IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC, and **Chelsey Nelson,**

Plaintiffs,

v.

Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission–Enforcement; Louisville Metro Human Relations Commission–Advocacy; Verná Goatley, in her official capacity as Executive Director of the Louisville Metro Human Relations Commission–Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission–Enforcement,

Defendants.

Case No. 3:19-cv-00851-BJB-CHL

Notice of Supplemental Authority in Support of Plaintiffs' Combined Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Their Summary Judgment

Plaintiffs Chelsey Nelson and her photography studio file this notice of supplemental authority about *FEC v. Cruz*, 142 S. Ct. 1638 (2022) (Exhibit A) and *NetChoice, LLC v. Attorney General, State of Florida*, No.21-12355, 2022 WL 1613291 (11th Cir. May 23, 2022) (Exhibit B). *Cruz* bolsters Chelsey's standing, *Netchoice* supports her free-speech claims, and both cases demonstrate Louisville's high burden to justify applying its law to Chelsey.

***FEC v. Cruz*:** In *Cruz*, the Bipartisan Campaign Reform Act (BCRA) placed a $250,000 loan cap on what political campaign committees could repay candidates for federal office from their own personal contributions. 142 S. Ct. at 1645–46. The Federal Election Commission (FEC) then promulgated regulations to implement this cap. *Id*. Before the election, Senator Ted Cruz donated $260,000 to his re-election campaign committee and only received $250,000 back after the election because of the BCRA limits. *Id*. Cruz challenged the BCRA and its regulations based on this $10,000 injury for burdening his and his campaign's First Amendment right to engage in campaign spending. The Court agreed and held that the BCRA and its regulations had to pass but failed heightened scrutiny. *Id.* at 1650–57.

Cruz supports Chelsey's standing in two ways. *First*, the Court rejected Louisville's argument that "manufactured" injuries (Doc. 97, PageID.3821) prevent standing. 142 S. Ct. at 1647. Cruz had standing "even if" his injury was "willingly incurred" when his "sole and exclusive motivation behind [his] actions … was to establish the factual basis for this challenge." *Id.* Of course here, Chelsey has been and genuinely wants to create certain photographs and express certain views. So Louisville's arguments are factually wrong and, as *Cruz* underscores, legally irrelevant. Doc. 104, PageID.4550–51.

Second, the Court found standing because the BCRA and its regulations were intertwined—just like the Accommodations and Publication Provisions. *Id.* at 4560–61. Cruz's injury was "traceable" to the *BCRA* even though it was caused "by the

agency's threatened enforcement of its *regulation*." 142 S. Ct. at 1649 (emphasis added). The regulations could not "operate independently of" the BCRA and were "expressly promulgated to implement" the BCRA, so that if the BCRA's cap was "invalid and unenforceable" the regulations were "as well." *Id.* So too with the Accommodations and Publication Provisions. Louisville's sole basis for restricting Chelsey's desired editorial statement under the *Publication Provision* is that the statement's content proposes an activity the *Accommodations Provision* prohibits. Doc. 97, PageID.3833–34. In the words of *Cruz*, the Publication Provision "implements" and cannot "operate independently" of the Accommodations Provision. Doc. 104, PageID.4560–61. So the Accommodations Provision injures Chelsey via the Publication Provision giving her standing to challenge both.

Cruz also shows that Louisville's law fails heightened scrutiny. The Court reiterated that the government must "point to record evidence"—not "conjecture," "anecdotes," or "hypothes[es]"—"demonstrating the need to address a special problem." 142 S. Ct. at 1653 (cleaned up). The Court then scrutinized and rejected the government's evidence, including "a handful of media reports," "a scholarly article," and "a few stray floor statements." *Id.* at 1653–54. The Court also rejected poll findings. The poll failed to measure key opinions (like respondents' views on contributions "*before* the election"). *Id.* at 1654. And the poll left key terms undefined so that the court could not determine whether respondents understood "political favor" as meaning legal or illegal influence. *Id.*

But Louisville has provided much more "meager" evidence than this. *Id.* For example, Louisville cites the *Masterpiece* Study to justify regulating Chelsey, but this study has more deficiencies than the poll in *Cruz:* the study did not measure creative professionals' exposure to or knowledge of *Masterpiece*, the likelihood of sexual orientation discrimination pre-*Masterpiece*, or whether non-responses resulted from legitimate message-based objections as opposed to discriminatory

intent. *See* Doc. 90. If the poll and other evidence did not satisfy heightened scrutiny in *Cruz*, Louisville's evidence cannot satisfy strict scrutiny here.

NetChoice, LLC v. Attorney General, State of Florida. In *Netchoice*, an association of internet and social-media companies challenged a Florida law that regulated how they could moderate user content posted on their platforms. 2022 WL 1613291, *3–5. These companies argued that the law violated their First Amendment by infringing and burdening their editorial judgment. The Eleventh Circuit agreed.

In doing so, the court rejected many of the arguments Louisville makes in this case. For example, Louisville says its law regulates Chelsey's conduct, not the content of her speech. Doc. 97, PageID.3832–33. Florida likewise argued that its law regulated the conduct of how companies hosted third-party speech, rather than the companies' own speech. *Netchoice*, 2022 WL 1613291, *6. But *Netchoice* rejected that, saying these companies engaged in "inherently expressive" activity when they "exercise[d] editorial judgment" over what posts to remove and how to prioritize content. *Id.* at *9. Chelsey exercises even more editorial judgment than these companies; she creates her own photographs and blogs. The *Netchoice* court also rejected the state's labels. While the state labeled the companies' activities as "conduct," the court determined that the "'conduct' that the challenged provisions regulate … is the platforms' 'censorship' of users' posts." *Id.* at *11. That logic applies with greater force here: Louisville's law directly regulates Chelsey's own speech—her choices about the content in her own photographs and blogs.

Next, while Louisville and *amici* invoke *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (Doc. 97, PageID. 3832–33, Doc. 108–1, PageID.4753–54), *Netchoice* distinguished *FAIR* because "[s]ocial-media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech." *Id.* at *13. Under that logic, Chelsey falls even further outside

of *FAIR*—she is in the business of creating, editing, and publishing her own speech. Likewise, while Louisville and *amici* distinguish *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (Doc. 97, PageID. 3833, Doc. 108–1, PageID.4752), *Netchoice* explains that these cases "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 editorial judgments protected by the First Amendment." *Id.* at *9. Chelsey exercises even more control over her expression than social-media companies because she creates her expression herself.

And while Louisville justifies regulating Chelsey's photographs and blogs because she operates a "business[] open to the general public" (Doc. 97, PageID. 3828), *Netchoice* confirmed that businesses retain their First Amendment right to make "content- and viewpoint-based decisions" even when they "generally hold themselves open to all members of the public…" *Id.* at *15.

Finally, although Louisville argues that its law survives any level of scrutiny (Doc. 97, PageID.3838–43), *Netchoice* held that the content-moderation restrictions did not "survive intermediate—let alone strict—scrutiny." *Id.* at *21. Here, Louisville's laws trigger and cannot hope to pass strict scrutiny. *See* Doc. 92–1, PageID.2825–29. Of particular import, *Netchoice* squarely rejected Louisville's argument that it has an interest in regulating Chelsey because of the "unique nature" of the services she provides. Doc. 111, Page.ID.4799. *Netchoice* said private entities don't lose First Amendment protection because they have "market power" or "public importance," because they succeed "in the marketplace and hit[] it big," or because they are more "*effective*" than other companies. 2022 WL 1613291, *16–17, 22. Simply put, if Florida could not regulate tech companies in selecting what third-party speech they host, Louisville cannot force Chelsey to personally and actively create and publish speech that violates her conscience.

For all of these reasons, *Cruz* and *Netchoice* deserve careful consideration.

Respectfully submitted this 6th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2022, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

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EXHIBIT A

142 S.Ct. 1638
Supreme Court of the United States.

FEDERAL ELECTION COMMISSION, Appellant
v.
Ted CRUZ for Senate, et al.

No. 21-12

Argued January 19, 2022

Decided May 16, 2022

Synopsis

Background: Senator and his campaign committee brought action against Federal Election Commission (FEC), alleging that provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, which placed $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened political speech in violation of First Amendment. A three-judge panel of the district court was convened pursuant to the BCRA. The United States District Court for the District of Columbia, Rao, Circuit Judge, 542 F.Supp.3d 1, denied FEC's motion to dismiss for lack of standing, granted summary judgment to plaintiffs as to the statute, and dismissed as moot the challenge to the regulation. On direct appeal, the Supreme Court postponed its consideration of its jurisdiction.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] injuries to Senator and committee were fairly traceable to challenged statute, as required for Article III standing, though Senator and committee purposely incurred their injuries;

[2] loan-repayment limitation burdened political speech, for First Amendment purposes; and

[3] prevention of quid pro quo corruption or its appearance did not justify the burden on political speech arising from loan-repayment limitation.

Affirmed.

Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

West Headnotes (25)

[1] **Federal Civil Procedure** In general; injury or interest

Federal Courts Case or Controversy Requirement

Article III limits federal courts to deciding "Cases" and "Controversies," and among other things, that limitation requires a plaintiff to have standing. U.S. Const. art. 3, § 2, cl. 1.

[2] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

The requisite elements of Article III standing are that a plaintiff must show: (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief. U.S. Const. art. 3, § 2, cl. 1.

[3] **Constitutional Law** Elections

Present inability of Senator's campaign committee to repay final $10,000 of Senator's personal loans to his committee, for Senator's reelection campaign less than four years earlier, constituted an injury in fact to both Senator and committee, as element for Article III standing to bring action against Federal Election Commission (FEC) alleging that provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened political speech in violation of First Amendment; Senator suffered $10,000 pocketbook harm, and committee was prevented from discharging its obligation to repay its debt

to Senator, which might inhibit that form of financing in the future. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[4] **Constitutional Law** Elections

Injuries to Senator and his campaign committee were fairly traceable to challenged statute, as required for Article III standing to bring action against Federal Election Commission (FEC) alleging that provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened political speech in violation of First Amendment, though Senator and committee purposely incurred their injuries in order to establish the factual basis for challenging the statute; choice of Senator and committee to subject themselves to loan-repayment limitation, did not change the fact that they were subject to the limitation and would face genuine legal penalties if they did not comply. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[5] **Federal Civil Procedure** Causation; redressability

An injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, as required for Article III standing to challenge the enactment, even if the injury could be described in some sense as willingly incurred. U.S. Const. art. 3, § 2, cl. 1.

[6] **Federal Civil Procedure** In general; injury or interest

When determining whether a plaintiff has Article III standing, courts accept as valid the merits of the plaintiff's legal claims. U.S. Const. art. 3, § 2, cl. 1.

[7] **Constitutional Law** Elections

Even assuming that Senator and his campaign committee had not exhausted the challenged statute's $250,000 cap on use of post-election contributions to repay Senator's personal loans to committee, injuries to Senator and committee, from Federal Election Commission's (FEC) threatened enforcement of its regulation prohibiting use of pre-election and post-election contributions to repay candidate loans above $250,000 that were outstanding 20 days after the election, were fairly traceable to the operation of the statute itself, as required for Article III standing to challenge the statute as burdening political speech in violation of First Amendment. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[8] **Administrative Law and Procedure** Statutory basis and limitation

Administrative Law and Procedure Effect on agency

A federal agency literally has no power to act, including under its regulations, unless and until Congress authorizes it to do so by statute.

[9] **Administrative Law and Procedure** Operation and Effect

An agency's regulation cannot operate independently of the statute that authorized it.

[10] **Constitutional Law** Elections

Senator and his campaign committee satisfied redressability element for Article III standing to challenge, as burdening political speech in violation of First Amendment, provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation that placed $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees; if statute was declared invalid and unenforceable, then the regulation, prohibiting use of pre-

election and post-election contributions to repay candidate loans to campaign committees above $250,000 that were outstanding 20 days after the election, would also be unenforceable, and injury from threatened enforcement of regulation could be redressed through remedy sought by Senator and committee, i.e., order enjoining government from taking any action to enforce loan-repayment limitation. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[11] **Federal Civil Procedure** In general; injury or interest

A plaintiff injured by one law does not thereby acquire Article III standing to challenge a different law. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

A litigant cannot, by virtue of his Article III standing to challenge one government action, challenge other governmental actions that did not injure him. U.S. Const. art. 3, § 2, cl. 1.

[13] **Constitutional Law** Political Rights and Discrimination

The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office. U.S. Const. Amend. 1.

[14] **Constitutional Law** Campaign finance in general

The First Amendment safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom to speak without legislative limit on behalf of his own candidacy. U.S. Const. Amend. 1.

[15] **Constitutional Law** Political Rights and Discrimination

First Amendment protection of conduct for campaigns for political office reflects the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. U.S. Const. Amend. 1.

[16] **Constitutional Law** Limitations on amounts

Election Law Limitations on amount of expenditures

Provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened First Amendment rights of candidates and their campaigns to engage in core political speech, and thus, government was required to justify the loan-repayment limitation by showing a permissible interest; candidates often made such loans to jumpstart a fledgling campaign or to finish strong in a tight race, and limit on use of post-election contributions increased the risk that candidate loans over $250,000 would not be repaid in full, inhibiting candidates from making such loans in the first place. U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[17] **Constitutional Law** Political speech, beliefs, or activity in general

Prevention of quid pro quo corruption or its appearance is a permissible ground under the First Amendment for restricting political speech. U.S. Const. Amend. 1.

[18] **Constitutional Law** Political speech, beliefs, or activity in general

First Amendment protection of political speech prohibits legislative attempts to tamper with the right of citizens to choose who shall govern them. U.S. Const. Amend. 1.

[19] **Constitutional Law** Limitations on amounts

Election Law Limitations on amount of contributions

Prevention of quid pro quo corruption or its appearance, which was a permissible ground under First Amendment for restricting political speech, did not justify the burden on political speech arising from provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees; such post-election contributions were otherwise regulated, in order to prevent corruption or its appearance, through $2,900 statutory cap on individual contributions to candidates for federal office and statutory requirement of public disclosure of nontrivial contributions, and government did not identify a single case of quid pro quo corruption in context of loan-repayment limitation. U.S. Const. Amend. 1; 52 U.S.C.A. §§ 30104(b)(3)(A), (c)(1), 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[20] **Constitutional Law** Campaign finance, contributions, and expenditures

Prophylaxis-upon-prophylaxis approaches to regulating campaign finance are a significant indicator, when a regulation is challenged under First Amendment as burdening political speech, that the regulation may not be necessary for the interest it seeks to protect. U.S. Const. Amend. 1.

[21] **Constitutional Law** Political speech, beliefs, or activity in general

When the government is defending a restriction on political speech as being necessary to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured, by pointing to record evidence or legislative findings demonstrating the need to address a special problem. U.S. Const. Amend. 1.

[22] **Constitutional Law** Political speech, beliefs, or activity in general

Under First Amendment protection of political speech, the government may not seek to limit the appearance of mere influence on or access to candidates, because influence and access embody a central feature of democracy, i.e., constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. U.S. Const. Amend. 1.

[23] **Constitutional Law** Contributions

The line between quid pro quo corruption and donors' general influence over candidates may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment protection of political speech, and in drawing that line, the First Amendment requires courts to err on the side of protecting political speech rather than suppressing it. U.S. Const. Amend. 1.

[24] **Constitutional Law** Limitations on amounts

Election Law Limitations on amount of expenditures

Deference to Congress would be especially inappropriate, when considering whether anticorruption goals justified burden on political speech arising from provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, where the legislative act might have been an effort to insulate legislators from effective electoral challenge. U.S. Const. Amend. 1; 52 U.S.C.A. §§ 30104(b)(3)(A), (c)(1), 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[25] **Constitutional Law** Political speech, beliefs, or activity in general

It remains the Supreme Court's role to decide whether a particular legislative choice is an unconstitutional burden on political speech. U.S. Const. Amend. 1.

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Held Unconstitutional
52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

***1641** *Syllabus*[*]

During his 2018 Senate reelection campaign and consistent with federal law, see 11 C.F.R. § 110.10; 52 U.S.C. § 30101(9)(A)(i), appellee Ted Cruz loaned $260,000 to his campaign committee, Ted Cruz for Senate (Committee). To repay these and other campaign debts, campaigns may continue to receive contributions after election day. See 11 C.F.R. § 110.1(b)(3)(i). Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA) restricts the use of post-election contributions by limiting the amount that a candidate may be repaid from such funds to $250,000. 52 U.S.C. § 30116(j). Relevant here, the Federal Election Commission (FEC) has promulgated regulations establishing three rules to implement that limitation: First, a campaign may repay up to $250,000 in candidate loans using contributions made "at any time." 11 C.F.R. § 116.12(a). Second, to the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs "within 20 days of the election." § 116.11(c)(1). Third, when the 20-day post-election deadline expires, the campaign must treat any portion above $250,000 as a contribution to the campaign, precluding later repayment. § 116.11(c)(2).

The Committee began repaying Cruz's loans after the 20-day post-election window for repaying amounts over $250,000 had closed. It accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid. Cruz and the Committee filed this action in Federal District Court, alleging that Section 304 of BCRA violates the First Amendment and raising challenges to the FEC's implementing regulation, § 116.11. The District Court granted Cruz and his Committee summary judgment on their constitutional claim, holding that the loan-repayment limitation burdens political speech without sufficient justification, and dismissed as moot their challenges to the regulation.

Held:

1. Appellees have standing to challenge the threatened enforcement of Section 304. Pp. 1646 – 1650.

(a) The Government recognizes that the Committee's present inability to repay the final $10,000 of Cruz's loans constitutes an injury in fact both to Cruz and his Committee. It maintains, however, that appellees lack Article III standing because these injuries are not traceable to the threatened enforcement of Section 304, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. First, the Government argues that appellees knowingly triggered the application of the loan-repayment limitation and thus their injuries are traceable to themselves, not the Government. This Court has never recognized an exception to Article III standing's traceability requirement for injuries that a party purposely incurs. Moreover, this Court has made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred. See *Evers v. Dwyer*, 358 U.S. 202, 204, 79 S.Ct. 178, 3 L.Ed.2d 222 (*per curiam*). Cases cited by the Government—*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264, and *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (*per curiam*)—do not alter that conclusion. In contrast to those cases, here the appellees' injuries are directly inflicted by the FEC's threatened enforcement of the provisions they now challenge. That appellees chose to subject themselves to those provisions does not change the fact that they *are* subject to them, and will face genuine legal penalties if they do not comply. Finally, the Government's observation that it should not be blamed for appellees' injuries because the Committee had a legally available alternative—*i.e.,* repaying Cruz's loans in full with pre-election funds, within 20 days of the election—misses the point. Demanding that the Committee do so would require it to forgo the exercise of the First Amendment right the Court must assume it has when assessing standing—the right to repay its campaign debts in full, at any time. Pp. 1646 – 1648.

(b) The Government next argues that although appellees would have standing to challenge the FEC's implementing regulation, § 116.11, they do not have standing to challenge Section 304 itself. The Government contends that the Committee used pre-election funds to repay the first $250,000, and thus Section 304's cap on using post-election

funds to repay a candidate's loan does not prohibit repayment of the final $10,000 here. Instead, it is the agency's regulation —with its 20-day limit—that prevents repayment. Appellees insist that they used post-election funds—in the form of overlimit contributions to the 2018 campaign that were "redesignated" as contributions to the 2024 campaign—to repay Cruz's loans. Ordinarily, it would not matter whether a plaintiff was challenging the statute's enforcement or instead the enforcement of a regulation. Here, however, the parties assume that the distinction makes a difference because the subject-matter jurisdiction of the three-judge District Court is limited to actions challenging the enforcement of the statute. See BCRA § 304(a). Even under the Government's account, the present inability of the Committee to repay and Cruz to recover the final $10,000 is traceable to the operation of Section 304 itself. An agency's regulation cannot "operate independently of" the statute that authorized it. *California v. Texas*, 593 U. S. ——, ——, 141 S.Ct. 2104, 210 L.Ed.2d 230. Here, the FEC's 20-day rule was expressly promulgated to implement Section 304. Thus, if Section 304 is invalid and unenforceable, the agency's 20-day rule is as well, and the remedy appellees sought in the District Court would redress appellees' harm by preventing enforcement of the agency's 20-day rule. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In challenging the FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation, appellees may raise constitutional claims against Section 304, the statutory provision that, through the agency's regulation, is being enforced. Cf. *Collins v. Yellen*, 594 U. S. ——, —— – ——, 141 S.Ct. 1761, 210 L.Ed.2d 432. And because they are challenging "the constitutionality of [a] provision of [BCRA]," § 403(a), jurisdiction was proper in the three-judge District Court. Pp. 1647 – 1650.

2. Section 304 of BCRA burdens core political speech without proper justification. Pp. 1650 – 1656.

(a) The loan-repayment limitation abridges First Amendment rights by burdening candidates who wish to make expenditures on behalf of their own candidacy through personal loans. Restricting the sources of funds that campaigns may use to repay candidate loans increases the risk that such loans will not be repaid in full, which, in turn, deters candidates from loaning money to their campaigns. This burden is no small matter. Debt is a ubiquitous tool for financing electoral campaigns, especially for new candidates and challengers. By inhibiting a candidate from using this critical source of campaign funding, Section 304 raises a barrier to entry—thus abridging political speech. Pp. 1650 – 1652.

(b) The Government has not demonstrated that the loan-repayment limitation furthers a permissible goal. Any law that burdens First Amendment freedoms, even slightly, must be justified by a permissible interest. Pp. 1651 – 1656.

(i) The only permissible ground for restricting political speech recognized by this Court is the prevention of "*quid pro quo*" corruption or its appearance. See *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 207, 134 S.Ct. 1434, 188 L.Ed.2d 468. Here, the Government argues that the contributions at issue raise a heightened risk of corruption because they are used to repay a candidate's personal loans. But given that these contributions are already capped at $2,900 per election in order to prevent corruption or its appearance, the approach of adding an additional layer of regulation is a significant indicator that the regulation may not be necessary for the interest it seeks to protect. See *id.* at 221, 134 S.Ct. 1434. Because the Government is defending a restriction on speech, it must do more than "simply posit the existence of the disease sought to be cured"; it must instead point to "record evidence or legislative findings" demonstrating the need to address a special problem. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795. "[M]ere conjecture" is "[in]adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434. Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context, even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Pp. 1651 – 1654.

(ii) In the absence of direct evidence, the Government turns to a scholarly article, a poll, and statements by Members of Congress to show that the contributions used to repay candidate loans carry a heightened risk of at least the appearance of corruption. All of this evidence, however, concerns the sort of "corruption," loosely conceived, that this Court has repeatedly explained is not legitimately regulated under the First Amendment. Nor is it equivalent to "legislative findings" that demonstrate the need to address a special problem. Pp. 1653 – 1655.

(iii) As a fallback argument, the Government analogizes post-election contributions used to repay a candidate's loans to gifts because they enrich the candidate as opposed to

the campaign's treasury. But this analogy is meaningful only if the baseline is that the campaign will default. The record suggests, however, that winning candidates are commonly repaid in full. For these candidates, post-election contributions bear little resemblance to a gift; they instead restore the candidate to the status quo ante. As for losing candidates, the Government does not provide any anticorruption rationale to explain why contributions to those candidates should be restricted. Finally, the Government argues for deference to Congress's "legislative judgment" that Section 304 furthers an anticorruption goal. Given scant evidence of corruption, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to "insulate[ ] legislators from effective electoral challenge." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 404, 120 S.Ct. 897, 145 L.Ed.2d 886 (BREYER, J., concurring). In the end, it remains the role of this Court to decide whether a particular legislative choice is constitutional. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93. Pp. 1655 – 1656.

542 F.Supp.3d 1, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

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Opinion

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

***1645** In order to jumpstart a fledgling campaign or finish strong in a tight race, candidates for federal office often loan money to their campaign committees. A provision of federal law regulates the repayment of such loans. Among other things, it bars campaigns from using more than $250,000 of funds raised after election day to repay a candidate's personal loans. This limit on the use of post-election funds increases the risk that candidate loans over $250,000 will not be repaid in full, inhibiting candidates from making such loans in the first place. The question is whether this restriction violates the First Amendment rights of candidates and their campaigns to engage in political speech.

I

A

Candidates for federal office may, consistent with federal law, use various sources to fund their campaigns. A candidate may spend an unlimited amount of his own money in support of his campaign. See *Buckley v. Valeo*, 424 U.S. 1, 52–54, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). His campaign—a legal entity distinct from the candidate himself—may borrow an unlimited amount from third-party lenders or from the candidate himself. See 11 C.F.R. § 110.10 (2017); 52 U.S.C. § 30101(9)(A)(i); see also *Buckley*, 424 U.S. at 52–54, 96 S.Ct. 612. And campaigns may, of course, accept contributions directly from other organizations or from individuals, subject to monetary limitations. Individual contributions are capped at $2,900 for the primary and $2,900 for the general election. See §§ 30116(a), (c); 86 Fed. Reg. 7869 (2021). Campaigns may continue to receive contributions after election day, so long as those contributions go toward repaying campaign debts. See 11 C.F.R. § 110.1(b)(3)(i).

Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 98, 52 U.S.C. § 30116(j), further restricts the use of post-election funds. Under that provision, a candidate who loans money to his campaign may not be repaid more than $250,000 of such loans from contributions

made to the campaign after the date of the election. *Ibid.* To implement that limit, the Federal Election Commission (FEC) has ***1646** promulgated regulations establishing three rules pertinent here: First, a campaign may repay up to $250,000 in candidate loans using contributions made "at any time before, on, or after the date of the election." 11 C.F.R. § 116.12(a). Second, to the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs "within 20 days of the election." § 116.11(c)(1). And third, if more than $250,000 remains unpaid when the 20-day post-election deadline expires, the campaign must treat the portion above $250,000 as a contribution to the campaign, precluding later repayment. § 116.11(c)(2).

B

Appellee Ted Cruz represents Texas in the United States Senate. This case arises from his 2018 reelection campaign, which was, at the time, the most expensive Senate race in history. Before election day, Cruz loaned $260,000 to the other appellee here, Ted Cruz for Senate (Committee). At the end of election day, however, the Committee was in the red by approximately $340,000. App. 285. It eventually began repaying Cruz's loans, but by that time the 20-day post-election window for repaying amounts over $250,000 had closed. See 11 C.F.R. §§ 116.11(c)(1), (2). The Committee accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid.

Cruz and the Committee filed this action in the United States District Court for the District of Columbia, alleging that Section 304 of BCRA violates the First Amendment. They also raised challenges to the FEC's implementing regulation, 11 C.F.R. § 116.11. A three-judge panel was convened to hear the case. See BCRA § 403(a)(1), 116 Stat. 113; see also 28 U.S.C. § 2284.

The three-judge District Court granted Cruz and his Committee summary judgment on their constitutional claim, holding that the loan-repayment limitation burdens political speech without sufficient justification. 542 F.Supp.3d 1 (2021). The District Court also ordered that appellees' challenges to the regulation, previously held in abeyance, be dismissed as moot. The Government appealed directly to this Court, as authorized by 28 U.S.C. § 1253. We postponed consideration of our jurisdiction. 594 U. S. —— (2021).

II

[1] **[2]** The Constitution limits federal courts to deciding "Cases" and "Controversies." Art. III, § 2. Among other things, that limitation requires a plaintiff to have standing. The requisite elements of Article III standing are well established: A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[3] As the Government recognizes, the Committee's present inability to repay the final $10,000 of Cruz's loans constitutes an injury in fact both to Cruz and to his Committee. See Reply Brief 8. Cruz, of course, suffers a $10,000 pocketbook harm. See *Czyzewski v. Jevic Holding Corp.*, 580 U. S. 451, 464, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017). And the bar on repayment injures the Committee by preventing it from discharging its obligation to repay its debt, which may inhibit that form of financing in the future. The Government maintains, however, that these injuries are not traceable to the threatened enforcement of Section 304, for two reasons: first, because the inability to repay Cruz's loans was "self-inflicted," and second, because it ***1647** is the threatened enforcement of an agency regulation, not the statute itself, that causes the harm. We address each argument in turn.

A

[4] First, the Government argues that appellees lack standing because their injuries were "self-inflicted." Brief for Appellant 20. Because appellees knowingly triggered the application of the loan-repayment limitation, the Government says, any resulting injury is in essence traceable to *them*, not the Government. The predicate for this argument is appellees' stipulation in the District Court that "the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loan[s] and the [C]ommittee's actions in waiting to repay them was to establish the factual basis for this challenge." App. 325. At bottom, the Government asks us to recognize an exception to traceability for injuries that a party purposely incurs.

[5] We have never recognized a rule of this kind under Article III. To the contrary, we have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such

application, even if the injury could be described in some sense as willingly incurred. See *Evers v. Dwyer*, 358 U.S. 202, 204, 79 S.Ct. 178, 3 L.Ed.2d 222 (1958) (*per curiam*) (that the plaintiff subjected himself to discrimination "for the purpose of instituting th[e] litigation" did not defeat his standing); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (a "tester" plaintiff posing as a renter for purposes of housing-discrimination litigation still suffered an injury under Article III).

The cases the Government cites do not alter our conclusion. In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013), for example, the plaintiffs attempted to manufacture standing by voluntarily taking costly and burdensome measures that they said were necessary to protect the confidentiality of their communications in light of the Government surveillance policy they sought to challenge. *Id.*, at 402, 133 S.Ct. 1138. Their problem, however, was that they could not show that they had been or were likely to be subjected to that policy in any event. *Id.*, at 416, 133 S.Ct. 1138. Likewise, in *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976) (*per curiam*), we held that the unilateral decisions by a group of States to reimburse their residents for taxes levied by other States was not a basis to attack the legality of those taxes. Nothing in the challenged taxes required the plaintiff States to offer reimbursements; accordingly, the financial injury those States suffered was due to their own independent response to taxes levied on others. *Id.*, at 664, 96 S.Ct. 2333. Here, by contrast, the appellees' injuries are directly inflicted by the FEC's threatened enforcement of the provisions they now challenge. That appellees chose to subject themselves to those provisions does not change the fact that they *are* subject to them, and will face genuine legal penalties if they do not comply. See 52 U.S.C. § 30109(a)(5); 11 C.F.R. § 111.24.

[6] One final point bears mentioning. The Government maintains that it should not be blamed for appellees' injuries because it provided the Committee with a legally available "alternative" that would have avoided any liability—repaying Cruz's loans in full with pre-election funds, within 20 days of the election. But even if such funds were available, the Government's argument largely misses the point. For standing purposes, we accept as valid the merits of appellees' legal claims, so we must assume that the loan-repayment limitation —including ***1648** the 20-day rule—unconstitutionally burdens speech. See *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("standing in no way depends on the merits of the plaintiff 's contention that particular conduct is illegal"). Demanding that the Committee comply with the Government's "alternative" would therefore require it to forgo the exercise of a First Amendment right we must assume it has—the right to repay its campaign debts in full, at any time. And this would require the Committee to subject itself to the very framework it says unconstitutionally burdens its speech. Such a principle finds no support in our standing jurisprudence. See, *e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

B

The Government next asserts that although appellees would have standing to challenge the FEC's implementing regulation, 11 C.F.R. § 116.11, they do not have standing to challenge Section 304 itself. As a reminder, Section 304 prohibits the use of post-election funds to repay a candidate's personal loans; it does not restrict the use of funds raised before the election. See 52 U.S.C. § 30116(j). That restriction comes instead from Section 304's implementing regulation, 11 C.F.R. § 116.11. This regulation provides that neither pre-election nor post-election funds may be used to repay candidate loans above $250,000 outstanding 20 days after the election. §§ 116.11(c)(1)–(2). Such amounts must instead be treated as contributions to the campaign, barring their repayment.

Bearing that in mind, the Government contends that the record before the District Court reveals that the Committee used funds raised *before* the election to repay the first $250,000 of Cruz's loans. For support, it naturally points to appellees' stipulation that "none of the $250,000 of the loan that was repaid was from contributions raised after the election." App. 329. Thus, the Government says, the Committee has not yet reached the cap in Section 304 on the use of post-election funds, and can still repay the remaining balance without running afoul of that *statutory* restriction. It is instead the agency's *regulation*—with its 20-day limit—that prevents repayment of the final $10,000. This matters, the Government insists, because "[s]tanding is not dispensed in gross," and plaintiffs must establish standing separately for each claim that they press and each form of relief that they seek. Brief for Appellant 17 (quoting *TransUnion LLC v. Ramirez*, 594 U. S. ——, ——, 141 S.Ct. 2190, 2208, 210 L.Ed.2d 568 (2021)). A challenge to the regulation, the Government argues, is separate from a challenge to the statute that authorized it.

For their part, appellees insist that the record, properly interpreted, shows that the Committee used post-election funds to repay Cruz. During the period between election day and when the Committee repaid Cruz's loans, the Committee received more than $250,000 in "redesignated" contributions to Cruz's 2024 campaign. Those contributions came from individuals who donated to the 2018 election in amounts exceeding their base limit and who, subsequent to the election, redesignated the overlimit amount to the 2024 campaign. See 11 C.F.R. § 110.1(b)(5). Such funds, appellees say, qualify as "post-election contributions" for purposes of Section 304, and may have been used to repay the first $250,000 of Cruz's loans. See § 116.12(a).

These arguments have an Alice in Wonderland air about them, with the Government arguing that appellees would *not* violate the statute by repaying Cruz, and the appellees arguing that they *would*. But ***1649** this case has unfolded in an unusual way. After all, Cruz and the Committee likely would have had standing to bring a pre-enforcement challenge (as they do now) to Section 304 in a much easier manner—by simply alleging and credibly demonstrating that Cruz wished to loan his campaign an amount larger than $250,000, but would not do so only because the loan-repayment limitation made it unlikely that such amount would be repaid. See *Susan B. Anthony List*, 573 U.S. at 158–159, 134 S.Ct. 2334. In addition, it ordinarily would not matter whether a plaintiff was challenging the statute's enforcement or instead the enforcement of a regulation and, in doing so, raising arguments about the validity of the statute that authorized the regulation. Cf. *Collins v. Yellen*, 594 U. S. ——, —— – ——, 141 S.Ct. 1761, 1779–1780, 210 L.Ed.2d 432 (2021). The parties here, however, assume that the distinction makes a difference because the subject-matter jurisdiction of the three-judge District Court is limited to actions challenging the enforcement of the statute. See BCRA § 403(a) (authorizing a three-judge court to hear any "action ... brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act").

It seems to us that the Government is likely correct that appellees have not shown that they exhausted Section 304's cap on the use of post-election funds. The loan-repayment limitation applies to contributions "made" after the date of the election. 52 U.S.C. § 30116(j). And a contribution is "considered to be made when the contributor relinquishes control" over it, which occurs when the contribution is "delivered" to the Committee or the candidate. 11 C.F.R. § 110.1(b)(6). The redesignated contributions on which appellees now rely, however, involve funds that were delivered to the Committee *before* the 2018 election. And those funds have remained under the Committee's control from that date, even if they were later redesignated to a different campaign.

[7] **[8]** **[9]** **[10]** But we need not go further down this rabbit hole. Even under the Government's account, appellees have standing to challenge the threatened enforcement of Section 304. The present inability of the Committee to repay and Cruz to recover the final $10,000 Cruz loaned his campaign is, even if brought about by the agency's threatened enforcement of its regulation, traceable to the operation of Section 304 itself. An agency, after all, "literally has no power to act"—including under its regulations—unless and until Congress authorizes it to do so by statute. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). An agency's regulation cannot "operate independently of " the statute that authorized it. *California v. Texas*, 593 U. S. ——, ——, 141 S.Ct. 2104, 2119–2120, 210 L.Ed.2d 230 (2021). And here, the FEC's 20-day rule was expressly promulgated to implement Section 304. See 68 Fed. Reg. 3973 (2003). Indeed, the Government admitted at oral argument that it could find no other basis to authorize enforcement of this regulation, Tr. of Oral Arg. 5, and "concede[d]" that "the most likely result, if the statute were declared invalid, is that the regulation would cease to be on the books or would cease to be enforceable," *ibid.* Thus, if Section 304 is invalid and unenforceable—as Cruz and the Committee contend—the agency's 20-day rule is as well. And the remedy appellees sought in the District Court —an order enjoining the Government from taking any action to enforce the loan-repayment limitation, App. 27—would redress appellees' harm by preventing enforcement of the ***1650** agency's 20-day rule. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

[11] **[12]** Contrary to the Government's suggestion, the foregoing analysis does not call into question the principle that "a plaintiff injured by one law does not thereby acquire standing to challenge a different law." Brief for Appellant 17. It is true that a litigant cannot, "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353, n. 5, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). Here, however, appellees

seek to challenge the *one* Government action that causes their harm: the FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation. In doing so, they may raise constitutional claims against Section 304, the statutory provision that, through the agency's regulation, is being enforced. Cf. *Collins*, 594 U. S., at ——– ——, 141 S.Ct., at 1779–1780. Even on the Government's version of the facts, then, we are satisfied that appellees have standing to challenge the threatened enforcement of Section 304. And because they are challenging "the constitutionality of [a] provision of [BCRA]," § 403(a), jurisdiction was proper in the three-judge District Court. We thus proceed to the merits.

III

A

[13] **[14]** **[15]** The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). It safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54, 96 S.Ct. 612. This broad protection, we have explained, "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.*, at 14, 96 S.Ct. 612 (internal quotation marks omitted).

[16] The Government seems to agree with appellees that the loan-repayment limitation abridges First Amendment rights, at least to some extent, see Brief for Appellant 27–32, and we reach the same conclusion. This provision, by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans. See 52 U.S.C. § 30101(9)(A)(i) (defining "expenditure" to include loans); see also *Buckley*, 424 U.S. at 52, 96 S.Ct. 612. By restricting the sources of funds that campaigns may use to repay candidate loans, Section 304 increases the risk that such loans will not be repaid. That in turn inhibits candidates from loaning money to their campaigns in the first place, burdening core speech.

The data bear out the deterrent effect of Section 304. After BCRA was passed, there appeared a "clear clustering of [candidate] loans right at the $250,000 threshold." A. Ovtchinnikov & P. Valta, Debt in Political Campaigns 26 (2020), Record 65–1 (Ovtchinnikov, Debt); see also Brief for United States Senator Roy Blunt et al. as *Amici Curiae* 6–7. There was no such clustering before the loan-repayment limitation went into effect. The Government's evidence in the District Court, moreover, reflects that the percentage of loans by Senate candidates for exactly $250,000 has increased tenfold since BCRA was passed. See App. 312–313. Section 304, then, has altered "the propensity of many politicians to make large loans." Ovtchinnikov, Debt 26; see also Brief for Protect the First Foundation as *Amicus Curiae* 10–11. In ***1651** doing so, it has predictably restricted a candidate's speech on behalf of his own candidacy. See *Buckley*, 424 U.S. at 54, 96 S.Ct. 612.

Quite apart from this record evidence, the burden on First Amendment expression is "evident and inherent" in the choice that candidates and their campaigns must confront. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011); see also *id.*, at 746, 131 S.Ct. 2806 ("we do not need empirical evidence to determinate that the law at issue is burdensome"); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 738–740, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (requiring no empirical evidence of a burden). Although Section 304 "does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right." *Id.*, at 738–739, 128 S.Ct. 2759. That penalty, of course, is the significant risk that a candidate will not be repaid if he chooses to loan his campaign more than $250,000. And that risk in turn may deter some candidates from loaning money to their campaigns when they otherwise would, reducing the amount of political speech. This "drag" on a candidate's First Amendment right to use his own money to facilitate political speech is no less burdensome "simply because it attaches as a consequence of a statutorily imposed choice." *Id.*, at 739, 128 S.Ct. 2759.

The "drag," moreover, is no small matter. Debt is a ubiquitous tool for financing electoral campaigns. The raw dollar amount of loans made to campaigns in any one election cycle is in the nine figures, "significantly exceeding" the amount of independent expenditures. Ovtchinnikov, Debt 11. And personal loans from candidates themselves constitute the bulk of this financing. See Brief for Appellant 35 ("more than 90% of campaign debt consists of candidate loans"). In fact, candidates who self-fund usually do so using personal loans.

See J. Steen, Self-Financed Candidates in Congressional Elections 21 (2006).

The ability to lend money to a campaign is especially important for new candidates and challengers. As a practical matter, personal loans will sometimes be the only way for an unknown challenger with limited connections to front-load campaign spending. See G. Jacobson, Money in Congressional Elections 97–101 (1980). And early spending—and thus early expression—is critical to a newcomer's success. See Steen, Self-Financed Candidates in Congressional Elections, at 35, 171. A large personal loan also may be a useful tool to signal that the political outsider is confident enough in his campaign to have skin in the game, attracting the attention of donors and voters alike. See R. Biersack, P. Herrnson, C. Wilcox, Seeds for Success: Early Money in Congressional Elections, 18 Leg. Studies Q. 535, 537 (1993); see also Brief for United States Senator Roy Blunt et al. as *Amici Curiae* 13. By inhibiting a candidate from using this critical source of campaign funding, however, Section 304 raises a barrier to entry—thus abridging political speech.

The dissent cannot and does not claim that Section 304 imposes no burden on candidate speech. See *post*, at 1659 (opinion of KAGAN, J.) ("every contribution regulation has some kind of indirect effect on electoral speech"). The dissent instead dismisses that burden as minor and insignificant. *Post*, at 1658 – 1660. As just explained, the extent of the burden may vary depending on the circumstances of a particular candidate and particular election. But there is no doubt that the law does burden First Amendment electoral speech, and any such law must at least be justified ***1652** by a permissible interest. See *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 210, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

B

With those First Amendment costs in mind, we turn to whether the loan-repayment limitation is justified. The parties debate whether strict or "closely drawn" scrutiny should apply in answering that question. *Buckley*, 424 U.S. at 25, 96 S.Ct. 612. We need not resolve this dispute because, under either standard, the Government must prove at the outset that it is in fact pursuing a legitimate objective. See *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434. It has not done so here.

1

[17] **[18]** This Court has recognized only one permissible ground for restricting political speech: the prevention of "*quid pro quo*" corruption or its appearance. See *id.*, at 207, 134 S.Ct. 1434; see also *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). We have consistently rejected attempts to restrict campaign speech based on other legislative aims. For example, we have denied attempts to reduce the amount of money in politics, see *McCutcheon*, 572 U.S. at 191, 134 S.Ct. 1434, to level electoral opportunities by equalizing candidate resources, see *Bennett*, 564 U.S. at 749–750, 131 S.Ct. 2806, and to limit the general influence a contributor may have over an elected official, see *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 359–360, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). However well intentioned such proposals may be, the First Amendment —as this Court has repeatedly emphasized—prohibits such attempts to tamper with the "right of citizens to choose who shall govern them." *McCutcheon*, 572 U.S. at 227, 134 S.Ct. 1434; see also *Davis*, 554 U.S. at 742, 128 S.Ct. 2759; *Bennett*, 564 U.S. at 750, 131 S.Ct. 2806.

[19] The Government argues that the contributions at issue raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans. It also maintains that post-election contributions are particularly troubling because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good.

[20] We greet the assertion of an anticorruption interest here with a measure of skepticism, for the loan-repayment limitation is yet another in a long line of "prophylaxis-upon-prophylaxis approach[es]" to regulating campaign finance. *McCutcheon*, 572 U.S. at 221, 134 S.Ct. 1434 (quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.)). Individual contributions to candidates for federal office, including those made after the candidate has won the election, are already regulated in order to prevent corruption or its appearance. Such contributions are capped at $2,900 per election, see 86 Fed. Reg. 7869, and nontrivial contributions must be publicly disclosed, see 52 U.S.C. §§ 30104(b)(3)(A), (c)(1). The dissent's dire predictions about the impact of today's decision elide the

fact that the contributions at issue remain subject to these requirements. See *post*, at 1657 – 1658, 1664. And the requirements are themselves prophylactic measures, given that "few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357, 130 S.Ct. 876. ***1653** Such a prophylaxis-upon-prophylaxis approach, we have explained, is a significant indicator that the regulation may not be necessary for the interest it seeks to protect. See *McCutcheon*, 572 U.S. at 221, 134 S.Ct. 1434; see also *Bennett*, 564 U.S. at 752, 131 S.Ct. 2806 ("In the face of [the State's] contribution limits [and] strict disclosure requirements ... it is hard to imagine what marginal corruption deterrence could be generated by [an additional measure].").

[21] There is no cause for a different conclusion here. Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than "simply posit the existence of the disease sought to be cured." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996). It must instead point to "record evidence or legislative findings" demonstrating the need to address a special problem. *Ibid.* We have "never accepted mere conjecture as adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)).

Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Cf. Brief for Campaign Legal Center et al. as *Amici Curiae* 17–18 (citing the 10 States that do impose such a prohibition). Our previous cases have found the absence of such evidence significant. See *Citizens United*, 558 U.S. at 357, 130 S.Ct. 876 (the Government did not claim that the political process was corrupted in the 26 States that allowed unrestricted independent expenditures by corporations); *McCutcheon*, 572 U.S. at 209, n. 7, 134 S.Ct. 1434 (the Government presented no evidence of corruption in the 30 States that did not impose aggregate limits on individual contributions).

The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But as the District Court found, those reports "merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate." 542 F.Supp.3d at 15. That is not the type of *quid pro quo* corruption the Government may target consistent with the First Amendment. See *McCutcheon*, 572 U.S. at 207–208, 134 S.Ct. 1434.

[22] The dissent at points shrugs off this distinction, see *post,* at 1657, 1662 – 1663, n. 3, 1663 – 1664, but our cases make clear that "the Government may not seek to limit the appearance of mere influence or access." *McCutcheon*, 572 U.S. at 208, 134 S.Ct. 1434. As we have explained, influence and access "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.*, at 192, 134 S.Ct. 1434.

[23] To be sure, the "line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Id.*, at 209, 134 S.Ct. 1434. And in drawing that line, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Ibid.* (quoting *Wisconsin Right to Life*, 551 U.S. at 457, 127 S.Ct. 2652 (opinion of ROBERTS, C. J.)).

***1654** 2

In the absence of direct evidence, the Government turns elsewhere. It contends that a scholarly article, a poll, and statements by Members of Congress show that these contributions carry a heightened risk of at least the appearance of corruption. Essentially all the Government's evidence, however, concerns the sort of "corruption," loosely conceived, that we have repeatedly explained is not legitimately regulated under the First Amendment.

The academic article—cited for various propositions by both sides—concludes that "indebted politicians" are "more likely to switch their votes" if they receive contributions from the banking or insurance industries. Ovtchinnikov, Debt 31. But the authors explicitly note that they cannot distinguish between voting pattern changes traceable to legitimate donor influence or access, and voting pattern changes as part of an illicit *quid pro quo*. See A. Ovtchinnikov & P. Valta, Self-Funding of Political Campaigns, Management Science, Articles in Advance 18 (April 7, 2022) (Ovtchinnikov, Self-Funding). As noted, our precedents demand adherence to that distinction. See, *e.g.*, *McCutcheon*, 572 U.S. at 209, 134 S.Ct. 1434. The authors also state that their analysis is merely a

"first step" in understanding whether politicians' self-funding decisions impact voting behavior, because they cannot "pin down a causal link" yet. Ovtchinnikov, Self-Funding 21.

The online poll the Government asks us to consider similarly misses the mark. The poll, conducted at the Government's behest for this litigation, reports that most respondents thought it "very likely" or "likely" that a person who "donate[s] money to a candidate's campaign after the election expect[s] a political favor in return." App. 351–352. But it failed to ask whether those same respondents thought it likely that donors who contribute to a campaign *before* the election also are likely to expect political favors in return. Nor did the poll mention that the individual base limits still apply to such contributions. And it failed to define the term "political favor," leaving unclear the critical issue whether the respondents associated such contributions with the direct exchange of money for official acts, which Congress may regulate, or simply increased influence and access, which Congress may not.

Finally, the Government places great weight on statements made by certain Members of Congress during debates that preceded the enactment of BCRA. One Senator, for example, remarked that without the loan-repayment limitation, a winning candidate who loaned money to his campaign could "get it back from [his] constituents [at] fundraising events" where he could ask, "How would you like me to vote now that I am a Senator?" 147 Cong. Rec. S2462 (March 19, 2001) (remarks of Sen. Domenici). Another stated that candidates "have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it." 147 Cong. Rec. S2541 (March 20, 2001) (remarks of Sen. Hutchison). Nothing these legislators said, however, constitutes actual evidence that the loan-repayment limitation was necessary to prevent *quid pro quo* corruption or its appearance. And a few stray floor statements are not the same as "legislative findings" that might suggest a special problem to be addressed. *Colorado Republican Federal Campaign Comm.*, 518 U.S. at 618, 116 S.Ct. 2309.

All the above is pretty meager, given that we are considering restrictions on "the most fundamental First Amendment activities"—the right of candidates for political office to make their case to the American people. *Buckley*, 424 U.S. at 14, 96 S.Ct. 612. In any event, the legislative ***1655** record helps appellees just as much as the Government, given that some Senators evidently viewed the limit as designed to protect incumbents like themselves from wealthy challengers. See 147 Cong. Rec. S2465 (March 19, 2001) (remarks of Sen. Sessions) ("[Section 304] prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those loans from any contributions made to the candidate.... I am glad I didn't face a person who could write a check for $60 million, $10 million —or $5 million, for that matter. If so, I would like to be able to have a level playing field so I could stay in the ball game."); see also 147 Cong. Rec. S2541 (March 20, 2001) (remarks of Sen. Hutchison) ("Our purpose is to level the playing field.").

That the limit may have been designed to protect incumbents should come as no surprise. Section 304 was enacted as part of the "Millionaire's Amendment" to BCRA, designed to hobble wealthy candidates mounting self-financed campaigns. See *Davis*, 554 U.S. at 739, 128 S.Ct. 2759. And it was debated together with another provision we have already held unconstitutional, in part because it pursued the same impermissible goal of "level[ing] electoral opportunities for candidates of different personal wealth." *Id.*, at 741, 128 S.Ct. 2759. The connection between these two provisions casts further doubt on the anticorruption interest the Government now asserts in this case.

3

Perhaps to make up for its evidentiary shortcomings, the Government falls back on what it calls a "common sense" analogy: Post-election contributions used to repay a candidate's loans are akin to a "gift" because they "add to the candidate's personal wealth" as opposed to the campaign's treasury. Brief for Appellant 33. The risk of corruption is thus greater, the Government argues, because the donor is lining the pockets of a legislator or legislator-elect.

The dissent at multiple points makes the same argument, contending that contributions that go toward repaying a candidate's loan "enrich the candidate personally," allowing him to "buy a car or make tuition payments or join a country club." *Post,* at 1660, 1664; see also *post*, at 1657, 1657 – 1658, 1660 – 1661, 1663 – 1664. But this forgets that we are talking about repayment of a *loan*, not a gift. If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that in any way.

On top of that, contributions that go toward retiring a candidate's debt could only arguably enrich the candidate

if the candidate does not otherwise expect to be repaid. In other words, the Government's gift comparison is meaningful only if the baseline is that the campaign will default. The Government, however, provides no reason to believe that most or even many *winning* candidates—the only candidates with whom its anticorruption interest is concerned—expect not to be repaid by their campaigns. To the contrary, the Government has recognized throughout this litigation that winning candidates are commonly repaid in full. See App. 31–32 (citing the former FEC Commissioner's statement that "only winners have an easy time dealing with debt"); *id.,* at 317 (same); see also Ovtchinnikov, Self-Funding 11 (concluding that, even with BCRA's limitations on loan repayment in place, two out of three winning campaigns were able to repay a candidate's loans in full). For such a candidate, then, post-election contributions bear little resemblance to a gift, because there is less of a chance that his campaign will default. Such contributions instead restore the candidate to the status quo ante, ***1656** a position to which he legitimately expected to return. As for losing candidates, they are of course in no position to grant official favors, and the Government does not provide any anticorruption rationale to explain why post-election contributions to those candidates should be restricted. See Brief for Appellant 45–46.

The analogy also proves too much. By the Government's logic, post-election contributions to retire candidate loans are little different from gifts given directly to the candidate. But that logic is belied by how the Government treats the two categories of purported "gifts." On the one hand, federal law flatly prohibits candidates from using campaign contributions for personal purposes. See 52 U.S.C. § 30114(b)(2). And it forbids Senators from accepting gifts worth $250 or more. See 2 U.S.C. § 4725(a)(1). By contrast, the postulated "gift-by-loan-repayment" limits are simply the individual contribution limits, which are now more than ten times higher than the gift limit: $2,900 per election. And Section 304 allows over 86 such "gifts" before a campaign hits the Act's $250,000 cap. Either the Government is openly tolerating a significant number of "gifts" far more generous than what it would normally think fit to allow, or post-election contributions that go toward retiring campaign debt are in no real sense "gifts" to a candidate. We find the latter answer more persuasive.

[24] As a final argument, the Government claims that if the matter is otherwise in doubt, we should defer to Congress's "legislative judgment" that Section 304 furthers an anticorruption goal. Brief for Appellant 39; see also *post*, at 1661 (KAGAN, J., dissenting) (also arguing that we have no "reason to second-guess Congress's experience-based judgment"). Such deference, the Government contends, is grounded "in part on the understanding that Congress 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.' " Brief for Appellant 40 (quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (some internal quotation marks omitted)). But as explained, the evidence here is scant, and Congress's judgment is hardly based on "vast amounts of data." *Id.,* at 195, 117 S.Ct. 1174. Moreover, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to "insulate[ ] legislators from effective electoral challenge." *Shrink Missouri Government PAC*, 528 U.S. at 404, 120 S.Ct. 897 (BREYER, J., concurring); see also *Randall v. Sorrell*, 548 U.S. 230, 248–249, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion).

[25] In the end, it remains our role to decide whether a particular legislative choice is constitutional. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); see also *Randall*, 548 U.S. at 248–249, 126 S.Ct. 2479 (stressing need for "the exercise of independent judicial judgment" in case raising concern that "contribution limits that are too low [may] harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders"). And here the Government has not shown that Section 304 furthers a permissible anticorruption goal, rather than the impermissible objective of simply limiting the amount of money in politics.

* * *

For the reasons set forth, we conclude that Cruz and the Committee have standing to challenge the threatened enforcement of Section 304 of BCRA. We also conclude that this provision burdens core political speech without proper justification. ***1657** The judgment of the District Court is affirmed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

A candidate for public office extends a $500,000 loan to his campaign organization, hoping to recoup the amount from benefactors' post-election contributions. Once elected,

he devotes himself assiduously to recovering the money; his personal bank account, after all, now has a gaping half-million-dollar hole. The politician solicits donations from wealthy individuals and corporate lobbyists, making clear that the money they give will go straight from the campaign to him, as repayment for his loan. He is deeply grateful to those who help, as they know he will be—more grateful than for ordinary campaign contributions (which do not increase his personal wealth). And as they paid him, so he will pay them. In the coming months and years, they receive government benefits—maybe favorable legislation, maybe prized appointments, maybe lucrative contracts. The politician is happy; the donors are happy. The only loser is the public. It inevitably suffers from government corruption.

The campaign finance measure at issue here has for two decades checked the crooked exchanges just described. The provision, Section 304 of the Bipartisan Campaign Reform Act of 2002, prohibited a candidate from using post-election donations to repay loans exceeding $250,000 that he made to his campaign. The theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing. At the very least —even if an illicit exchange does not occur—the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms.

In striking down the law today, the Court greenlights all the sordid bargains Congress thought right to stop. The theory of the decision (unlike of the statute) is hard to fathom. The majority says that Section 304 violates the candidate's First Amendment rights by interfering with his ability to "self-fund" his campaign. *Ante*, at 1651. But the candidate can in fact *self*-fund all he likes. The law impedes only his ability to use *other people's* money to finance his campaign—much as standard (and permissible) contribution limits do. And even that third-party restriction is a modest one, applying only to post- (not pre-) election donations to repay sizable (not small) loans. So the majority overstates the First Amendment burdens Section 304 imposes. At the same time, the majority understates the anti-corruption values Section 304 serves. In the majority's view, there is "scant" danger here of *quid pro quo* corruption; loan repayments produce only the "sort of 'corruption' " in which contributors wield "greater influence" over candidates than they otherwise would. *Ante*, at 1653 – 1654, 1656. Assume away all objections to that distinction, which even the majority concedes is "vague," *ante,* at 1653 – 1654; for better or worse, it underlies this Court's recent campaign finance decisions. Still, the conduct targeted by Section 304 threatens, if anything does, both corruption and the appearance ***1658** of corruption of the *quid pro quo* kind. That is because the regulated transactions—as Members of Congress well knew from experience—personally enrich those already elected to office. In allowing those payments to go forward unrestrained, today's decision can only bring this country's political system into further disrepute.

I

In assessing a law's burden on speech, this Court's decisions all distinguish between restricting expenditures and restricting contributions. See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 19–23, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). (The majority glosses over that core distinction, for reasons that will soon become clear.) According to settled precedent, expenditure restrictions—caps on a campaign's or candidate's electoral spending—impose the greatest burdens on expression. The First Amendment, as the majority notes, "has its fullest and most urgent application" when a "legislative limit" prevents a candidate from "us[ing] personal funds to finance campaign speech"—that is, speech "on behalf of his own candidacy." *Ante*, at 1650 (internal quotation marks omitted). By contrast, laws focused on third-party contributions to a campaign (a category the majority mostly prefers to ignore) typically "entail[ ] only a marginal restriction" on First Amendment interests. *Buckley*, 424 U.S. at 20, 96 S.Ct. 612. Take, for example, a simple limit on the amount someone can donate to a campaign, like the federal $2,900 ceiling. That kind of restriction, we have reasoned, in no way interferes with the donor's "freedom to discuss candidates and issues" through independent spending. *Id.*, at 1656. And it has only an indirect effect on the campaign itself. To be sure, the cap makes raising money (for speech and other things) harder: It forces candidates "to raise funds from a greater number" of people and generally results in the campaign taking in less money than it otherwise would. *Id.*, at 1656. But the Court has viewed such limits as troublesome only if they are so low as to prevent candidates from raising "the resources necessary for effective advocacy." *Randall v. Sorrell*, 548 U.S. 230, 247, 126 S.Ct. 2479, 165 L.Ed.2d 482

(2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612). In the usual case, the incidental effect of a contribution restriction on a campaign's speech does not count as a significant First Amendment burden. See *Randall*, 548 U.S. at 246–247, 126 S.Ct. 2479.

Under that precedent, Section 304 "entails only a marginal restriction" on speech, because it regulates contributions alone. *Buckley*, 424 U.S. at 20, 96 S.Ct. 612. The provision leaves a campaign free to spend any amount of money for speech. Likewise, it leaves the candidate himself—here, Senator Ted Cruz—free to do so. The candidate can (in the majority's words) "use personal funds to finance campaign speech" without limit; if he wishes, he can devote his whole fortune to "speech on behalf of his own candidacy." *Ante,* at 1650 – 1651. Section 304 restricts only the use of third-party contributions to support his efforts—which, as just shown, imposes a far more modest First Amendment burden. Recall how Section 304 works: It prevents post-election campaign contributions from going to repay large loans that the candidate has made to his campaign. So the provision limits—much as standard contribution caps do—only the candidate's ability to shift the costs of his electoral speech to others. Or said a bit differently, it addresses not a candidate's "self-fund[ing]," *ante*, at 1651, but only his reliance on third-party financing.

And even that regulation of third-party contributions is a narrow one. Under Section 304, a campaign can always accept ***1659** donations for small loans a candidate makes. And it can use *pre*-election donations to retire even his sizable loans. The statute just insists that donations for that purpose occur when speech is ongoing, and before everyone knows which candidate won (and so is in a position to return the favor by delivering government benefits). Consistent with our caselaw, that minor restriction on a candidate's use of other people's money does not severely burden his (or anyone else's) expression.

The majority's argument to the contrary focuses not on the restriction Section 304 actually imposes, but on the indirect effects the provision might have. The majority does not dispute that Section 304 places no limits on the amount a candidate can spend for expression. See *ante*, at 1650 – 1651. Nor does (or could) the majority even claim that the provision caps what a candidate can lend his campaign. Instead, the majority argues that the law "may deter" a candidate from making large loans because it curtails a potential source of repayment—*i.e.*, post-election donations. *Ante*, at 1651. In that way, the majority insists, the law—though concededly regulating only the use of contributions—functions to "restrict[ ] a candidate's speech." *Ante*, at 1650 – 1651; see *ante,* at 1651 – 1652.

But every contribution regulation has some kind of indirect effect on electoral speech, and we have still understood them to impose only minimal burdens. Consider again a standard contribution ceiling, like the federal $2,900 cap. That limit, as we have acknowledged, makes raising money harder. See *Randall,* 548 U.S. at 247, 126 S.Ct. 2479; *Buckley*, 424 U.S. at 20–21, 96 S.Ct. 612. And so it predictably gives a campaign less money to spend. (In fact, a lot less: Just think of a world in which a candidate could raise an unlimited sum from every supporter.) With the contribution cap in effect, the campaign cannot pay for (nearly) as many advertisements, mailings, signs, and so forth. And likewise, to return to the fact pattern here, the campaign has less money available than it otherwise would to repay a candidate's (or any other) loans. By the majority's logic, that downstream effect would mean the contribution cap imposes a significant First Amendment burden. But as noted above, we have always held to the contrary, save for the rare case in which the limit is so low as to preclude effective advocacy. See *supra*, at 1657 – 1659. There is no reason to treat Section 304 differently. In fact, its restriction on post-election contributions for loan repayment probably has much smaller indirect effects on a campaign's or candidate's speech than the contribution ceilings this Court has approved. (Again, just think of all the multi-million-dollar donations those ceilings prevent.) So the majority's view cannot be right.

And more fundamentally, the majority fails to appreciate what Section 304 has an indirect effect *on*: lending, rather than spending, money. In the majority's view, those two activities count as one and the same. See *ante,* at 1650 – 1651. But they are not, in an obvious way. The *expenditure* of "personal funds" for speech, this Court has observed, "reduces the candidate's dependence" on donors—precisely because he is not trying to speak on their dime. *Buckley*, 424 U.S. at 53, 96 S.Ct. 612. The *loan* of personal funds has the opposite effect, as further shown in this opinion's next part. When a candidate lends substantial funds to his campaign, he wants (maybe desperately needs) them returned; he thus risks—indeed, invites—dependence on donors, who alone can make him financially whole. Section 304 responds to that difference in whether a candidate is speaking independently, or instead relying on others' largesse. The provision at most deters a

single mechanism ***1660** for financing electoral activities, because it carries a heightened threat of corruption.

II

Preventing *quid pro quo* corruption or its appearance is a compelling interest by any measure. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). *Quid pro quo* corruption—which extends beyond criminal bribery to "less blatant and specific" arrangements—"subver[ts] the political process" and threatens "the integrity of our system of representative democracy." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388–389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (internal quotation marks omitted). And the appearance of that corruption (though scarcely mentioned in the majority opinion) is "[o]f almost equal concern." *Id.*, at 388, 120 S.Ct. 897. Avoiding that appearance is "critical" if public "confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.*, at 389, 120 S.Ct. 897.

Serious dangers of actual and apparent *quid pro quo* corruption attend the transactions Section 304 regulates—again, the use of post-election contributions to repay a candidate's personal loans. Consider a simple comparison. When a campaign uses a donation to fund routine electoral activities (including speech), the money marginally aids the candidate's electoral odds, but in no way adds to his personal wealth. By contrast, when a campaign uses a donation to repay the candidate's loan, every dollar given goes straight into the candidate's pocket. With each such contribution, his assets increase; he can now buy a car or make tuition payments or join a country club—all with his donors' dollars. So contributions going to loan repayment have exceptional value to the candidate—which his donors of course realize. And when the contributions occur after the election, their corrupting potential further increases. At that time, a campaign can use donations only to repay loans, of which some 97% come from candidates. See 11 C.F.R. 110.1(b)(3)(i) (2017); A. Ovtchinnikov & P. Valta, Self-Funding of Political Campaigns, Management Science, Articles in Advance 5 (Apr. 7, 2022) (Ovtchinnikov, Self-Funding). So post-election donors can be confident their money will enrich a candidate personally. And those donors have of course learned which candidate won. When they give money to repay the victor's loan, they know—not merely hope—he will be in a position to perform official favors. The recipe for *quid pro quo* corruption is thus in place: a donation to enhance the candidate's own wealth (the *quid*), made when he has become able to use the power of public office to the donor's advantage (the *quo*). The heightened threat of corruption—and, even more, of its appearance—is self-evident (except, it seems, to observers allergic to all campaign finance regulation).

In addressing that special danger, Section 304 is anything but a "prophylaxis-upon-prophylaxis," as the majority labels it. *Ante,* at 1652. The idea behind that fancy-sounding epithet is just that the statute is a needless precaution: The $2,900 contribution ceiling, the majority asserts, already provides generous protection against the corrupting potential of donations, so the loan-repayment provision is unnecessary. See *ibid.* But that claim ignores that Section 304 targets only a subset of contributions, which raise (as just described) unique corruption risks. When an added protection addresses an added danger, the existence of a basic protection (however ordinarily ample) fails to show the supplement's pointlessness. Regular seatbelts might suffice to protect drivers on the interstate, but special belts—and ***1661** roll cages to boot—are essential measures on the racetrack. So too, a $2,900 cap might suffice to prevent corruption from normal campaign contributions—but not from post-election contributions to repay a candidate's loan, and thus to enrich him personally. When Congress, as here, responds to a heightened threat with a heightened safeguard, the majority has no call to "greet" it "with a measure of skepticism." *Ibid.*

Nor does the majority have reason to second-guess Congress's experience-based judgment about the specially corrupting effects of post-election donations to repay candidate loans. The majority's first attempt to counter that judgment is that "we are only talking about repayment of a *loan*": "If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that in any way." *Ante,* at 1655. But that altogether misses the point. However much money the candidate had before he makes a loan to his campaign, he has less after it: The amount of the loan is the size of the hole in his bank account. So whatever he could buy with, say, $250,000—surely a car, but that's beside the point—he cannot buy any longer. Until, that is, donors pay him back. Then, the hole is filled, the bank account replenished, and the purchasing power restored. That is a significant financial gain to the officeholder, courtesy of donors. If they had not stepped up, the officeholder would have been $250,000 poorer.

The majority's second theory fares no better. Contributions to repay loans, the majority argues, do not really enrich an officeholder, because he has, from the beginning, "expect[ed] to be repaid." *Ante*, at 1655. But the record provides no support for that self-assured statement. Contra the majority, the Government "has recognized throughout this litigation" not that winning candidates are usually repaid, but only that they are repaid more often than losing ones. *Ibid.*; see App. 31–32, 317.[1] That is no surprise—and the fact is affirmatively unhelpful for the majority's position, because it shows how post-election donations reflect an expectation of payback from the recipient. Nothing else in the record (or outside it) is helpful to the majority either. The best empirical study suggests that a substantial portion of winning campaigns fail to retire candidate loans, even when their amounts are too small to trigger Section 304's restrictions. See Ovtchinnikov, Self-Funding 11; see also Brief for Campaign Legal Center et al. as *Amici Curiae* 12–13 (summarizing research "show[ing] that most campaigns fail to pay off candidates' personal loans in any amount at any time," in confirmation of the "[c]onventional wisdom" that post-election fundraising is "notoriously difficult"). So a candidate with a loan outstanding has plenty of reason to feel anxious—and to see the loan's repayment as a gratitude-inducing personal benefit. The donor takes him off a sharp hook. And even a candidate who expects repayment is far from impervious to corruption. He may have ***1662** that confidence exactly because he knows that a raft of lobbyists will be eager to pay for political benefits. And with his bank account depleted, he has a great temptation to perform his part in such an exchange.[2]

The common sense of Section 304—the obviousness of the theory behind it—lessens the need for the Government to identify past cases of *quid pro quo* corruption involving candidate loan repayments. As this Court has made clear, "[t]he quantum of empirical evidence needed" to sustain a campaign finance law "var[ies] up or down with the novelty and plausibility of the [law's] justification." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 144, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). There is nothing novel or implausible about Section 304's rationale—once again, that payments going to line an elected official's pockets pose an especial risk of corruption. It is in fact what everyone knows to be true—because everyone knows people (including politicians) will often do things for money. The majority suggests that we should discard our understanding of how the world works because the Government has not come forward with adjudicated instances of corruption in the loan-repayment context. See *ante*, at 1652 – 1654. But *quid pro quo* exchanges, in that and every other setting, are nigh-impossible to detect and prove. That is indeed why we have campaign finance laws like Section 304. They prohibit conduct posing a heightened risk of corruption, so that the Government does not have to ferret out illicit exchanges case by case by case. To strike down Section 304 because the Government has not proved to a certainty some number of loan-repayments-for-political-paybacks is to miss the provision's essential point.

In any event, the Government and its *amici* have marshalled significant evidence showing that the loan repayments Section 304 targets have exactly the dangers Congress thought. See Brief for Appellant 37–40; Brief for Campaign Legal Center et al. 27–29. Here is a sampling from the record, involving jurisdictions unprotected by either Section 304 or a state equivalent. In Ohio, various law firms donated almost $200,000 to help the newly elected attorney general recoup his personal loans. Those donors later received more than 200 state contracts worth nearly $10 million in legal fees. See L. Bischoff, Donations Helping DeWine Pay Down Campaign Loan, Springfield News-Sun, Feb. 2, 2012, p. A1. In Alaska, a lobbyist collected almost $100,000 for post-election repayment of the Governor's personal loans. A business in which he held an interest later received a $9 million state contract. See B. Curry, Alaska Gov. Sheffield's Impeachment Inquiry Has Overtones of Watergate Scandal, L. A. Times, July 19, 1985, p. 11. In Kentucky, two Governors loaned their campaigns millions of dollars, "only to be repaid after the election by contributors seeking no-bid contracts." J. Moore, ***1663** Campaign Finance Reform in Kentucky: The Race for Governor, 85 Ky. L. J. 723, 746 (1997). The scandal those transactions created led to a new state campaign-finance law similar to Section 304. In upholding that statute, a court more cognizant than this one about how corruption works explained that "heavily indebted candidates" were "easy bedfellows for *quid pro quo* contributors." *Wilkinson v. Jones*, 876 F.Supp. 916, 930 (W.D. Ky. 1995). That is also true on the local level. In San Diego, to take just one instance, three city council members cast critical votes benefiting lobbyists who had raised funds to retire their campaign debts. See C. Gustafson, Lobbyists See Benefit From Three City Officials, San Diego Union-Tribune, June 13, 2009, p. A1.[3]

An empirical study in the record confirms the dangers of corruption shown in those examples. The study first found, based on data preceding Section 304's enactment, that politicians carrying campaign debt were "significantly more likely" than their "debt-free counterparts" to "switch their

votes" after receiving contributions from special interests. A. Ovtchinnikov & P. Valta, Debt in Political Campaigns (2020), in No. 1:19–cv–00908 (D DC, July 14, 2020), ECF Doc. 65–1, p. 31. In other words, officeholders did more in exchange for donations repaying their personal loans than for other donations. The analysis next looked at Section 304's effect. Here, the data showed that politicians with debt exceeding the law's $250,000 threshold became "significantly less responsive" to contributions than before: They began to "behave remarkably similar to their debt free counterparts." *Id.*, at 28; see Ovtchinnikov, Self-Funding 3 (similarly stating that those politicians became more "independent of contributions from special interest[s]"). In other words, Section 304 did just what Congress thought it would. By preventing post-election contributions from personally enriching politicians, the provision diminished donor-responsive voting. The majority tries to undermine those findings by quoting the kind of careful caveats always accompanying good social science. See *ante,* at 1654; Ovtchinnikov, Self-Funding 21 (noting that the study is a "first step in understanding" and that more work is needed to "fully pin down" all aspects of causation). But the authors are confident—and rightly so—in the findings just described: that Section 304 markedly decreased the frequency with which officeholders voted as donors would like. And although the authors could not responsibly claim that all the shifted votes they tallied were part of *quid pro quo* deals—they are, after all, professors, not the FBI—they deduce from the data that politicians carrying campaign debt were "less likely to [be] sell[ing] access" than to be "sell[ing] votes." *Id.,* at 18.

Finally, the record evidence addresses the "almost equal[ly]" important matter of the appearance of corruption. *Shrink Missouri*, 528 U.S. at 390, 120 S.Ct. 897; see *supra*, at 1659 – 1660. A Government-commissioned survey of public opinion found that 81% of respondents believed it "very ***1664** likely" or "likely" that a person who "donate[s] money to a candidate's campaign after the election expect[s] a political favor in return." App. 351–353. That bears repeating: 81%—an overwhelming perception across all demographic categories, as well as across all party affiliations and political ideologies. See *ibid.* As the court reviewing the Kentucky version of Section 304 explained: "[T]here is an impression" when a contribution repays a loan after an election that the contributor is simply "lining the candidate's pocket, as there is no ongoing campaign to which the contribution may be made." *Wilkinson*, 876 F.Supp. at 930; see *supra*, at 1662 – 1663. The majority flyspecks the polling questions: Why didn't the poll define "political favor"? Did the poll mention that the contributions had to comply with the $2,900 cap? And so forth. See *ante*, at 1654 – 1655. But really—is it likely that such tinkering would have made a real difference? The poll results were so lopsided because the post-election contributions Section 304 targets—ones adding to the candidate's personal wealth—have so conspicuous a potential to corrupt. The public knows that to be true. The public's representatives in Congress knew it to be true. Only this Court—somehow—does not.

* * *

"Democracy works only if the people have faith in those who govern." *Shrink Missouri*, 528 U.S. at 390, 120 S.Ct. 897 (internal quotation marks omitted). And the people cannot have faith in representatives who trade official acts for financial gain. Section 304 prevents that kind of corruption, at barely discernable cost to First Amendment freedoms. The provision limits one narrow use of third-party contributions to a campaign, thus "entail[ing] only a marginal restriction" on speech. *Buckley*, 424 U.S. at 20, 96 S.Ct. 612. And the provision targets a practice posing exceptional risks of *quid pro quo* deals. Repaying a candidate's loan after he has won election cannot serve the usual purposes of a contribution: The money comes too late to aid in any of his campaign activities. All the money does is enrich the candidate personally at a time when he can return the favor—by a vote, a contract, an appointment. It takes no political genius to see the heightened risk of corruption—the danger of "I'll make you richer and you'll make me richer" arrangements between donors and officeholders. Section 304 has guarded against that threat for two decades, but no longer. In discarding the statute, the Court fuels non-public-serving, self-interested governance. It injures the integrity, both actual and apparent, of the political process. I respectfully dissent.

All Citations

142 S.Ct. 1638, 22 Cal. Daily Op. Serv. 4559, 2022 Daily Journal D.A.R. 4905

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The statement the majority quotes from a former FEC Commissioner does not support any broader understanding of the Government's claim. That statement appears in a parenthetical to a citation for the Government's actual argument: that winning candidates "possess a greater capacity" than losing ones do to get their loans repaid. App. 31. And the statement—that "only winners" have "an easy time dealing with debt"—means not that all or most winners do, but instead that no losers do. *Id.*, at 31–32. The former Commissioner who made the remark had also served as counsel to a losing presidential campaign, and he was merely observing how hard that campaign had found it to repay debt. See P. Overby, How Will Clinton Resolve Campaign Debt? National Public Radio, May 14, 2008.

2 The majority also fails to recognize that post-election contributions can go toward interest payments, enabling a candidate to turn a tidy profit on top of recovering the amount loaned. Consider the case of one member of the U. S. House Transportation and Infrastructure Committee. She loaned her campaign $150,000 at an 18% interest rate (no, that is not a typo), and over time collected more than $200,000 in interest payments. Much of that money came from fundraising events hosted by a lobbying firm representing members of the transportation industry. See A. Zajac, Interest on Campaign Loan Pays, L. A. Times, Feb. 14, 2009, p. B1. The example is extreme, but the FEC typically allows candidates to charge their campaigns—which then tap contributors for—a commercially reasonable rate of interest. See FEC, Campaign Guide for Congressional Candidates and Committees 101 (2021).

3 The majority asserts without explanation that these and other similar examples involve not *quid pro quo* corruption, but only contributors' exercise of their "greater influence" over candidates. *Ante*, at 1653 – 1654. Even accepting that distinction (as our caselaw does), the majority's claim is hard to understand. Here is the *quid* in the examples: a donation paying off a successful candidate's personal loan. And here is the *quo*: a government contract, or a key vote. However "vague" the "line between *quid pro quo* corruption and general influence," *ibid.*, those exchanges cross it. The majority must mean that the Government has not proved beyond a doubt that the trades in fact occurred. But again, that is the wrong standard given (1) the difficulty of such proof and (2) the significant risks of *quid pro quo* corruption inherent in the above fact patterns. See *supra*, at 1661 – 1662.

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EXHIBIT B

2022 WL 1613291
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

NETCHOICE, LLC, d.b.a. NetChoice, Computer & Communications Industry Association, d.b.a. CCIA, Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, State of FLORIDA, in their official capacity, Joni Alexis Poitier, in her official capacity as Commissioner of the Florida Elections Commission, Jason Todd Allen, in his official capacity as Commissioner of the Florida Elections Commission, John Martin Hayes, in his official capacity as Commissioner of the Florida Elections Commission, Kymberlee Curry Smith, in her official capacity as Commissioner of Florida Elections Commission, Deputy Secretary of Business Operations of the Florida Department of Management Services, in their official capacity, Defendants-Appellants.

No. 21-12355

Filed: 05/23/2022

Synopsis

Background: Trade associations representing internet and social-media platforms brought action challenging Florida statutes regulating social-media providers under First and Fourteenth Amendments, Commerce Clause, and as preempted by federal law. The United States District Court for the Northern District of Florida, No. 4:21-cv-00220-RH-MAF, Robert Hinkle, J., 546 F.Supp.3d 1082, granted associations' motion for preliminary injunction, and state appealed.

Holdings: The Court of Appeals, Newsom, Circuit Judge, held that:

[1] platforms engaged in First-Amendment-protected activity;

[2] platforms were not common carriers;

[3] all but one of the statutory provisions triggered First Amendment scrutiny;

[4] platforms were not likely to succeed on merits of their claim that every challenged provision was per se invalid as result of bill's proponents' viewpoint-based motivation;

[5] platforms were likely to succeed on claim that prohibitions against deplatforming candidates, deprioritizing and "shadow-banning" content, and censoring "journalistic enterprises" violated First Amendment;

[6] platforms were likely to succeed on claim that requiring them to apply their standards in consistent manner, and to allow users to opt out of their algorithms, and limiting changes to their user agreements violated First Amendment;

[7] platforms failed to establish likelihood of success on claim that requiring them to publish their standards, inform users about changes, provide users with view counts, and inform candidates about free advertising violated First Amendment; and

[8] platforms were likely to succeed on claim that requirement that they provide notice and detailed justification for every content-moderation action was unduly burdensome.

Affirmed in part, vacated in part, and remanded.

West Headnotes (32)

[1] **Constitutional Law** Applicability to governmental or private action; state action

Free Speech Clause constrains governmental actors and protects private actors. U.S. Const. Amend. 1.

[2] **Constitutional Law** Telecommunications and Computers

While First Amendment protects citizens from governmental efforts to restrict their access to social media, no one has vested right to force platform to allow her to contribute to or consume social-media content. U.S. Const. Amend. 1.

[3] **Federal Courts** Preliminary injunction; temporary restraining order

Court of Appeals reviews grant of preliminary injunction for abuse of discretion, reviewing any underlying legal conclusions de novo and any findings of fact for clear error.

[4] **Injunction** Grounds in general; multiple factors

Ordinarily, district court may grant injunctive relief only if moving party shows that: (1) it has substantial likelihood of success on merits; (2) irreparable injury will be suffered unless injunction issues; (3) threatened injury to movant outweighs whatever damage proposed injunction may cause opposing party; and (4) if issued, injunction would not be adverse to public interest.

[5] **Constitutional Law** Resolution of non-constitutional questions before constitutional questions

Federal courts should generally avoid reaching constitutional questions if there are other grounds upon which case can be decided, but that rule applies only when dispositive nonconstitutional ground is available.

[6] **Constitutional Law** Telecommunications and Computers

Social media platforms are private companies with First Amendment rights, and when they disclose, publish, or disseminate information, they engage in speech within meaning of First Amendment. U.S. Const. Amend. 1.

[7] **Constitutional Law** Telecommunications and Computers

When social media platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys message and thereby engages in "speech" within meaning of First Amendment. U.S. Const. Amend. 1.

[8] **Constitutional Law** Telecommunications and Computers

Private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to public are editorial judgments protected by First Amendment. U.S. Const. Amend. 1.

[9] **Constitutional Law** Conduct, protection of

In determining whether conduct is expressive, and thus protected by First Amendment, court must ask whether reasonable person would interpret it as some sort of message, not whether observer would necessarily infer specific message. U.S. Const. Amend. 1.

[10] **Constitutional Law** Telecommunications and Computers

Telecommunications Regulation in general

Social media platforms' exercise of editorial judgment was inherently expressive, and thus when platforms chose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engaged in First-Amendment-protected activity, even if platforms did not review majority of content that made it onto their platforms. U.S. Const. Amend. 1.

[11] **Constitutional Law** Freedom of Speech, Expression, and Press

Consumer confusion is not prerequisite to First Amendment protection. U.S. Const. Amend. 1.

[12] **Constitutional Law** Telecommunications and Computers

Telecommunications Common carrier or public utility status

Social media platforms were not common carriers with diminished First Amendment free speech rights, even though they generally held themselves open to all members of public; they required users, as preconditions of access, to accept their terms of service and abide by their community standards, and Congress had distinguished internet companies from common carriers. U.S. Const. Amend. 1; Communications Act of 1934 § 223, 47 U.S.C.A. § 223(e)(6).

[13] **Constitutional Law** Telecommunications and Computers

Telecommunications Common carrier or public utility status

State could not force social media platforms to become common carriers, thereby abrogating or diminishing First Amendment free speech rights that they currently possessed and exercised, even though they generally held themselves open to all members of public; platforms did not serve public indiscriminately but, rather, exercised editorial judgment to curate content that they displayed and disseminated. U.S. Const. Amend. 1.

[14] **Constitutional Law** Trade or Business

Private company engaging in speech within meaning of First Amendment does not lose its constitutional rights just because it succeeds in marketplace and hits it big. U.S. Const. Amend. 1.

[15] **Constitutional Law** Telecommunications and Computers

Telecommunications Validity

Provisions of Florida statutes regulating social media providers that prohibited deplatforming political candidates, deprioritizing and "shadow-banning" content by or about candidates, and censoring, deplatforming, or shadow-banning "journalistic enterprises" triggered First Amendment free speech scrutiny; provisions clearly restricted platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they found objectionable. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 106.072(2), 501.2041(2)(h), 501.2041(2)(j).

[16] **Constitutional Law** Telecommunications and Computers

Telecommunications Validity

Florida statutes that forced social media providers to remove or retain all content that was similar to material that they had previously removed burdened platforms' right to make editorial judgments on case-by-case basis or to change types of content they would disseminate —and, hence, messages they expressed, and thus triggered First Amendment scrutiny. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 501.2041(2)(b), 501.2041(2)(c).

[17] **Constitutional Law** Telecommunications and Computers

Telecommunications Validity

Florida statute that required social media platforms, upon user's request, not to exercise editorial discretion that they otherwise would have exercised in curating content—prioritizing some posts and deprioritizing others—in user's feed, even if platform would have preferred, for its own reasons, to give greater prominence to some posts while limiting reach of others, triggered First Amendment scrutiny. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 501.2041(2)(f), 501.2041(2)(g).

[18] **Constitutional Law** Telecommunications and Computers

Telecommunications Validity

Florida statute requiring social media platforms to allow deplatformed users to access their own data stored on the platform's servers for at least 60 days did not prevent or burden to any significant extent exercise of editorial judgment or compel any disclosure, and thus did not trigger First Amendment scrutiny. U.S. Const. Amend. 1; Fla. Stat. Ann. § 501.2041(2)(i).

[19] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

Constitutional Law Strict or exacting scrutiny; compelling interest test

Content-neutral regulation of expressive conduct is subject to intermediate scrutiny under First Amendment, while regulation based on expression's content must withstand additional rigors of strict scrutiny. U.S. Const. Amend. 1.

[20] **Constitutional Law** Content-Based Regulations or Restrictions

Law is "content-based," for First Amendment purposes, if it suppresses, disadvantages, or imposes differential burdens upon speech because of its content, that is, if it applies to particular speech because of topic discussed or idea or message expressed. U.S. Const. Amend. 1.

[21] **Constitutional Law** Content-Based Regulations or Restrictions

Law can be content-based, for First Amendment purposes, either because it draws facial distinctions defining regulated speech by particular subject matter or because, though facially neutral, it cannot be justified without reference to content of regulated speech. U.S. Const. Amend. 1.

[22] **Constitutional Law** Viewpoint or idea discrimination

Constitutional Law Content-Based Regulations or Restrictions

Viewpoint-based laws, when government targets not subject matter, but particular views taken by speakers on subject, constitute egregious form of content discrimination under First Amendment, and are prohibited, seemingly as per se matter. U.S. Const. Amend. 1.

[23] **Civil Rights** Preliminary Injunction

Social media platforms were not likely to succeed on merits of their claim that every provision of Florida bill regulating them was per se invalid as result of bill's proponents' viewpoint-based motivation to combat what they perceived to be "leftist" bias of "big tech oligarchs" against "conservative" ideas, for purposes of determining their entitlement to preliminary injunction relief. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 106.072, 501.2041.

[24] **Constitutional Law** Freedom of Speech, Expression, and Press

When statute is facially constitutional, plaintiff cannot bring free speech challenge under First Amendment by claiming that lawmakers who passed it acted with constitutionally impermissible purpose. U.S. Const. Amend. 1.

[25] **Constitutional Law** Narrow tailoring

When law is subject to intermediate scrutiny under First Amendment, government must show that it is narrowly drawn to further substantial governmental interest unrelated to suppression of free speech; narrow tailoring in this context means that regulation must be no greater than is essential to furtherance of government's interest. U.S. Const. Amend. 1.

[26] **Civil Rights** Preliminary Injunction

Social media platforms were likely to succeed on merits of their claim that provisions of Florida statutes that prohibited them from deplatforming political candidates, deprioritizing and "shadow-banning" content by or about candidates, and censoring, deplatforming, or shadow-banning "journalistic enterprises" violated First Amendment, for purposes of determining their entitlement to preliminary injunction, even if state had some interest in counteracting "unfair" private "censorship" that privileges some viewpoints over others, and in promoting widespread dissemination of information from multiplicity of sources. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 106.072(2), 501.2041(2)(f), 501.2041(2)(h), 501.2041(2)(j).

[27] **Constitutional Law** Freedom of Speech, Expression, and Press

State may not burden speech of others in order to tilt public debate in preferred direction or advance some points of view. U.S. Const. Amend. 1.

[28] **Civil Rights** Preliminary Injunction

Social media platforms were likely to succeed on merits of their claim that provisions of Florida statutes requiring them to apply their censorship, deplatforming, and shadow-banning standards in consistent manner, and to allow users to opt out of their post-prioritization and shadow-banning algorithms, and prohibiting them from making changes to their user rules, terms, and agreements more than once every 30 days violated First Amendment, for purposes of determining their entitlement to preliminary injunction; it was substantially unlikely that state would be able to establish that its restrictions served substantial governmental interest, or that burden they imposed was no greater than was essential to furtherance of that interest. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 501.2041(2)(b), 501.2041(2)(c), 501.2041(2)(f), 501.2041(2)(g).

[29] **Constitutional Law** Reasonableness; relationship to governmental interest

To comply with Free Speech Clause, commercial disclosure requirement must be reasonably related to state's interest in preventing deception of consumers, and must not be unjustified or unduly burdensome such that it would chill protected speech. U.S. Const. Amend. 1.

[30] **Civil Rights** Preliminary Injunction

Social media platforms failed to establish likelihood of success on merits of their claim that provisions of Florida statutes requiring them to publish their standards, inform users about changes to their rules, provide users with view counts for their posts, and inform political candidates about free advertising violated First Amendment, and thus were not entitled to preliminary injunction; provisions were reasonably related to state's interest in ensuring that users were fully informed about terms of that transaction and were not misled about platforms' content-moderation policies, and it was unlikely that requirements were unduly burdensome or likely to chill platforms' speech. U.S. Const. Amend. 1; Fla. Stat. Ann. §§ 501.2041(2)(a), 501.2041(2)(c), 501.2041(2)(e).

[31] **Civil Rights** Preliminary Injunction

Social media platforms were likely to succeed on merits of their claim that Florida's requirement that they provide notice and detailed justification for every content-moderation action was unduly burdensome and likely to chill their protected speech, in violation of First Amendment, for purposes of determining their entitlement to preliminary injunction; requirement not only imposed potentially significant implementation costs, but also exposed platforms to up to $100,000 in statutory damages per claim and pegged liability to vague terms like "thorough" and "precise." U.S. Const. Amend. 1; Fla. Stat. Ann. § 501.2041(2)(d).

[32] **Civil Rights** Preliminary Injunction

Ongoing First Amendment violation constitutes irreparable injury, as required to support granting of preliminary injunction. U.S. Const. Amend. 1.

West Codenotes

Validity Called into Doubt

Fla. Stat. Ann. §§ 106.072(2), 501.2041(2)(b), (c), (d), (f), (g), (h), (j)

Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 4:21-cv-00220-RH-MAF

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Before Newsom, Tjoflat, and Ed Carnes, Circuit Judges.

Opinion

Newsom, Circuit Judge:

***1** **[1]** Not in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok. But "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (quotation marks omitted). One of those "basic principles"—indeed, the most basic of the basic—is that "[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, —— U.S. ——, 139 S. Ct. 1921, 1926, 204 L.Ed.2d 405 (2019). Put simply, with minor exceptions, the government can't tell a private person or entity what to say or how to say it.

The question at the core of this appeal is whether the Facebooks and Twitters of the world—indisputably "private actors" with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms. The State of Florida insists that they aren't, and it has enacted a first-of-its-kind law to combat what some of its proponents perceive to be a concerted effort by "the 'big tech' oligarchs in Silicon Valley" to "silenc[e]" "conservative" speech in favor of a "radical leftist" agenda. To that end, the new law would, among other things, prohibit certain social-media companies from "deplatforming" political candidates under any circumstances, prioritizing or deprioritizing any post or message "by or about" a candidate, and, more broadly, removing anything posted by a "journalistic enterprise" based on its content.

We hold that it is substantially likely that social-media companies—even the biggest ones—are "private actors" whose rights the First Amendment protects, *Manhattan Cmty.*, 139 S. Ct. at 1926, that their so-called "content-moderation" decisions constitute protected exercises of editorial judgment, and that the provisions of the new Florida law that restrict large platforms' ability to engage in content moderation unconstitutionally burden that prerogative. We further conclude that it is substantially likely that one of

the law's particularly onerous disclosure provisions—which would require covered platforms to provide a "thorough rationale" for each and every content-moderation decision they make—violates the First Amendment. Accordingly, we hold that the companies are entitled to a preliminary injunction prohibiting enforcement of those provisions. Because we think it unlikely that the law's remaining (and far less burdensome) disclosure provisions violate the First Amendment, we hold that the companies are not entitled to preliminary injunctive relief with respect to them.

I

A

We begin with a primer: This is a case about social-media platforms. (If you're one of the millions of Americans who regularly use social media or can't remember a time before social media existed, feel free to skip ahead.)

***2** At their core, social-media platforms collect speech created by third parties—typically in the form of written text, photos, and videos, which we'll collectively call "posts"—and then make that speech available to others, who might be either individuals who have chosen to "follow" the "post"-er or members of the general public. Social-media platforms include both massive websites with billions of users—like Facebook, Twitter, YouTube, and TikTok—and niche sites that cater to smaller audiences based on specific interests or affiliations—like Roblox (a child-oriented gaming network), ProAmericaOnly (a network for conservatives), and Vegan Forum (self-explanatory).

[2] Three important points about social-media platforms: First—and this would be too obvious to mention if it weren't so often lost or obscured in political rhetoric—platforms are private enterprises, not governmental (or even quasi-governmental) entities. No one has an obligation to contribute to or consume the content that the platforms make available. And correlatively, while the Constitution protects citizens from governmental efforts to restrict their access to social media, *see Packingham v. North Carolina*, —— U.S. ——, 137 S. Ct. 1730, 1737, 198 L.Ed.2d 273 (2017), no one has a vested right to force a platform to allow her to contribute to or consume social-media content.

Second, a social-media platform is different from traditional media outlets in that it doesn't create most of the original content on its site; the vast majority of "tweets" on Twitter and videos on YouTube, for instance, are created by individual users, not the companies that own and operate Twitter and YouTube. 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 that 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, and relatedly, social-media platforms aren't "dumb pipes": They're not just servers and hard drives storing information or hosting blogs that 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, for instance, she sees a curated and edited compilation of content from the people and organizations that she follows. If she follows 1,000 people and 100 organizations on a particular platform, for instance, her "feed"—for better or worse—won't just consist of every single post created by every single one of those people and organizations arranged in reverse-chronological order. Rather, the platform will have exercised editorial judgment in two key ways: First, the platform will have removed posts that violate its terms of service or community standards—for instance, those containing hate speech, pornography, or violent content. *See, e.g.*, Doc. 26-1 at 3–6; *Facebook Community Standards*, Meta, https://transparency fb.com/policies/community-standards (last accessed May 15, 2022). 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 given visit to the site. *See* Doc. 26-1 at 3.

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—private individuals, politicians, news organizations, corporations, and advocacy groups—can be both speaker and listener. In playing this role, the platforms invest significant time and resources into editing and organizing—the best word, we think, is *curating*—users' posts into collections of content that they then disseminate to others. By engaging in this content moderation, the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints.

B

***3** The State of Florida enacted S.B. 7072—in the words of the Act's sponsor, as quoted in Governor DeSantis's signing statement—to combat the "biased silencing" of "our freedom of speech as conservatives ... by the 'big tech' oligarchs in Silicon Valley." *News Release: Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech* (May 24, 2021).[1] The bill, the Governor explained, was passed to take "action to ensure that 'We the People'—real Floridians across the Sunshine State—are guaranteed protection against the Silicon Valley elites" and to check the "Big Tech censors" that "discriminate in favor of the dominant Silicon Valley ideology." *Id.* By signing the bill, the Governor sought to "fight[ ] against [the] big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative." *Id.*

S.B. 7072's enacted findings are more measured. They assert that private social-media platforms are important "in preserving first amendment protections for all Floridians" and, comparing platforms to "public utilities," argue that they should be "treated similarly to common carriers." S.B. 7072 § 1(5), (6). That, the Act says, is because social-media platforms "have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians" and because "[t]he state has a substantial interest in protecting its residents from inconsistent and unfair actions" by the platforms. *Id.* § 1(9), (10).

To these ends, S.B. 7072 contains several new statutory provisions that apply 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 DeSantis had complained. Even so, the definition's broad conception of what a "social media platform" *does* may well sweep in other popular websites, like the crowdsourced reference tool Wikipedia and virtual handmade 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.

Fla. Stat. § 501.2041(1)(g). As originally enacted, the law's definition of "social media platform" expressly excluded any platform "operated by a company that owns and operates a theme park or entertainment complex." *Id.* But after the onset of this litigation—and after Disney executives made public comments critical of another recently enacted Florida law—the State repealed S.B. 7072's theme-park-company exemption. *See* S.B. 6-C (2022).

The relevant provisions of S.B. 7072—which are codified at Fla. Stat. §§ 106.072 and 501.2041[2]—can be divided into three categories: (1) content-moderation restrictions; (2) disclosure obligations; and (3) a user-data requirement.

Content-Moderation Restrictions

• **Candidate deplatforming**: A social-media platform "may not willfully deplatform a candidate for office." Fla. 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).

***4** • **Posts by or about candidates**: "A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about ... a candidate." *Id.* § 501.2041(2)(h). "Post prioritization" refers to the practice of arranging certain content in a more or less prominent position in a user's feed or search results. *Id.* § 501.2041(1)(e).[3] "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 Florida 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 the term "consistent."

• **30-day restriction**: A platform may not make changes to its "user rules, terms, and agreements ... more than once every 30 days." *Id.* § 501.2041(2)(c).

• **User opt-out**: A platform must "categorize" its post-prioritization and shadow-banning algorithms and allow users to opt out of them; for users who opt out, the platform must display material in "sequential or chronological" order. *Id.* § 501.2041(2)(f). The platform must offer users the opportunity to opt out annually. *Id.* § 501.2041(2)(g).

Disclosure Obligations

• **Standards**: A social-media platform must "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." *Id.* § 501.2041(2)(a).

• **Rule changes**: A platform must inform its users "about any changes to" its "rules, terms, and agreements before implementing the changes." *Id.* § 501.2041(2)(c).

• **View counts**: Upon request, a platform must provide a user with the number of others who viewed that user's content or posts. *Id.* § 501.2041(2)(e).

• **Candidate free advertising**: Platforms that "willfully provide[ ] free advertising for a candidate must inform the candidate of such in-kind contribution." *Id.* § 106.072(4).

• **Explanations**: Before a social-media platform deplatforms, censors, or shadow-bans any user, it must provide the user with a detailed notice. *Id.* § 501.2041(2)(d). In particular, the notice must be in writing and be delivered within 7 days, and must include both a "thorough rationale explaining the reason" for the "censor[ship]" and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision. *Id.* § 501.2041(3). (The notice requirement doesn't apply "if the censored content or material is obscene." *Id.* § 501.2041(4).)

User-Data Requirement

***5** • **Data access**: A social-media platform must allow a deplatformed user to "access or retrieve all of the user's information, content, material, and data for at least 60 days" after the user receives notice of deplatforming. *Id.* § 501.2041(2)(i).

Enforcement of § 106.072—which contains the candidate-deplatforming provision—falls to the Florida Elections Commission, which is empowered to 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 through civil suits filed by private parties. *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, in some instances, attorneys' fees. *Id.* § 501.2041(6).

C

The plaintiffs here—NetChoice and the Computer & Communications Industry Association (together, "NetChoice")—are trade associations that represent internet and social-media companies like Facebook, Twitter, Google (which owns YouTube), and TikTok. They sued the Florida officials charged with enforcing S.B. 7072 under 42 U.S.C. § 1983. In particular, they sought to enjoin enforcement of §§ 106.072 and 501.2041 on a number of grounds, including, as relevant here, that the law's provisions (1) violate the

social-media companies' right to free speech under the First Amendment and (2) are preempted by federal law.

The district court granted NetChoice's motion and preliminarily enjoined enforcement of §§ 106.072 and 501.2041 in their entirety. The court held that the provisions that impose liability for platforms' decisions to remove or deprioritize content are likely preempted by 47 U.S.C. § 230(c)(2), which states that "[n]o provider or user of an interactive computer service shall be held liable on account of ... any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

On NetChoice's free-speech challenge, the district court held that the Act's provisions implicated the First Amendment because they restrict platforms' constitutionally protected exercise of "editorial judgment." The court then applied strict First Amendment scrutiny because it concluded that some of the Act's provisions were content-based and, more broadly, because it found that the *entire bill* was motivated by the state's viewpoint-based purpose to defend conservatives' speech from perceived liberal "big tech" bias: "This viewpoint-based motivation, without more, subjects the legislation to strict scrutiny, root and branch." Doc. 113 at 23–26. The court held that the Act's provisions "come nowhere close" to surviving strict scrutiny because, it said, "leveling the playing field" for speech is not a legitimate state interest, the provisions aren't narrowly tailored, and the State hadn't even argued that the provisions could survive such scrutiny. *Id.* at 27. The court further noted that even if more permissive intermediate scrutiny applied, the provisions wouldn't survive because they don't meet the narrow-tailoring requirement and instead "seem designed not to achieve any governmental interest but to impose the maximum available burden on the social media platforms." *Id.* at 28. The court concluded that the plaintiffs easily met the remaining requirements for a preliminary injunction.

***6** The State appealed. Before us, the State first argues that the plaintiffs are unlikely to succeed on their preemption challenge because some applications of the Act are consistent with § 230. Second, and more importantly for our purposes, the State contends that S.B. 7072 doesn't even *implicate*—let alone 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, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). 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" that are protected by the First Amendment under longstanding Supreme Court precedent, including *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986), *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). According to NetChoice, strict scrutiny applies to the entire law "several times over" because it is speaker-, content-, and viewpoint-based. Moreover, and in any event, 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 briefly defends the district court's preemption holding, but focuses on the First Amendment issues because they fully dispose of the case and because, it contends, a First Amendment violation is a quintessential irreparable injury for injunctive-relief purposes.

D

[3] **[4]** "We review the grant of a preliminary injunction for abuse of discretion, reviewing any underlying legal conclusions *de novo* and any findings of fact for clear error." *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270 (11th Cir. 2020). Ordinarily, "[a] district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public

interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). Likelihood of success on the merits "is generally the most important" factor. *Gonzalez*, 978 F.3d at 1271 n.12 (quotation marks omitted).

* * *

[5] We will train our attention on the question whether NetChoice has shown a substantial likelihood of success on the merits of its First Amendment challenge to Fla. Stat. §§ 106.072 and 501.2041. Because we conclude that the Act's content-moderation restrictions are substantially likely to violate the First Amendment, and because that conclusion fully disposes of the appeal, we needn't reach the merits of the plaintiffs' preemption challenge.[4]

***7** In assessing whether the Act likely violates the First Amendment, we must initially consider whether it triggers First Amendment scrutiny in the first place—*i.e.*, whether it regulates "speech" within the meaning of the Amendment at all. *See Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021). In other words, we must determine whether social-media platforms engage in First-Amendment-protected activity. If they do, we must then proceed to determine what level of scrutiny applies and whether the Act's provisions survive that scrutiny. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021) ("*FLFNB II*").

For reasons we will explain in the balance of the opinion, we hold as follows: (1) S.B. 7072 triggers First Amendment scrutiny because it restricts social-media platforms' exercise of editorial judgment and requires them to make certain disclosures; (2) strict scrutiny applies to some of the Act's content-moderation restrictions while intermediate scrutiny applies to others; (3) the Act's disclosure provisions should be assessed under the standard articulated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); (4) it is substantially likely that the Act's content-moderation restrictions will not survive even intermediate scrutiny; (5) it is also substantially likely that the requirement that platforms provide a "thorough rationale" for each content-moderation decision will not survive under *Zauderer*; (6) it is not substantially likely that the Act's remaining disclosure provisions are unconstitutional; and (7) the preliminary-injunction factors favor enjoining the provisions of the Act that are substantially likely to be unconstitutional.

II

A

[6] **[7]** Social-media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights, *see First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781–84, 98 S.Ct. 1407, 55 L.Ed.2d 707 (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," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (quotation marks omitted). 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 that "Big Tech" companies harbor a "leftist" bias against "conservative" perspectives, the companies that operate social-media platforms express themselves (for better or worse) 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 and thereby engages in "speech" within the meaning of the First Amendment.

Laws that restrict platforms' ability to speak through content moderation therefore trigger First Amendment scrutiny. Two lines of precedent independently confirm this commonsense conclusion: first, and most obviously, decisions protecting exercises of "editorial judgment"; and second, and separately, those protecting inherently expressive conduct.

1

We'll begin with the 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" protected by the First Amendment.

***8** *Miami Herald Publishing Co. v. Tornillo* is the pathmarking case. There, 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" that the First Amendment was designed to safeguard. 418 U.S. at 258, 94 S.Ct. 2831. Florida had 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. *Id.* at 243, 94 S.Ct. 2831. 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." *Id.* at 250–51, 256, 94 S.Ct. 2831 (quotation marks omitted). Florida's "intrusion into the function of editors," the Court held, was barred by the First Amendment. *Id.* at 258, 94 S.Ct. 2831.

The Court subsequently extended *Miami Herald*'s protection of editorial judgment beyond newspapers. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 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, 106 S.Ct. 903 (plurality op.). A plurality of the Court reasoned that the concerns underlying *Miami Herald* applied to a utility company in the same way that they did to the institutional press. *Id.* at 11–12, 106 S.Ct. 903. 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. *Id.* at 17–21, 106 S.Ct. 903.

So too, in *Turner Broadcasting Systems, Inc. v. FCC*, 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, 114 S.Ct. 2445. "[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." *Id.* (quotation marks omitted); *see also Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674, 118 S.Ct. 1633, 140 L.Ed.2d 875 (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, 114 S.Ct. 2445.[5]

Most recently, the Court applied the editorial-judgment principle to a parade organizer in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, explaining that parades (like newspapers and cable-TV packages) constitute protected expression. 515 U.S. at 568, 115 S.Ct. 2338. 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. *Id.* at 564, 115 S.Ct. 2338. Citing *Miami Herald*, 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." *Id.* at 570, 115 S.Ct. 2338. The Court concluded that 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 autonomy to choose the content of his own message." *Id.* at 573, 115 S.Ct. 2338. 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." *Id.* at 574–75, 115 S.Ct. 2338.

***9** **[8]** Together, *Miami Herald*, *Pacific Gas*, and particularly *Turner* and *Hurley* 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 editorial judgments protected by the First Amendment. For reasons we will explain, social-media platforms' content-moderation decisions constitute the same sort of editorial judgments and thus trigger First Amendment scrutiny.

2

[9] 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. We recently explained that standard in *Coral Ridge Ministries, Inc. v. Amazon.com, Inc.*:

> 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.

6 F.4th at 1254 (cleaned up).

In *Coral Ridge*, a Christian ministry and media organization sued Amazon.com, alleging that 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. *Id.* 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 *Hurley* about which groups to include in the march. *Id.* 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." *Id.* (quoting *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) ("*FLFNB I*")).

The *Coral Ridge* case built on our earlier decision in *Fort Lauderdale Food Not Bombs*. 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. *Id.* 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.' " *Id.* at 1244–45 (quoting *Spence v. Washington*, 418 U.S. 405, 410, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)).

3

[10] Whether we assess social-media platforms' content-moderation activities against the *Miami Herald* line of cases or against our own decisions explaining what constitutes expressive conduct, the result is the same: Social-media platforms exercise editorial judgment that is inherently expressive. When platforms choose to 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.

***10** Social-media platforms' content-moderation decisions are, we think, closely analogous to the editorial judgments that the Supreme Court recognized in *Miami Herald*, *Pacific Gas*, *Turner*, and *Hurley*. Like parade organizers and cable operators, social-media companies are in the business of delivering curated compilations of speech created, in the first instance, by others. 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." *Hurley*, 515 U.S. at 575, 115 S.Ct. 2338. Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups. A few examples:

- 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.[6]

- 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 that include what it considers to be hate speech, fraud or deception, nudity or sexual activity, and public-health misinformation.[7]

- 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.[8]

- Roblox, a gaming social network primarily for children, prohibits "[s]ingling out a user or group for ridicule or abuse," any sort of sexual content, depictions of and support for war or violence, and any discussion of political parties or candidates.[9]

- Vegan Forum allows non-vegans but "will not tolerate members who promote contrary agendas."[10]

And to be clear, some platforms exercise editorial judgment to promote explicitly political agendas. On the right, ProAmericaOnly promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS."[11] And on the left, The Democratic Hub says that its "online community is for 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."[12]

All such decisions about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on platforms' own particular 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 *Coral Ridge* 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 (right or wrong) that some platforms' content-moderation decisions reflected a "leftist" bias against "conservative" views—which, for better or worse, surely counts as expressing a message. That observers perceive bias in platforms' content-moderation decisions is compelling evidence that those decisions are indeed expressive.

***11** In an effort to rebut this point, the State responds that because the vast majority of content that makes it onto social-media platforms is never reviewed—let alone removed or deprioritized—platforms aren't engaged in conduct of sufficiently expressive quality to merit First Amendment protection. *See* Reply Br. of Appellant at 16. With respect, the State's argument misses the point. The "conduct" that the challenged provisions regulate—what this entire appeal is about—is the platforms' "censorship" of users' posts—*i.e.*, the posts that platforms *do* review and remove or deprioritize.[13] The question, then, is whether *that* conduct is expressive. For reasons we've explained, we think it unquestionably is.[14]

B

In the face of the editorial-judgment and expressive-conduct cases, the State insists that S.B. 7072 doesn't even implicate, let alone violate, the First Amendment. The State's first line of argument relies on two cases—*PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*")—in which the Supreme Court upheld government regulations that effectively compelled private actors to "host" others' speech. The State's second argument seeks to evade—or at least minimize—First Amendment scrutiny by labeling social-media platforms "common carriers." We find neither argument convincing.

1

***12** We begin with the "hosting" cases. The first decision to which the State points, *PruneYard*, 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, 100 S.Ct. 2035. In that case, though, the only First Amendment interest that 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." *Id.* at 85, 100 S.Ct. 2035. The Supreme Court's subsequent decisions in *Pacific Gas* and *Hurley* distinguished and cabined *PruneYard*. The *Pacific Gas* plurality explained that "[n]otably absent from *PruneYard* 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, 106 S.Ct. 903 (plurality op.); *see also id.* at 24, 106 S.Ct. 903 (Marshall, J., concurring in the judgment) ("While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest."); *Hurley*, 515 U.S. at 580, 115 S.Ct. 2338 (noting that the "principle of speaker's autonomy was simply not threatened in" *PruneYard*). Because NetChoice asserts that 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, *PruneYard* is inapposite.

FAIR may be a bit closer, but it, too, is distinguishable. In that case, 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, 126 S.Ct. 1297. 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. *Id.* at 51, 126 S.Ct. 1297. But the Court held that 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." *Id.* at 60, 126 S.Ct. 1297. 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. *Id.* at 60–61, 126 S.Ct. 1297.

With respect to the first argument, the Court distinguished *Miami Herald*, *Pacific Gas*, and *Hurley* on the ground that, in those cases, "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63, 126 S.Ct. 1297. 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 that editorial pages, newsletters, and parades are. *Id.* at 64, 126 S.Ct. 1297. 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." *Id.* 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*. *Id.* at 62, 126 S.Ct. 1297.

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." *Id.* at 66, 126 S.Ct. 1297. 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. *Id.* Because "explanatory speech" was necessary to understand the message conveyed by the law schools' conduct, the Court concluded, that conduct wasn't "inherently expressive." *Id.*

***13** *FAIR* isn't controlling here because social-media platforms warrant First Amendment protection on both of the grounds that the Court held that 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 that it disseminates to its users "engages in speech activity." *Ark. Educ. TV Comm'n*, 523 U.S. at 674, 118 S.Ct. 1633; *see Sorrell*, 564 U.S. at 570, 131 S.Ct. 2653 (explaining that the "dissemination of information" is "speech within the meaning of the First Amendment"); *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) ("If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." (cleaned up)). Just as the must-carry provisions in *Turner* "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, 114 S.Ct. 2445, 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 that 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." *Id.* 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. *Id.* 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. *Id.* at 1241 (citing *Brown v. Louisiana*, 383 U.S. 131, 141–42, 86 S.Ct. 719, 15 L.Ed.2d 637 (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. *Id.* 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. *Id.* at 1245; *see also Coral Ridge*, 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.[15] Thus, social-media platforms engage in content moderation that is inherently expressive notwithstanding *FAIR*.

***14**
* * *

The State asserts that *PruneYard* and *FAIR*—and, for that matter, the Supreme Court's editorial-judgment decisions—establish three "guiding principles" that should lead us to conclude that 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 in order to implicate the First Amendment—does find support in *FAIR*. *See* 547 U.S. at 64, 126 S.Ct. 1297. 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 that 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. Fla. 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 inherently expressive conduct, which we have said it is, then the Act *does* interfere with platforms' ability to speak. *See Pacific Gas*, 475 U.S. at 10–12, 16, 106 S.Ct. 903 (plurality op.) (noting that if the government could compel speakers to "propound ... messages with which they disagree," the First Amendment's protection "would be empty, for the government could require speakers to affirm in one breath that which they deny in the next").

[11] The State's second principle—that in order to trigger First Amendment scrutiny a regulation must create a risk that viewers or listeners might confuse a user's and the platform's speech—finds little support in our precedent. Consumer confusion simply isn't a prerequisite to First Amendment protection. In *Miami Herald*, for instance, even though no reasonable observer would have mistaken a political candidate's statutorily mandated right-to-reply column for the newspaper reversing its earlier criticism, the Supreme Court deemed the paper's editorial judgment to be protected. *See* 418 U.S. at 244, 258, 94 S.Ct. 2831. Nor was there a risk of consumer confusion in *Turner*: No reasonable person would have thought that the cable operator there endorsed every message conveyed by every speaker on every one of the channels it carried, and yet the Court stated categorically that the operator's editorial discretion was protected. *See* 512 U.S. at 636–37, 114 S.Ct. 2445. Moreover, it seems to us that the State's confusion argument boomerangs back around on itself: If a platform announces a community standard prohibiting, say, hate speech, but is then barred from removing or even disclaiming posts containing what it perceives to be hate speech, there's a real risk that a viewer might *erroneously*

conclude that the platform doesn't consider those posts to constitute hate speech.

The State's final principle—that in order to receive First Amendment protection a platform must curate and present speech in such a way that a "common theme" emerges—is similarly flawed. *Hurley* held that "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, 115 S.Ct. 2338; *see FLFNB I*, 901 F.3d at 1240 (citing *Hurley* for the proposition that a "particularized message" isn't required for conduct to qualify for First Amendment protection). Moreover, even if one could theoretically attribute a common theme to a parade, *Turner* makes clear that no such theme is required: It seems to us inconceivable that one could ascribe a common theme to the cable operator's choice there to carry hundreds of disparate channels, and yet the Court held that the First Amendment protected the operator's editorial discretion. 512 U.S. at 636, 114 S.Ct. 2445.[16]

***15** In short, the State's reliance on *PruneYard* and *FAIR* and its attempts to distinguish the editorial-judgment line of cases are unavailing.

2

The State separately seeks to evade (or at least minimize) First Amendment scrutiny by labeling social-media platforms "common carriers."[17] The crux of the State's position, as expressed at oral argument, 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 *et seq*. For reasons we explain, we disagree.

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.

a

[12] The first version of the argument fails because, in point of fact, social-media platforms are not—in the nature of things, so to speak—common carriers. That is so for at least three reasons.

First, social-media 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 v. Midwest Video Corp*., 440 U.S. 689, 701, 99 S.Ct. 1435, 59 L.Ed.2d 692 (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 if, but 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 make—and have always made—"individualized" content- and viewpoint-based decisions about whether to publish particular messages or users.

***16** Second, Supreme Court precedent strongly suggests that internet companies like social-media platforms aren't common carriers. While the Court has applied less stringent First Amendment scrutiny to television and radio broadcasters, the *Turner* 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, 114 S.Ct. 2445. Instead of "comparing cable operators to electricity providers, trucking companies, and railroads—all entities subject to traditional economic regulation"—the *Turner* Court "analogized the cable operators [in that case] to the publishers, pamphleteers, and bookstore owners traditionally protected by the First Amendment." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 428 (D.C. Cir. 2017) (Kavanaugh, J., dissental); *see Turner*, 512 U.S. at 639, 114 S.Ct. 2445. And indeed, the Court explicitly distinguished online from broadcast media in *Reno v. American Civil Liberties Union*, 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, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). These precedents demonstrate that social-media 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 services." *See, e.g.*, 47 U.S.C. § 223(e)(6) ("Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."). And the Act goes on to provide protections for internet companies that are inconsistent with the traditional common-carrier obligation of indiscriminate service. In particular, it explicitly protects internet companies' ability to restrict access to a plethora of material that they might consider "objectionable." *Id.* § 230(c)(2)(A). Federal law's 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

[13] 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 social-media 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. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 825, 116 S.Ct. 2374, 135 L.Ed.2d 888 (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."); *Cablevision Sys. Corp. v. 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. Telecom Ass'n*, 855 F.3d at 434 (Kavanaugh, J., dissental) ("Can the Government really force Facebook and Google ... to operate as common carriers?").

* * *

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; *see Biden v. Knight First Amend. Inst.*, —— U.S. ——, 141 S. Ct. 1220, 1226, 209 L.Ed.2d 519 (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. Telecom. Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016)); *see Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). The problem, as we've explained, is that social-media platforms *don't* serve the public indiscriminately but, rather, exercise editorial judgment to curate the content that they display and disseminate.

***17 [14]** 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; *see Knight*, 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." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring) (quoting *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 408, 34 S.Ct. 612, 58 L.Ed. 1011 (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. *See Miami Herald*, 418 U.S. at 251, 258, 94 S.Ct. 2831.

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

With one exception, we hold that the challenged provisions of S.B. 7072 trigger First Amendment scrutiny either (1) by restricting social-media platforms' ability to exercise editorial judgment or (2) by imposing disclosure requirements. Here's a brief rundown.

[15] 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 (§ 106.072(2)), deprioritizing and "shadow-banning" content by or about candidates (§ 501.2041(2)(h)), and censoring, deplatforming, or shadow-banning "journalistic enterprises" (§ 501.2041(2)(j)) all clearly restrict platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable.

[16] The consistency requirement (§ 501.2041(2)(b)) and the 30-day restriction (§ 501.2041(2)(c)) also—if somewhat less obviously—restrict editorial judgment. Together, these provisions force platforms to remove (or retain) all content that is similar to material that they have previously removed (or retained). Even if a platform wants to retain or remove content in an *inconsistent* manner—for instance, to steer discourse in a particular direction—it may not do so. And even if a platform wants to leave certain content up and continue distributing it to users, it can't do so if within the past 30 days it's removed other content that a court might find to be similar. These provisions thus burden platforms' right to make editorial judgments on a case-by-case basis or to change the types of content they'll disseminate—and, hence, the messages they express.

[17] The user-opt-out requirement (§ 501.2041(2)(f), (g)) also triggers First Amendment scrutiny because it forces platforms, upon a user's request, not to exercise the editorial discretion that they otherwise would in curating content—prioritizing some posts and deprioritizing others—in the user's feed. Even if a platform would prefer, for its own reasons, to give greater prominence to some posts while limiting the reach of others, the opt-out provision would prohibit it from doing so, at least with respect to some users.

S.B. 7072's disclosure provisions implicate the First Amendment, but for a different reason. These provisions don't directly restrict editorial judgment or expressive conduct, but *indirectly* burden platforms' editorial judgment by compelling them to disclose certain information. Laws that compel commercial disclosures and thereby indirectly burden protected speech trigger relatively permissive First Amendment scrutiny, which we will explain. *See Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265; *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, —— U.S. ——, 138 S. Ct. 2361, 2378, 201 L.Ed.2d 835 (2018) ("*NIFLA*").

***18** **[18]** Finally, the exception: We hold that S.B. 7072's user-data-access requirement (§ 501.2041(2)(i)) does *not* trigger First Amendment scrutiny. This provision—which requires social-media platforms to allow deplatformed users to access their own data stored on the platform's servers for at least 60 days—doesn't prevent or burden to any significant extent the exercise of editorial judgment or compel any disclosure.[18]

* * *

Taking stock: 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. All but one of S.B. 7072's operative provisions implicate platforms' First Amendment rights and are therefore subject to First Amendment scrutiny.

III

A

Having determined that it is substantially likely that S.B. 7072 triggers First Amendment scrutiny, we must now determine the level of scrutiny to apply—and to which provisions.

[19] **[20]** **[21]** We begin with the basics. "[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; *see also Turner*, 512 U.S. at 643–44, 662, 114 S.Ct. 2445 (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). A law is content-based if it "suppress[es], disadvantage[s], or impose[s] differential burdens upon speech because of its content," *Turner*, 512 U.S. at 642, 114 S.Ct. 2445—*i.e.*, if it "applies to particular speech because of the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). A law can be content-based either because it draws "facial distinctions ... defining regulated speech by particular subject matter" or because, though facially neutral, it "cannot be justified without reference to the content of the regulated speech." *Id.* at 163–64, 135 S.Ct. 2218 (quotation marks omitted).

[22] Viewpoint-based laws—"[w]hen the government targets not subject matter, but particular views taken by speakers on a subject"—constitute "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). They "are prohibited," seemingly as a *per se* matter. *Minn. Voters All. v. Mansky*, —— U.S. ——, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018); *see Turner*, 512 U.S. at 642, 114 S.Ct. 2445 ("The government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed." (quotation marks omitted and alteration adopted)).

1

[23] NetChoice asks us to affirm the district court's conclusion that S.B. 7072's "viewpoint-based *motivation*" subjects the entire Act—every provision—"to strict scrutiny, root and branch." Doc. 113 at 25 (emphasis added). It's certainly true—as already explained—that at least a handful of S.B. 7072's key proponents candidly acknowledged their desire to combat what they perceived to be the "leftist" bias of the "big tech oligarchs" against "conservative" ideas. *Id.* It's also true that the Act applies only to a subset of speakers consisting of the largest social-media platforms and that the law's enacted findings refer to the platforms' allegedly "unfair" censorship. *See* S.B. 7072 § (9), (10); Fla. Stat. § 501.2041(1)(g). But given the state of our (sometimes dissonant) precedents, we don't think that NetChoice is substantially likely to succeed on the merits of its claim that the entire Act is impermissibly viewpoint-based. Here's why.

***19** **[24]** We have held—"many times"—that "when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a constitutionally impermissible purpose." *In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015). In *Hubbard*, we cited (among other decisions) *United States v. O'Brien* for the proposition that courts shouldn't look to a law's legislative history to find an illegitimate motivation for an otherwise constitutional statute. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). The plaintiffs in *O'Brien* had challenged a law prohibiting the burning of draft cards on the ground that Congress's "purpose"—as evidenced in the statements of several legislators—was "to suppress freedom of speech." 391 U.S. at 382–83, 88 S.Ct. 1673. The Supreme Court refused to void the statute "on the basis of what fewer than a handful of Congressmen said about it" given that Congress "had the undoubted power to enact" it if legislators had only made " 'wiser' speech[es] about it." *Id.* at 384, 88 S.Ct. 1673; *see also Arizona v. California*, 283 U.S. 423, 455, 51 S.Ct. 522, 75 L.Ed. 1154 (1931) ("Into the motives which induced members of Congress to enact the [statute], this court may not inquire."). Even though the statute in *O'Brien* regulated expressive conduct and its legislative history suggested a viewpoint-based motivation, the *O'Brien* Court declined to invalidate the statute as a *per se* matter, or even apply strict scrutiny, but rather upheld the law under what we have come to call intermediate scrutiny. 391 U.S. at 382, 88 S.Ct. 1673.

To be fair, there is some support for NetChoice's motivation-based argument for invalidating S.B. 7072 in toto, but not enough to overcome the clear statements in *Hubbard* and *O'Brien*. It's true that the Supreme Court said in *Turner* that "even a regulation neutral on its face may be content based if its *manifest purpose* is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645–46, 114 S.Ct. 2445 (emphasis added). And *Turner* cited, with a hazy "*cf.*" signal, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534–535, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), which held that in the *free-exercise* context, it was appropriate to look beyond "the text of the laws at issue" to identify discriminatory animus against a minority religion. But NetChoice hasn't cited—and we're not aware

of—any Supreme Court or Eleventh Circuit decision that relied on legislative history or statements by proponents to characterize as viewpoint-based a law challenged on *free-speech* grounds.[19] The closest the Supreme Court seems to have come is in *Sorrell v. IMS Health, Inc.*, in which it looked to a statute's "formal legislative findings" to dispel "any doubt" that the challenged statute was content-based. 564 U.S. at 564–65, 131 S.Ct. 2653. But the only evidence of viewpoint-based motivation in S.B. 7072's enacted findings are the references to "unfair[ness]." Those, we think, are far less damning than the findings in *Sorrell*, which expressly—and startlingly—stated that the regulated speakers conveyed messages that were "often in conflict with the goals of the state." 564 U.S. at 565, 131 S.Ct. 2653 (quotation marks omitted).

***20** Finally, the fact that S.B. 7072 targets only a subset of social-media platforms isn't enough to subject the entire law to strict scrutiny or *per se* invalidation. It's true that the Supreme Court's "precedents are deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others" because they "run the risk that the State has left unburdened those speakers whose messages are in accord with its own views." *NIFLA*, 138 S. Ct. at 2378 (quotation marks omitted); *cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (noting that the power to "single[ ] out a few members of the press presents such a potential for abuse that no interest suggested by [the State] can justify the scheme"). But "[i]t would be error to conclude ... that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others": "[H]eightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[20] *Turner*, 512 U.S. at 660–61, 114 S.Ct. 2445 (quoting *Minneapolis Star*, 460 U.S. at 585, 103 S.Ct. 1365). S.B. 7072's application to only the largest social-media platforms might be viewpoint-motivated, *or* it might be based on some other "special characteristic" of large platforms—for instance, their market power. *See* Appellant's App'x at 237–46. Given *Hubbard* and *O'Brien*—and in the absence of clear precedent enabling us to find a viewpoint-discriminatory purpose based on legislative history—we conclude that NetChoice hasn't shown a substantial likelihood of success on the merits of its argument that S.B. 7072 should be stricken, or subject to strict scrutiny, in its entirety.[21]

2

Having determined that we cannot use the Act's chief proponents' statements as a basis to invalidate S.B. 7072 "root and branch," we must proceed on a more nuanced basis to determine what sort of scrutiny each provision—or category of provisions—triggers.

To start, we hold that it is substantially likely that what we have called the Act's content-moderation restrictions are subject to either strict or intermediate First Amendment scrutiny, depending on whether they are content-based or content-neutral. *See FLFNB II*, 11 F.4th at 1291–92. Some of these provisions are self-evidently content-based and thus subject to strict scrutiny. The journalistic-enterprises provision, for instance, prohibits a platform from making content-moderation decisions concerning any "journalistic enterprise *based on the content of*" its posts, Fla. Stat. § 501.2041(2)(j) (emphasis added), and thus applies "because of the ... message" that the platform's decision expresses, *Reed*, 576 U.S. at 163, 135 S.Ct. 2218: Removing a journalistic enterprise's post, for instance, because it is duplicative or too big is permissible, but removing a post to communicate disapproval of its content isn't. Similarly, the restriction on deprioritizing posts "about ... a candidate," *id.* § 501.2041(2)(h), regulates speech based on "the topic discussed," *Reed*, 576 U.S. at 163, 135 S.Ct. 2218, and is therefore clearly content-based. At the other end of the spectrum, the candidate-deplatforming (§ 106.072(2)) and user-opt-out (§ 501.2041(2)(f), (g)) provisions are pretty obviously content-neutral. Neither a prohibition on banishing political candidates nor a requirement that platforms allow users to decline content curation depends in any way on the substance of platforms' content-moderation decisions.

***21** Some of the provisions—for instance, § 501.2041(2)(b)'s requirement that platforms exercise their content-moderation authority "consistently"—may exhibit both content-based and content-neutral characteristics. Ultimately, though, we find that we needn't precisely categorize each and every one of S.B. 7072's content-moderation restrictions because it is substantially likely that they are all "regulation[s] of expressive conduct" that, at the very least, trigger intermediate scrutiny, *FLFNB II*, 11 F.4th at 1291–92—and, for reasons we'll explain in the next Part, none survive even that, *cf. Sorrell*, 564 U.S. at 571, 131 S.Ct. 2653 (noting that because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial

scrutiny is applied ... there is no need to determine whether all speech hampered by [the law] is commercial").

A different standard applies to S.B. 7072's disclosure provisions—§ 106.072(4) and § 501.2041(2)(a), (c), (e), (4). These are content-neutral regulations requiring social-media platforms to disclose "purely factual and uncontroversial information" about their conduct toward their users and the "terms under which [their] services will be available," which are assessed under the standard announced in *Zauderer*. 471 U.S. at 651, 105 S.Ct. 2265. While "restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny," when "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech ... the less exacting scrutiny described in *Zauderer* governs our review." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). Although this standard is typically applied in the context of advertising and to the government's interest in preventing consumer deception, we think it is broad enough to cover S.B. 7072's disclosure requirements—which, as the State contends, provide users with helpful information that prevents them from being misled about platforms' policies.

B

At last, it is time to apply the requisite First Amendment scrutiny. We hold that it is substantially likely that none of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny. We further hold that there is a substantial likelihood that the "thorough explanation" disclosure requirement (§ 501.2041(2)(d)) is unconstitutional. As for the remaining disclosure provisions, we hold that it is not substantially likely that they are unconstitutional.[22]

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[25] We'll start with S.B. 7072's content-moderation restrictions. While some of these provisions are likely subject to strict scrutiny, it is substantially likely that none survive even intermediate 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'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

***22** **[26]** 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. Indeed, the State's briefing doesn't even argue that these provisions can survive heightened scrutiny. (The State seems to have wagered pretty much everything on the argument that S.B. 7072's provisions don't trigger First Amendment scrutiny at all.) Nor can we discern any substantial or compelling interest that would justify the Act's significant restrictions on platforms' editorial judgment. We'll briefly explain and reject two possibilities that the State might offer.

[27] The State might theoretically assert some interest in counteracting "unfair" private "censorship" that privileges some viewpoints over others on social-media platforms. *See* 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," *Sorrell*, 564 U.S. at 578–79, 131 S.Ct. 2653, or "advance some points of view," *Pacific Gas*, 475 U.S. at 20, 106 S.Ct. 903 (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, remember, 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, we've explained, 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." *Buckley v. Valeo*, 424 U.S. 1, 48–49, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). At the end of the day, preventing "unfair[ness]" to certain users or points of view isn't a substantial governmental interest; rather, private actors have a First Amendment right to be "unfair"—which is to say, a right to have and express their own points of view. *Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831.

The State might also assert an interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner*, 512 U.S. at 662, 114 S.Ct. 2445. Just as the *Turner* 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," *id.* at 663–64, 114 S.Ct. 2445, the State could argue that S.B. 7072 ensures that political candidates and journalistic enterprises are able to communicate with the public, *see* Fla. 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 the situation in *Turner*, where cable operators had "bottleneck, or gatekeeper control over most programming delivered into subscribers' homes," 512 U.S. at 623, 114 S.Ct. 2445, 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. *See Reno*, 521 U.S. at 870, 117 S.Ct. 2329 (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. *Buckley*, 424 U.S. at 48–49, 96 S.Ct. 612.

***23** **[28]** There is also a substantial likelihood that the consistency, 30-day, and user-opt-out provisions (§ 501.2041(2)(b), (c), (f), (g)) fail to advance substantial governmental interests. First, 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." *See* § 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 on the ground that it allowed similar groups in the past, or vice versa? We think not. *See Hurley*, 515 U.S. at 573–74, 115 S.Ct. 2338. Because social-media platforms exercise analogous editorial judgment, the same answer applies to them. Second, there is likely no governmental interest sufficient to justify prohibiting a platform from changing its content-moderation policies—*i.e.*, prohibiting a private speaker from changing the messages it expresses—more than once every 30 days. *See* § 501.2041(2)(c). Finally, there is likely no governmental interest sufficient to justify forcing platforms to show content to users in a "sequential or chronological" order, *see* § 501.2041(2)(f), (g)—a requirement that would prevent platforms from expressing messages through post-prioritization and shadow banning.

Moreover, and in any event, even if the State could establish that its content-moderation restrictions serve a substantial governmental interest, it hasn't even attempted to—and we don't think it could—show that the burden that those provisions impose is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673. 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 a sufficient number of users to post *anything* it wants—other than true "obscen[ity]"—and even prohibits platforms from adding disclaimers or warnings. *See* Fla. Stat. § 501.2041(2)(j). As one amicus vividly 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. *See* Chamber of Progress Amicus Br. at 12.[23] 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—in Fla. Stat. §§ 106.072(2), 501.2041(2)(b), (c), (f), (g), (h), (j)—violate the First Amendment.

2

[29] We assess S.B. 7072's disclosure requirements—in §§ 106.072(4), 501.2041(2)(a), (c), (d), (e))—under the *Zauderer* standard: A commercial disclosure requirement must be "reasonably related to the State's interest in preventing deception of consumers" and must not be "[u]njustified or unduly burdensome" such that it would

"chill[ ] protected speech." *Milavetz*, 559 U.S. at 250, 130 S.Ct. 1324 (citing *Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265).

[30] With one notable exception, it is not substantially likely that the disclosure provisions are unconstitutional. The State's interest here is in ensuring that users—consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies.[24] This interest is likely legitimate. On the ensuing burden question, NetChoice hasn't established a substantial likelihood that the provisions that require platforms to publish their standards (§ 501.2041(2)(a)), inform users about changes to their rules (§ 501.2041(2)(c)), provide users with view counts for their posts, (§ 501.2041(2)(e)), and inform candidates about free advertising (§ 106.072(4)), are unduly burdensome or likely to chill platforms' speech. So, these provisions aren't substantially likely to be unconstitutional.[25]

***24** **[31]** But NetChoice *does* argue that § 501.2041(2)(d)—the requirement that platforms provide notice and a detailed justification for every content-moderation action—is "practically impossible to satisfy." Br. of Appellees at 49. We conclude that it is substantially likely that this provision is unconstitutional under *Zauderer* because it is unduly burdensome and likely to chill platforms' protected speech. The targeted platforms remove millions of posts per day; YouTube alone removed more than a billion comments in a single quarter of 2021. *See* Doc. 25-1 at 6. For every one of these actions, the law requires a platform to provide written notice delivered within seven days, including a "thorough rationale" for the decision and a "precise and thorough explanation of how [it] became aware" of the material. *See* § 501.2041(3). This requirement not only imposes potentially significant implementation costs but also exposes platforms to massive liability: The law provides for up to $100,000 in statutory damages per claim and pegs liability to vague terms like "thorough" and "precise." *See* § 501.2041(6)(a). Thus, a platform could be slapped with millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn't provide sufficiently "thorough" explanations when removing posts. It is substantially likely that this massive potential liability is "unduly burdensome" and would "chill[ ] protected speech"—platforms' exercise of editorial judgment—such that § 501.2041(2)(d) violates platforms' First Amendment rights. *Milavetz*, 559 U.S. at 250, 130 S.Ct. 1324.

* * *

It is substantially likely that S.B. 7072's content-moderation restrictions (§§ 106.072(2), 501.2041(2)(b), (c), (f), (g), (h), (j)) and its requirement that platforms provide a thorough rationale for every content-moderation action (§ 501.2041(2)(d)) violate the First Amendment. The same is not true of the Act's other disclosure provisions (§§ 106.072(4), 501.2041(2)(a), (c), (e)) and its user-data-access provision (§ 501.2041(2)(i)).[26]

IV

[32] Finally, we turn to the remaining preliminary-injunction factors. Our conclusions about which provisions of S.B. 7072 are substantially likely to violate the First Amendment effectively determine the result of this appeal because likelihood of success on the merits "is generally the most important of the four factors." *Gonzalez*, 978 F.3d at 1271 n.12 (quotation marks omitted). With respect to the second factor, we have held that "an ongoing violation of the First Amendment"—as the platforms here would suffer in the absence of an injunction—"constitutes an irreparable injury." *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017); *see also Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020). The third and fourth factors—"damage to the opposing party" and the "public interest"—"can be consolidated" because "[t]he nonmovant is the government." *Otto*, 981 F.3d at 870. And "neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance." *Id.* Therefore, the preliminary-injunction factors weigh in favor of enjoining the likely unconstitutional provisions of the Act.

* * *

We hold that the district court did not abuse its discretion when it preliminarily enjoined those provisions of S.B. 7072 that are substantially likely to violate the First Amendment. But the district court did abuse its discretion when it enjoined provisions of S.B. 7072 that aren't likely unconstitutional. Accordingly, we **AFFIRM** the preliminary injunction in part, and **VACATE and REMAND** in part, as follows:

Provision	Fla. Stat. §	Likely Constitutionality	Disposition

Candidate deplatforming	106.072(2)	Unconstitutional	**Affirm**
Posts by/about candidates	501.2041(2)(h)	Unconstitutional	**Affirm**
"Journalistic enterprises"	501.2041(2)(j)	Unconstitutional	**Affirm**
Consistency	501.2041(2)(b)	Unconstitutional	**Affirm**
30-day restriction	501.2041(2)(c)	Unconstitutional	**Affirm**
User opt-out	501.2041(2)(f),(g)	Unconstitutional	**Affirm**
Explanations (per decision)	501.2041(2)(d)	Unconstitutional	**Affirm**
Standards	501.2041(2)(a)	Constitutional	**Vacate**
Rule changes	501.2041(2)(c)	Constitutional	**Vacate**
User view counts	501.2041(2)(e)	Constitutional	**Vacate**
Candidate "free advertising"	106.072(4)	Constitutional	**Vacate**
User-data access	501.2041(2)(i)	Constitutional	**Vacate**

All Citations

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Footnotes

1 *See* https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech.

2 While S.B. 7072 also enacted antitrust-related provisions, only §§ 106.072 and 501.2041 are at issue in this appeal.

3 For purposes of this appeal, the State does not defend the Act's post-prioritization provisions.

4 The only provisions that NetChoice challenges as preempted are, for reasons we'll explain, also substantially likely to violate the First Amendment. Of course, federal courts should generally "avoid reaching constitutional questions if there are other grounds upon which a case can be decided," but that rule applies only when "a dispositive nonconstitutional ground is available." *Otto v. City of Boca Raton*, 981 F.3d 854, 871 (11th Cir. 2020) (quotation marks and emphasis omitted). Here, whether or not the preemption ground is "dispositive," *but cf. id.*, it isn't "nonconstitutional" because federal preemption is rooted in the Supremacy Clause of Article VI, *see La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

5 In *Turner*, the Court applied intermediate scrutiny because the law was content-neutral. *See* 512 U.S. at 662, 114 S.Ct. 2445. The point for present purposes is that the Court held that the must-carry provision triggered First Amendment scrutiny.

6 *Policies and Guidelines*, YouTube, https://www.youtube.com/creators/how-things-work/policies-guidelines (last accessed May 15, 2022).

7 *Facebook Community Standards*, Meta, https://transparency.fb.com/policies/community-standards (last accessed May 15, 2022).

8 *The Twitter Rules*, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-rules (last accessed May 15, 2022).

9 *Roblox Community Standards*, Roblox, https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards (last accessed May 15, 2022).

10 *Membership Rules*, Vegan Forum, https://www.vegan-forum.org/help/terms (last accessed May 15, 2022).

11 ProAmericaOnly, https://proamericaonly.org (last accessed May 15, 2022).

12 The Democratic Hub, https://www.democratichub.com (last accessed May 15, 2022).

13 The fact 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., dissental) (explaining that the fact that platforms "have not been aggressively exercising their editorial discretion does not mean that they have no *right* to exercise their editorial discretion").

14 Texas and several other states as amici insist that social-media 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, 115 S.Ct. 2338)). Instead, as explained in text, 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 (11th Cir. 2004)).

To the extent that the states argue that social-media platforms lack the requisite "intent" to convey a message, we find it implausible that platforms would engage in the laborious process of defining detailed community standards, identifying offending content, and removing or deprioritizing 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 that 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 that Facebook moderates content "in service of" its "values" of "authenticity," "safety," "privacy," and "dignity").

15 One might object that users know that 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, 126 S.Ct. 1297. 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, *see id.*, we find it unlikely that a reasonable observer would think, for instance, that 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 be drawn from the fact that certain types of content rarely or never appear when a user browses a social-media site—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, that some content-moderation decisions—for instance, to prioritize or deprioritize individual posts—are so subtle that 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 absence of explanatory speech. Specifically, it's likely clear to viewers that platforms take down individual posts, remove entire categories of content, and deplatform other users—and that such actions express messages. "Shadow-banning" would also likely be apparent and communicate a message to a reasonable user who knows that she follows a particular poster but doesn't see that poster's content, for instance, in her feed or search results. Thus, even if *some* content moderation isn't inherently expressive, much of it is. *See* *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (noting that a statute facially violates the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep" (quotation marks omitted)). As explained in text, S.B. 7072's content-moderation restrictions all regulate platforms' inherently expressive conduct and trigger heightened scrutiny. *See infra* Part II.C.

16 Of course, to the extent that one might say that a cable operator is pursuing, say, a "theme" of *non*-obscenity, the very same sort of thing could be said of social-media platforms. *See Facebook Community Standards*, *supra* (explaining that Facebook prohibits many categories of content as it seeks to foster the values of "authenticity," "safety," "privacy," and "dignity").

17 We say "or at least minimize" because it's not entirely clear what work a common-carrier designation would perform in a First Amendment analysis. While the Supreme Court has suggested that common carriers "receive a lower level of First Amendment protection than other forms of communication," it has never explained the precise level of protection that they do receive. Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. Free Speech L. 463, 480–82 (2021); *see also* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378, 104 S.Ct. 3106, 82 L.Ed.2d 278 (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" (cleaned up)). 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* TechFreedom Amicus Br. at 29 (quoting 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.

18 It is theoretically possible that this provision could impose such an inordinate burden on the platforms' First Amendment rights that some scrutiny would apply. But at this stage of the proceedings, the plaintiffs haven't shown a substantial likelihood of success on the merits of their claim that it implicates the First Amendment.

19 To be sure, in *Ranch House, Inc. v. Amerson*, we observed that in determining whether a law prohibiting nude-dance establishments had the purpose of "suppress[ing] protected speech," a court could examine the statute's "legislative findings[,] ... legislative history, and studies and information of which legislators were clearly aware." 238 F.3d 1273, 1280 (11th Cir. 2001). But *Ranch House* is largely inapposite. First, *Ranch House* seems, at most, to have ratified the possibility that a legislature's content-neutral purpose—combatting nude-dance establishments' "secondary effects"—could *save* a law that facially discriminated on the basis of content. *Id.* at 1279–80 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). That's the opposite of what NetChoice asks us to do here—*i.e.*, to *invalidate* a facially viewpoint-neutral law on the basis of its legislative history. Second, *Ranch House* recognized that the "[s]econdary effects doctrine is an exception to the general rule that a statute which on its face distinguishes among particular types of speech or expression by content is subject to the strictest scrutiny." *Id.* at 1282. We decline to extend *Ranch House*'s limited endorsement of legislative-history reviews beyond the unique nude-dancing and secondary-effects contexts.

20 NetChoice suggests that speaker-based laws trigger strict scrutiny, but on our reading of precedent, speaker-based laws don't constitute an analytical category distinct from content-based and viewpoint-based laws. Rather, speaker-based distinctions trigger strict scrutiny—or perhaps face *per se* invalidation—*when they indicate underlying content- or viewpoint-based discrimination*. *See* *Turner*, 512 U.S. at 658, 114 S.Ct. 2445 ("[L]aws favoring some speakers over others demand strict scrutiny *when the legislature's speaker preference reflects a content preference*." (emphasis added)); *Reed*, 576 U.S. at 170, 135 S.Ct. 2218 ("Characterizing a distinction as speaker-based is only the beginning—not the end—of our inquiry."). While the *Sorrell* Court noted that the challenged law imposed "a content- and speaker-based burden" that

warranted "heightened scrutiny," it's not clear that the law's speaker-based distinctions would have mandated heightened scrutiny had the law not also been content- and viewpoint-based. 564 U.S. at 570–72, 131 S.Ct. 2653.

21 Given the somewhat unsettled state of precedent, we needn't—and don't—decide whether courts can *ever* refer to a statute's legislative and enactment history to find it viewpoint-based.

22 We agree with the State that only those provisions of the Act that are substantially likely to be unconstitutional should be enjoined. The Act contains a severability clause that says that the invalidity of any provision "shall not affect other provisions or applications of the act which can be given effect without" it. S.B. 7072 § 6. Under Florida law, "[t]he severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." *Emerson v. Hillsborough County*, 312 So. 3d 451, 460 (Fla. 2021). The plaintiff bears the burden to establish that the measure isn't severable. *Id.* Here, the severability clause reflects the Florida legislature's intent to give effect to every constitutionally permissible provision of the Act, and, with the exception of its argument that the entire Act is viewpoint-based, NetChoice hasn't argued that any of the provisions are inseverable.

23 Even worse, S.B. 7072 would seemingly prohibit Facebook or Twitter from removing a video of a mass shooter's killing spree if it happened to be reposted by an entity that qualifies for "journalistic enterprise" status.

24 This interest likely applies to all of the disclosure provisions with the possible exception of the candidate-free-advertising provision (§ 106.072(4)). Neither party has addressed that provision in any detail, but it might serve a legitimate purpose in ensuring that candidates who purchase advertising from platforms are fully informed about the "free advertising" that the platform has already provided so that they can make better ad-purchasing decisions. While there is some uncertainty in the interest this provision serves and the meaning of "free advertising," we conclude that at this stage of the proceedings, NetChoice hasn't shown that it is substantially likely to be unconstitutional.

25 Of course, NetChoice still might establish during the course of litigation that these provisions *are* unduly burdensome and therefore unconstitutional.

26 Nor are these provisions substantially likely to be preempted by 47 U.S.C. § 230. Neither NetChoice nor the district court asserted that § 230 would preempt the disclosure, candidate-advertising, or user-data-access provisions. It is not substantially likely that any of these provisions treat social-media platforms "as the publisher or speaker of any information provided by" their users, 47 U.S.C. § 230(c)(1), or hold platforms "liable on account of" an "action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," *id.* § 230(c)(2)(A).

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