Nos. 22-277, 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, *ET AL.*, PETITIONERS,
v.
NETCHOICE, LLC, DBA NETCHOICE, *ET AL.*,
RESPONDENTS.

NETCHOICE, LLC, DBA NETCHOICE, *ET AL.*,
PETITIONERS,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
RESPONDENT.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND ELEVENTH CIRCUITS

BRIEF FOR THE CENTER FOR GROWTH AND OPPORTUNITY, *ET AL.* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are The Center for Growth and Opportunity, Freedom Foundation of Minnesota, Illinois Policy Institute, Independence Institute, James Madison Institute, Libertas Institute, Mountain States Policy Center, Oklahoma Council of Public Affairs, Pelican Institute for Public Policy, R Street Institute, Rio Grande Foundation, and The John Locke Foundation. *Amici* are educational and research organizations committed to the faithful interpretation of the Constitution, the rule of law, market economics, individual rights, and limited government. They write and train the public on topics including economic growth, innovation, and free speech. In the states where they operate, these organizations serve as some of the few, and at times the only, organized advocates of free-market policies and regulatory restraint. Though well-intentioned, the state laws here flout these principles and will turn the internet into what has aptly been called a "splinternet" of 50 state speech codes—balkanizing the country, confusing users, overburdening websites, and impoverishing public debate. *Amici* file this brief to explain why such state laws are both unconstitutional and unneeded.

SUMMARY OF ARGUMENT

I. The laws here are unconstitutional because the Constitution mandates a national free-speech marketplace, unburdened by state interference.

A. As shown by its text and history, a key design of the Fourteenth Amendment was to prevent states

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amici* or their counsel made a monetary contribution to fund preparation or submission of this brief.

from interfering with the free flow of ideas, as southern states had done with abolitionist speech before the Civil War. Much like the Commerce Clause, the Fourteenth Amendment (taken together with the First Amendment) bars states from interfering with the sovereignty of other states and thus embodies an anti-balkanization principle. Under this Court's cases, states cannot, consistent with the First Amendment, choose how much to protect speech. But that is what Texas and Florida have attempted to do.

B. The alternative—states protecting or refusing to protect speech at will—would be 50 different speech codes. Texas and Florida, for example, both seek viewpoint neutrality but take different approaches. Texas forbids censorship based on viewpoint; Florida explicitly *allows* "censorship"—but requires websites to be "consistent" in how they censor. (Florida also immunizes some topics and speakers from moderation.) Inevitably, courts in each of these states will diverge on how to apply these differing standards. And the laws here go far beyond neutrality mandates. For example, Florida imposes a slew of requirements on websites that Texas does not. After taking all these requirements together, websites will be left to decide whether to leave up in Florida what must come down in Texas, and vice versa. Meanwhile, users in Florida and Texas who prefer a different content mix will not simply have to move to a different *website*, as they do today, but will have to move to a different *state*. All this assumes, of course, that it is technologically *possible* for websites to vary speech protections by state, but that task may exceed the abilities of the most sophisticated "geofencing" services.

Now multiply these challenges across all 50 states, and one can see the confusion and division and

burdens imposed by Florida's and Texas's approach. No such problems beset the national free-speech marketplace required by the First Amendment.

II. The laws here are unnecessary because a free-speech marketplace is best fostered—and is already being fostered—by market forces.

A. Just six years ago, in striking down a state internet regulation, this Court warned that "extreme caution" is needed in trying to regulate the moving target that is the internet. Florida and Texas showed no such caution. The Court should weigh these states' laws carefully, lest the First Amendment be shredded by 50 states regulating a fast-changing medium subject to fierce market forces.

Close—indeed strict—scrutiny is also required because the laws here alter the content of the websites' speech, rendering the laws presumptively unconstitutional. This is true even though the websites express themselves using algorithms, which are just instructions that apply the value judgments of real people. Companies have First Amendment rights to use algorithms to help them speak more effectively. Readers have First Amendment rights to *read* speech produced with help from algorithms—and to read that speech on diverse platforms, each with its own distinctive speech mix. These rights are encapsulated not only in the Speech Clause, but in the Press Clause, which guards technologies that enable speech and serve readers. Websites using algorithms are every bit as much the "press" today as the printing press was in 1791.

B. Websites today compete for attention, allowing users to choose from a rich buffet of speakers—including conservative and heterodox voices often

taken for granted. The largest social-media site in the world is Facebook, with over three billion users. It is dominated by speakers on the right. So often has Ben Shapiro led the rankings, for example, that National Public Radio recently declared that "Ben Shapiro rules Facebook." Meanwhile, over on Spotify, the top podcast is hosted by frequent critic of the left Joe Rogan, whose show collects 190 million downloads a month. Other examples abound—from psychologist and free-speech advocate Jordan Peterson (almost 670 million views on YouTube), to conservative talk-show host Dave Rubin (890 million views), to centrist journalist Bari Weiss (one million followers on Twitter, now called "X").

C. Nor are leading tech firms exempt from market forces. No company has ever ruled the tech sector for long. IBM was dethroned by Microsoft. Hewlett-Packard was beaten by Apple. AOL was bested by Yahoo, which was knocked off by Google. And the creative destruction continues. Since the Fifth Circuit christened Twitter a "monopolist," the site was sold to a self-described free-speech absolutist. Now the overhauled and renamed company is surrounded by competitors—including Threads (10 million daily active users), Bluesky (the eighth-ranked social-media option on Apple's App Store), Mastodon (1.8 million monthly active users), and Truth Social (7 million downloads). This is not to mention other upstarts, including Gab and Rumble.

As a matter of constitutional principle and sound policy, then, the laws here should be struck down. The Eleventh Circuit's judgment should be affirmed, and the Fifth Circuit's judgment should be reversed.

ARGUMENT

I. The Constitution requires a national free-speech marketplace, which would be clogged by a snarl of state speech codes.

A. The First Amendment requires the national free flow of ideas, unburdened by state protectionism.

1. The Constitution requires a national market for free speech, unhindered by state interference. Of course, the First Amendment forbids "*Congress*" from "abridging the freedom of speech[.]" U.S. Const. amend. I (emphasis added). But the Amendment's reach expanded with ratification of the Fourteenth Amendment, which incorporated the First Amendment against the States. *Stromberg* v. *California*, 283 U.S. 359 (1931); *Gitlow* v. *New York*, 268 U.S. 652 (1925). Indeed, "[t]he Fourteenth Amendment was enacted in part to prevent states from violating freedom of speech." Michael Curtis, *Oliver Wendell Holmes Devise Lecture Symposium: "Free Speech" and its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 Wake Forest L. Rev. 419, 434 & n.86 (1996) (collecting authorities).

One can see the Fourteenth Amendment's connection to speech rights in its prohibition on states abridging the "privileges or immunities" of U.S. citizens. When the Amendment was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" *Timbs* v. *Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, concurring) (internal citations and quotation marks omitted); *id.* at 691 (Gorsuch, concurring) (collecting authorities). "Those rights were the inalienable rights of citizens

that had been long recognized, and the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights against interference by the States." *Timbs*, 139 S. Ct. at 692 (Thomas, concurring) (internal citations and quotation marks omitted). Indeed, so plainly does the Fourteenth Amendment "echo[]" the First that the argument for applying the First Amendment's protections against the States is "wonderfully straightforward." Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1273 (1992); see also Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 Geo. L. J. 1241, 1299 (2010) ("in the period between the Founding and Reconstruction, the phrase 'privileges and immunities of citizens of the United States' was consistently used as a reference to federally conferred rights and privileges such as those listed in the Bill of Rights").

"An ounce of history," moreover, provides "powerful confirmation" that the Fourteenth Amendment may soundly be read to impose the First Amendment on the States. Amar, *supra*, at 1275. "From the [1830s] on, the abolitionist crusaders had understood that freedom of speech for all men and women went hand in hand with freedom of bodily liberty for slaves. The Slave Power posed a threat to Freedom—of all kinds—and could support itself only through suppression of opposition speech, with gag rules on antislavery petitions, bans on 'incendiary' publications, intrusions on the right of peaceable assembly, and so on. This global theory of Freedom was * * * quite literally the popular platform of the antislavery movement, perhaps best exemplified by an 1856 Republican

Party campaign slogan" that included the phrase "Free Speech, Free Press, Free Men." *Id*. at 1275–76.

This "global theory of Freedom" echoed through debates leading to passage of the Fourteenth Amendment. For example, the year before the Amendment was introduced, a Kentucky representative argued "the Constitution will not become fully established until the man from Massachusetts can speak out his true opinions in the State of South Carolina, and the man of Mississippi shall be heard without interruption in Pennsylvania." Tyler Valeska, *Speech Balkanization*, 65 B.C. L. Rev. ___ (2024) (forthcoming) (quoting 9 Cong. Globe, 38th Cong., 2d Sess. 237 (1865)). The same sentiment recurred in "speeches backing the Amendment's passage and decrying the interstate censorship that had plagued the Interbellum South." Valeska, *supra*, at n.129 (quoting Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 Harv. J. on Legis. 1 (1968)).

2. Given its text and history, the Fourteenth Amendment, when taken together with the First, embodies an "anti-balkanization principle" cutting against "state-by-state regulation that subverts or skews interstate channels, substantially disrupting the interstate trade in ideas." Valeska, *supra*. Like the Commerce Clause, the First Amendment, read together with the Fourteenth, "vindicates a fundamental aim of the Constitution: fostering the creation of a national [free-speech] economy and avoiding the every-State-for-itself practices that had weakened the country under the Articles of Confederation." *Mallory* v. *Norfolk S. Ry*., 143 S. Ct. 2028, 2051 (2023) (Alito, concurring). Under the First and Fourteenth Amendments, "one State's power to impose burdens on * * * interstate market[s] [in speech] * * * is not only

subordinate to the federal power over interstate commerce [in speech], but is also constrained by the need to respect the interests of other States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 571 (1996) (citing *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 194–196 (1824)).

Simply put, "[s]tates cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2375 (2018) ("*NIFLA*") (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 423–424, n.19 (1993)); see also *Riley* v. *Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection"). "'[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,' and the people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375, 2378 (holding that petitioners were likely to succeed on their claim that state compelled-speech law violated the First Amendment) (quoting *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

B. Letting the state laws here stand will yield 50 different speech codes, which will overburden websites, balkanize the country, and confuse users.

If the First Amendment cannot perform its anti-balkanization function—and the laws here are left to stand—the law governing the internet will split into 50 different conflicting regimes. The internet will become, as some commentators have warned, the "splinternet." *E.g.*, Mark Lemley, *The Splinternet*, 70 Duke

L. J. 1397, 1399 (2021) ("The balkanization of the internet is a bad thing, and we should stop it if we can."). The result will be overburdened websites, baffled users, a populace with views of reality varying by state, and impoverished public debate.

The splintering is already underway. Compare, for example, Texas's and Florida's laws. Ostensibly the laws seek the same goals. Both require websites to publish speech that they might prefer to take down. But the laws take different approaches. Texas forbids "censor[ship]" based on "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1). Effectively, then, Texas requires content moderation to be viewpoint *neutral*. By contrast, Florida *allows* "censorship" based on viewpoint, but requires websites to "apply censorship, deplatforming, and shadow banning standards in a consistent manner[.]" Fla. Stat. § 501.2041(2)(b). (Florida does not define "consistent.")

What happens, then, when Texas courts predictably define viewpoint neutrality *differently* than Florida courts define consistency? Websites may wager that everything on a topic—say, arguably racist speech—must come down in Texas, but the same content may stay up in Florida. And again, these are two states pursuing many of the same goals. What happens when states on the other side of the political divide weigh in, as they are already doing? *E.g.*, *Volokh* v. *James*, 656 F. Supp. 3d 431, 436 (S.D.N.Y. 2023) (enjoining enforcement of New York law requiring websites to facilitate the reporting of hate speech). "Americans would 'have to decide whether they want to live on a red internet, or a blue one.'" Valeska, *supra* (quoting Casey Newton, *State Tech Laws are Dividing the Internet into Blue and Red*, Platformer (Apr. 17, 2023)). And to "live" on a different internet,

Americans would have to move to a different state. That would violate the rights of the minority, who enjoy a First Amendment right to hear speech without moving states. *Infra* at 13–14.

Plus, neutrality is just one issue. Here are five idiosyncrasies of Florida's law that, so far as we know, have no parallel in Texas's law:

- websites may deplatform candidates in the two weeks just before an election;
- entities may qualify as journalistic enterprises without publishing news;
- websites may not ban otherwise-illegal material in posts by the State's preferred speakers or on the State's preferred topics;
- political candidates may post obscenity, but journalistic enterprises may not; and
- journalistic enterprises' posts may not be removed, but political candidates' posts may be.

Fla. Stat. § 501.2041(1)(c), (d); *id.* § 501.2041(2)(h), (j). Now multiply such idiosyncrasies by 50, and one can see the confusion and division that will be sown among Americans if states can force websites to publish speech they would otherwise take down.

Of course, this assumes that websites *can* satisfy 50 different legal regimes. "Texas's and Florida's laws might render platforms incapable of operation in their current forms. The platforms have argued that creating different content moderation protocols on a state-by-state basis is technologically impossible." Valeska, *supra*. "Experts have cautioned that even if a patchwork approach to social media regulation is

technically possible, it would be practically infeasible." *Ibid.* (citing Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. Chi. L. Rev. Online (June 28, 2022)).

* * *

Practical or not, Florida's and Texas's laws violate the First Amendment, which, since ratification of the Fourteenth Amendment, mandates a national free-speech marketplace. The Constitution guards against the balkanized internet, and the balkanized populace, that will result if Florida's and Texas's laws stand.

II. A free-speech marketplace is best fostered—and is already *being* fostered—by normal market forces.

Nor are Florida's and Texas's laws necessary. The market can best address the concerns of the laws' proponents, and indeed is already doing so.

A. As all Justices agreed six years ago, "extreme caution" is needed before upsetting the internet's status quo.

As an initial matter, great caution is needed before disturbing the internet's status quo. This is so for doctrinal and practical reasons.

1. Caution is needed because content-moderation decisions are speech, even when carried out by algorithms.

By forcing websites to publish certain content, the state laws here "'alter[] the content' of [the websites'] speech." *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795). As a matter of settled doctrine, such

laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). "This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *NIFLA*, 138 S. Ct. at 2371 (internal citation and quotation marks omitted).

What distinguishes one site from another is what it publishes and refuses to publish. "[C]ontent moderation *is* the product." Thomas Germain, *Actually, Everyone Loves Censorship. Even You.*, GIZMODO (Feb. 22, 2023) (emphasis added), http://bit.ly/3Rge8pI. And that product is expressive. After all, a social-media site expresses its values—and the identity of the speech community it hopes to foster—by what it publishes. A site will therefore tailor its moderation policies to create forums that are compelling to its users. By overriding those tailored moderation policies, then, the laws here "'alter[] the content' of [the sites'] speech." *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795). As a result, the laws are presumptively unconstitutional.

Nor do the First Amendment clamps loosen because websites express themselves using tools called algorithms. Algorithms are just instructions that carry out the value judgments of real people. So too is so-called artificial intelligence, or AI. It is just a tool of its creator. "AI programs' output is, indirectly, the AI company's attempt to produce the most reliable answers to user queries, just as a publisher may establish a newspaper to produce the most reliable reporting on current events. * * * The analysis shouldn't change simply because this is done through

writing algorithms, selecting training data, and then fine-tuning the models using human input rather than hiring reporters or creating workplace procedures." Eugene Volokh, Mark Lemley & Peter Henderson, *Freedom of Speech and AI Output*, 3 J. Free Speech L. 653, 654 (2023). After all, "*someone* creates AI programs, whether AI companies, universities, or people. AI creators' speech, like [that] of corporations or organizations generally, is protected by the First Amendment." *Ibid.* (emphasis added).

What is more, "[t]he First Amendment protects 'speech' and not just speakers"; and "the Court has long recognized First Amendment rights 'to hear' and 'to receive information and ideas.'" Volokh, *et al.*, *supra*, at 656, 657 & n.11 (citing, among other cases, *Kleindienst* v. *Mandel*, 408 U.S. 753, 762–763 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas") (internal quotation marks omitted); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945) ("That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt."). "Regardless of whether any speaker interests are involved in an AI program's output, readers can gain at least as much from what the program communicates as they do from commercial advertising, corporate speech, and speech by foreign propagandists—three kinds of speech that have been held to be protected in large part because of listener interests." Volokh, *supra*, at 657 (citations omitted). Texas and Florida have trampled on the right of their citizens to "hear" and to "receive information and ideas"

published by websites, even if the websites' owners curated that information, and those ideas, using tools like algorithms or AI. *Id.* at 656–657

And speaking of tools, in its Press Clause, "the First Amendment protects *technologies* that make it easier to speak." Volokh, *et al.*, *supra*, at 659 (emphasis added). "The 'press' itself refers to one such technology, the printing press, which was of course both immensely valuable and immensely disruptive. Since then, the Court has recognized such protection for film, cable television, the Internet, social media, and more. The same should apply to generative AI." *Ibid.* Just because the "press" today follows instructions written in code to show words on screens—rather than yielding to a human hand to show words on paper—it is no less a "press" in the sense used by the First Amendment. *Ibid.* Both technologies carry out human value judgments about what speech is "worthy of presentation." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995).

2. Caution is needed because the modern internet is new, vast, and ever-changing.

Beyond these many doctrinal reasons for caution, there are acute practical reasons—reasons that guided this Court just six years ago in *Packingham* v. *North Carolina*, 582 U.S. 98 (2017). There, in striking down a state internet regulation, this Court warned: "This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Id.* at 105.

Five Justices joined that opinion, but all participating Justices agreed that the Court "should be cautious in applying our free speech precedents to the Internet"; it "should proceed circumspectly, taking one step at a time." *Id*. at 118–119 (Alito, concurring).

Circumspection was especially critical, the Court noted, because the internet is vast and still evolving. "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham*, 582 U.S. at 105. Too, social media are used by overwhelming majorities of Americans. *Id*. at 104 (citing *Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)). "Seven in ten American adults use at least one Internet social networking service." *Packingham*, 582 U.S. at 105. Courts—and legislatures—should thus be wary of upsetting the internet's status quo.

Caution is especially needed when the would-be internet regulator is a *state*. As we have shown (at 5–8), the Fourteenth Amendment blocks states from curtailing free-speech rights, a problem rife in the years before the Civil War. Again, "[s]tates cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *NIFLA*, 138 S. Ct. at 2375 (quoting *Cincinnati*, 507 U.S. at 423–424, n.19); *Riley*, 487 U.S. at 796 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection").

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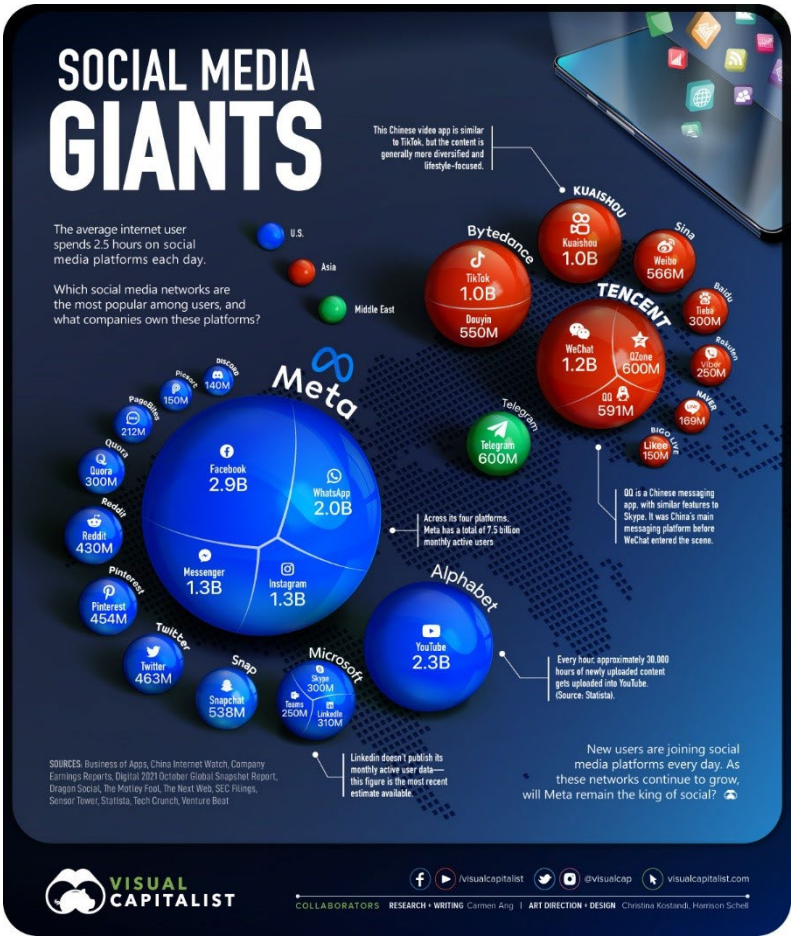
In sum, everything about this case calls for caution, as it raises First Amendment concerns in every direction. Florida and Texas showed no such caution

when they required that social-media sites—our most prolific modern printing presses—publish speech that their owners preferred to omit.

B. Thanks to fierce competition among sites, leading voices on the internet are heterodox and conservative.

The Court should proceed circumspectly for yet another reason. The status quo is not perfect, but it is good. Social-media sites today compete fiercely for attention, allowing users to choose from a smorgasbord of speakers—including conservative and heterodox voices too often taken for granted.

Take for example Facebook, the current goliath among social-media companies. "In 2022, Meta [Facebook's parent] made $116 billion in revenue, more than the combined total of every other social app." David Curry, *Social App Report* (2023), BusinessofApps (Nov. 15, 2023), http://bit.ly/3XyV7PS. Facebook's growth has been astonishing. In its first year (2004), Facebook reached over a million monthly active users. Kurt Wagner and Rani Molla, *Facebook's First 15 Years Were Defined by User Growth*, Vox (Feb. 5, 2019), http://bit.ly/3GTnvp7. In 2008, Facebook hit 100 million users. *Ibid.* By October 2012, Facebook reached over a billion users. *Ibid.* As of October 2023, Facebook monthly users numbered 3.05 billion. Meta, Meta Reports Third Quarter 2023 Results (Oct. 25, 2023), https://bit.ly/41iXOIb. Here is a graphic showing how Facebook and its parent, Meta, compare in user numbers to the other top social-media players:



Carmen Ang, *Ranked: The World's Most Popular Social Networks, and Who Owns Them*, Visual Capitalist (Dec. 6, 2021), https://bit.ly/3XApgOv.

When speaking of Facebook, Ben Shapiro bears special mention. So popular has Shapiro been on Facebook that National Public Radio declared that "Ben Shapiro rules Facebook." Miles Parks, *Outrage as a*

Business Model: How Ben Shapiro is Using Facebook to Build a Business Empire, National Public Radio (July 19, 2021), http://bit.ly/3CY1bJP. "An NPR analysis of social media data found that over the past year, stories published by the site Shapiro founded, The Daily Wire, received more likes, shares and comments on Facebook than any other news publisher by a wide margin." *Ibid*. "In May [2021], The Daily Wire generated more Facebook engagement on its articles than The New York Times, The Washington Post, NBC News and CNN combined." *Ibid*. "The conservative podcast host * * * drives an engagement machine unparalleled by anything else on the world's biggest social networking site." *Ibid*.

Facebook has company in publishing conservative speech. Last year, Shapiro's podcast ranked in the top ten Apple podcasts. Apple, *Apple reveals the most popular podcasts of 2022* (Dec. 5, 2022), https://apple.co/3WbQMAQ. Likewise, Spotify just announced that for the fourth straight year its leading podcast was The Joe Rogan Experience. Todd Spangler, *Joe Rogan Again Had Spotify's No. 1 Podcast in 2023.*, Variety (Nov. 29, 2023), https://bit.ly/3R3Vf80. Rogan, of course, drew attention for his views on Covid vaccines and for hosting guests who took heterodox views on the vaccines. Josh Dickey, *Joe Rogan Is Talking About Vaccines Again*, The Wrap (Apr. 13, 2022), https://bit.ly/3XE3nxK. His podcast is "effectively a series of wandering conversations, often over whiskey and weed, on topics including but not limited to: comedy, cage-fighting, psychedelics, and the political excesses of the left." Matt Flegenheimer, *Joe Rogan Is Too Big to Cancel*, N.Y. Times (July 1, 2021).

The size of Rogan's audience is staggering. "In 2019, Mr. Rogan said his podcast was downloaded

about 190 million times in a month. Some single episodes have reached tens of millions." Flegenheimer, *supra*. So big has Rogan become that the New York Times declared him "too big to cancel." *Ibid*.

Shapiro and Rogan are not alone as heterodox thinkers with legions of followers. Clinical psychologist, author, and free-speech advocate Jordan Peterson made his name on YouTube, where his channel now has 7.5 million subscribers, up 25% from last year. Jordan B Peterson (@JordanBPeterson), YouTube, https://bit.ly/3XjDSC7. Peterson's YouTube videos have been watched almost 670 million times, up over 30% from last year. *Ibid*. Conservative talk-show host Dave Rubin's videos have been viewed over 890 million times. Dave Rubin (@RubinReport), *About*, YouTube, https://bit.ly/3ZIitnN. The heterodox journal Quillette is visited an average of 1.6 million times per month. Semrush, *October 2023 Traffic Stats* (Quillette.com) (last visited Dec. 7, 2023), https://bit.ly/46Lkjqs.

Journalist Bari Weiss likewise is enjoying a swelling following online just a few years after evacuating the New York Times because, in her view, the Times was too inhospitable to centrists. Bari Weiss, *Resignation Letter*, https://bit.ly/3IVd0nJ. According to Weiss, she had been hired "with the goal of bringing in * * * first-time writers, centrists, conservatives and others who would not naturally think of The Times as their home. The reason for this effort was clear: The paper's failure to anticipate the outcome of the 2016 election meant that it didn't have a firm grasp of the country it covers." *Ibid*. But instead of following the truth, the paper became a progressive "performance space" where truth was "molded to fit the needs of a predetermined narrative." *Ibid*.

So Weiss left and founded her own podcast and journal, which were so successful that Weiss launched a media firm called The Free Press. *About The Free Press*, The Free Press, https://bit.ly/3wetFec. The company has fifteen employees, and the journal has 330,000 subscribers. Jemima Kelly, *Journalist Bari Weiss: "I hate bullies, period,"* Financial Times (Mar. 24, 2023), https://on.ft.com/3uq3LXm. Weiss has one million followers on X (formerly called Twitter). @bariweiss, X (Dec. 6, 2023), https://bit.ly/3sPtOHa.

* * *

All these conservative and heterodox media success stories have been possible despite hostile gatekeepers in traditional media. Why? Because of the openness, dynamism, and competitiveness of the internet. By interfering with these market forces, Texas and Florida are disrupting the very environment that has allowed diverse voices to flourish.

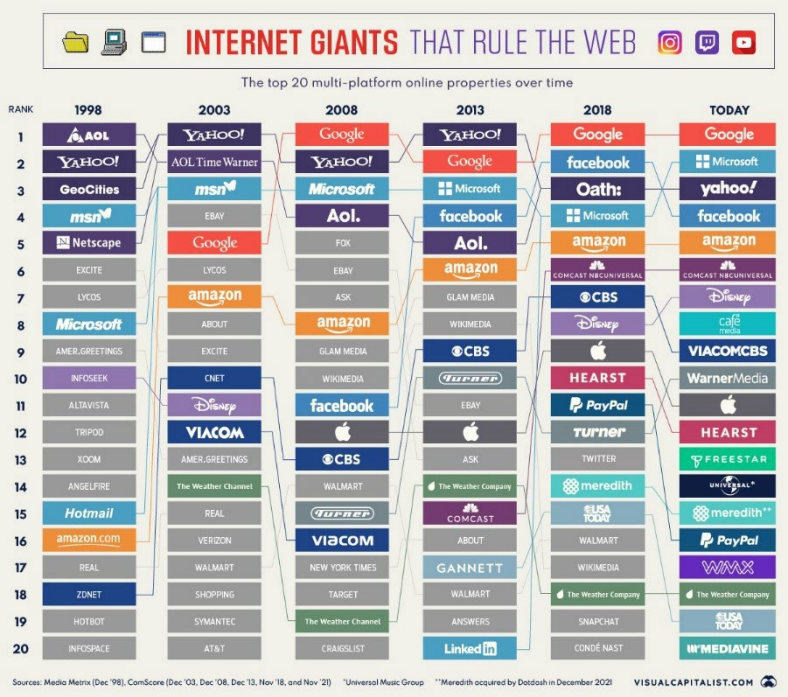
C. Assuming that large tech firms need government control ignores that no one ever rules the tech sector for long.

Again, none of this is to deny that social-media sites have behaved poorly—perhaps especially Twitter (again, now called X), whose excesses new owner Elon Musk exposed in releases that some called the Twitter Files. *E.g.*, Ryan Mills, *Twitter Files: Platform Suppressed Valid Information from Medical Experts about Covid-19*, National Review (Dec. 26, 2022), https://bit.ly/3ISV64Y. Nor is it to deny that some *amici* believe that investigations may be needed, especially if websites caved to government pressure or colluded with government officials. But the solution is not for state governments to impose

their own curatorial and editorial judgments. The primary solution is the market.

1. The history of large tech companies is a history of turnover.

From the days when Microsoft overtook IBM and Apple surpassed Hewlett-Packard, no one has ever lasted long atop the tech sector. And since the internet exploded into public view in the 1990s, its history has been one scene after another of what economist Joseph Schumpeter called "creative destruction." *Capitalism, Socialism and Democracy* 84 (3d ed. 1950). AOL, Netscape, Yahoo—all enjoyed their day in the sun but were elbowed aside by competitors offering more desirable products:



Nick Routley, *The 20 Internet Giants That Rule the Web*, Visual Capitalist (Jan. 19, 2022), https://bit.ly/2CQeaP0.

This chart may soon be out of date, given the unprecedented rise of OpenAI and other artificial-intelligence providers. Earlier this year, OpenAI's ChatGPT became "the fastest-growing consumer internet app of all time," hitting about 100 million monthly users in just two months—a threshold that Facebook did not reach for over four years. Jon Porter, *ChatGPT continues to be one of the fastest-growing services ever*, The Verge (Nov. 6, 2023), https://bit.ly/3NewO6S.

Sometimes the results of these power changes please the left; other times they please the right. The key is not to focus on who is up or down right now. It is to note that ultimately the winners are consumers, who "gain when firms try to 'kill' the competition and take as much business as they can." *R.J. Reynolds Tobacco Co.* v. *Cigarettes Cheaper!*, 462 F.3d 690, 696 (7th Cir. 2006) (Easterbrook, J.). If a website's product leaves room for competition, the market will provide that competition in short order.

2. Twitter, which the Fifth Circuit dubbed a "monopolist," is under new ownership, has been rebranded as a free-speech zone, and faces hostile competitors.

Take Twitter, for example. Since the Fifth Circuit christened it a "monopolist" (Pet. App. 2a (No. 22-555)), Twitter has changed hands—bought out by self-described "free-speech absolutist" Elon Musk. Ephrat Livni, "*Shadow Banning,"* N.Y. Times (Jan. 15, 2023). The company, now called "X," has been "reshaped so

rapidly" that—in the words of Musk—it "can be thought of as an inverse startup." Alexa Corse, *Musk Says Twitter is Worth Less Than Half What He Paid*, Wall Street Journal (Mar. 27, 2023). According to Musk, "[r]adical changes have been necessary in part to ensure that [X] didn't go bankrupt." *Ibid.*

X faces fierce competition for its "particular niche of online discourse" (Pet. App. 71a (No. 22-555)), sometimes known as microblogging. For example, Meta's version of X, called Threads, has "10 million daily active users globally, including many who have flocked to Threads * * * in search of what they describe as civil discourse." Salvador Rodriguez & Meghan Bobrowsky, *Meta's Threads Draws Power Users Seeking Alternative to Elon Musk's X*, Wall Street Journal, Oct. 24, 2023. "As of * * * September [2023], X's market share dropped to less than 82% while Threads has gained nearly 18% of the market." *Ibid.*

Other X competitors include "decentralized" social-media offerings like Mastodon, which can be hosted "on independent servers," using their own membership rules, "rather than [on servers] operated privately by a single company, the way Meta * * * runs Facebook and Instagram." Cordilia James, *Tired of Twitter? Unhappy Users Flock to Invitation-Only Bluesky*, Wall Street Journal (May 4, 2023). Rivals to X also include Bluesky, which lets users select moderation services from third parties. Jay Graber, *Composable Moderation*, Bluesky (Apr. 13, 2023), https://bit.ly/3uShJ4p. Recently, Bluesky was the eighth-ranked U.S. social-media application on Apple's App Store; it was ranked twenty-second in the U.S. Google Play store. James, *supra.* For its part, Mastodon reportedly has 1.8 million monthly users. Meera Navlakha, *Turns Out Mastodon Has Way More*

Active Users Than It Thought, Mashable (Oct. 10, 2023), https://bit.ly/47MKhef.

Still other networks are competing with X. Gab is a network founded in 2016 to "defend, protect and preserve free speech online for all people." Jazmin Goodwin, *Gab: Everything you need to know about the fast-growing, controversial social network*, CNN (Jan. 17, 2021), https://cnn.it/3XD25Df; Gab, *Website Terms of Service*, https://bit.ly/3ZKaaYw. The same is true of Rumble, a YouTube competitor that boasts 78 million monthly global users. Tom Parker, *Rumble sets new record of 78 million monthly active users*, Reclaim the Net (Sept. 7, 2022), https://bit.ly/3ZIHXRR.

Just last year, former president Donald Trump launched a new site called Truth Social; the application has been downloaded seven million times. Matthew Goldstein, *Trump's Truth Social Site Could Struggle to Survive Without New Financing*, N.Y. Times, Nov. 17, 2023. By its own telling, "Truth Social is America's 'Big Tent' social media platform that encourages an open, free, and honest global conversation without discriminating on the basis of political ideology." See https://truthsocial.com/. Although the site is struggling, it says it has "given millions of Americans their voices back using technology operated at a fraction of the cost of the Big Tech platforms." Goldstein, *supra.*

* * *

The Constitution, this Court's precedents, today's robust market offerings, and constant market upheavals all counsel for "extreme caution" here—caution to protect the internet as is. *Packingham*, 582 U.S. at 105. In ordering private websites to publish speech that they would otherwise refuse, Florida and

Texas showed no such caution. Their laws should be overturned so that the market can continue to provide a free nationwide flow of ideas, and the mix of speech preferred by listeners, not governments.

CONCLUSION

The Court should affirm the Eleventh Circuit's judgment and reverse the Fifth Circuit's.

Respectfully submitted.

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