platforms as common carriers because they engage in viewpoint-based censorship—the very conduct common carrier regulation would forbid. This contention is upside down. The platforms apparently believe any enterprise can avoid common carrier obligations by violating the same obligations. That is wrong and would rob the common carrier doctrine of any content.

The platforms' contention also involves a fair bit of historical amnesia. As discussed earlier, telegraph companies once engaged in extensive viewpoint-based discrimination, but that didn't immunize them from common carrier regulation. Rather, for most legislators and courts, it made such regulation more urgent. *S* Lakier, *a*, at 232-233. And nearly every other industry historically subjected to common carrier regulation initially discriminated against their customers and sought the right to continue to do so. *S , . .*, *M* , 37 N.J.L. at 532-33 (railroad); *M* , 94 U.S. at 119-20 (grain elevators); *W* , 22 N.W. at 238 (telephone); *P a Na . Ga & O C . . S a . K* , 34 N.E. 818, 818 (Ind. 1893) (gas); *C Da . Da Wa C .*, 53 N.E. 118, 121 (Ill. 1899) (water). The platforms offer no reason to adopt an ahistorical approach under which their existing desire to discriminate against their users permanently immunizes them from common carrier nondiscrimination obligations.

Moreover, the platforms are "affected with a public interest." Numerous people depend on social media platforms to communicate about civic life, art, culture, religion, science, politics, school, family, and business. The Supreme Court in 2017 recognized that platforms "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Pa a* , 137 S. Ct. at 1737. The Court's "modern public square" label reflects the fact that interactions and transactions the platforms host or facilitate are increasingly replacing in-person social interactions, cultural experiences, and economic undertakings.

In addition to their social importance, the platforms play a central role in American economic life. For those who traffic in information—journalists, academics, pundits—access to the platforms can be indispensable to vocational success. That's because in the modern economy, the platforms provide the most effective way to disseminate news, commentary, and other information. The same is true for all sorts of cultural figures, entertainers, and educators, a growing number of whom rely for much or all their income on monetizing expression posted to the platforms. Finally, even people and

companies who traffic in physical goods often lean heavily on the platforms to build their brand and market their products to consumers. That's why the platforms, which earn almost all their revenue through advertising, are among the world's most valuable corporations. Thus, just like the telephone a century ago, the platforms have become a key "factor in the commerce of the nation, and of a great portion of the civilized world." *W* , 22 N.W. at 239.

It's also true each platform has an effective monopoly over its niche of online discourse. Many early telephone companies did not have legal monopolies, but as a practical matter, they monopolized their geographic area due to the nature of the telephone business. *S* . at 238. Likewise with the platforms: While no law gives them a monopoly, "network effects entrench these companies" because it's difficult or impossible for a competitor to reproduce the network that makes an established platform useful to its users. *K* , 141 S. Ct. at 1224 (Thomas, J., concurring). To those familiar with the platforms, a few concrete examples can easily demonstrate the point. To effectively monetize, say, carpet cleaning instructional videos (a real niche), one needs access to YouTube. Alternatively, sports "influencers" need access to Instagram. And political pundits need access to Twitter. It's thus no answer to tell the censored athlete, she can just post from a different platform. As Justice Thomas has pointed out, that's like telling a man kicked off the train he can still "hike the Oregon Trail." *I* . at 1225. The platforms' entrenched market power thus further supports the reasonableness of a determination that the platforms are affected with a public interest.

Despite all this, the platforms still argue that even if S.B. 7072 is a valid common carrier regulation, it's still unconstitutional. They're wrong. The fact that the platforms fall within the historical scope of the common carrier doctrine undermines their attempt to characterize their censorship as "speech." As discussed earlier, the platforms' primary constitutional argument is that they so closely oversee the speech on their platforms that they exercise "editorial discretion" akin to a newspaper. But the same characteristics that make the platforms common carriers— (1) holding out their communications medium for the public to use on equal terms, and (2) their well-understood social and economic role as facilitators of speech—render them not newspapers but instead indispensable conduits for transporting information. Put differently, it's bizarre to posit that the platforms provide much of the key communications infrastructure on which the social and economic life of this Nation depends and yet conclude every communication transmitted through that infrastructure still implicates the platforms' own speech for First Amendment purposes.

III.

My colleagues not only erroneously conclude S.B. 7072's hosting rules trigger First Amendment scrutiny, but they compound their error by misapplying intermediate scrutiny. Specifically, they wrongly conclude the Act "do[es] not further any substantial governmental interest—much less any compelling one." But ensuring that "public has access to a multiplicity of information sources is a government purpose of the highest

IN THE SUPREME COURT OF THE UNITED STATES
APPEAL NO. 2023-2

DON REDBEARD, ATTORNEY GENERAL, STATE OF RED, in his official capacity; COMMISSIONERS OF THE RED STATE ELECTIONS COMMISSION, in their official capacities, **Petitioners** **v.** NETCHOICE, LLC, d.b.a. NetChoice, **Respondent**	**On Petition for Certiorari from the United States Court of Appeals for the Fourteenth Circuit**

ORDER GRANTING CERTIORARI

The State of Red's petition for an order of certiorari to the U.S. Court of Appeals for the Fourteenth Circuit is GRANTED. Oral argument shall occur on October 21, 2023, in Crawfordsville, Indiana, and be limited to the following issues:

1. When social media platforms curate the content they disseminate, do they engage in activity the First Amendment protects against state regulation?

2. Or do social media platforms lack First Amendment protection because they are hosts or "common carriers" whose conduct the government may freely regulate?

Petitioners shall open and close the argument.

FOR THE COURT
Pe er S lis Clerk of Court