ANTI-CENSORSHIP RHETORIC V. FIRST AMENDMENT REALITIES: THE FIGHT OVER FLORIDA'S ANTI-DEPLATFORMING STATUTE AND SOME THOUGHTS ABOUT SPEAKER AUTONOMY, COMPELLED EXPRESSION AND ACCESS MANDATES IN ONLINE FORA

Clay Calvert*

ABSTRACT

This Article examines the challenge in *NetChoice, LLC v. Moody* to a now-enjoined Florida statute barring large and lucrative social media outlets from deplatforming candidates running for public office in the Sunshine State. The deplatforming battle in *NetChoice* provides a springboard for analyzing the tension between the editorial autonomy of social media platforms and their unenumerated First Amendment right not to be compelled to speak, on the one hand, and government-imposed access mandates that ostensibly facilitate speech and enrich public debate, on the other. The Article initially uses the scholarship of Owen Fiss and Jerome Barron to set the theoretical table for understanding the long-simmering friction between speaker autonomy and government intervention in the marketplace of ideas. It then explores how Florida Governor Ron DeSantis framed the need for his state's anti-deplatforming law. Next, the Article scrutinizes U.S. District Judge Robert Hinkle's June 2021 preliminary injunction in *NetChoice* blocking its enforcement. Hinkle's analysis of First Amendment principles regarding editorial judgment, speaker autonomy, content-based laws and discrimination between speakers indicates that the statute would fail constitutional review even if it were not preempted for being inconsistent with 47 U.S.C. § 230(c)(2)(A). In brief, certain First Amendment realities, some tracing back to the U.S. Supreme Court's 1974 decision in *Miami Herald Publishing Co. v. Tornillo*, provide a formidable bulwark against the anti-censorship rhetoric propping up compelled-access mandates in the internet

* Professor of Law, Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. The author thanks University of Florida students Philip Friedman, Katelyn Gonzalez, Ahmad Ibsias, Lily Kino and Luke Zarzecki for their reviews of drafts of this Article.

era, particularly in what Judge Hinkle aptly called "ideologically sensitive cases."

INTRODUCTION

More than a quarter-century ago, Professor Owen Fiss described "a complicated truth"[1] affecting the First Amendment freedom of speech.[2] It is "that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well."[3] That observation built upon Fiss's earlier exploration of the tension between the First Amendment's role in safeguarding the autonomy of speakers, on the one hand, and the possibility that government intervention in the marketplace of ideas might improve public debate, on the other.[4] He propounded in 1986 that:

> [a] commitment to rich public debate will allow, and sometimes even require the state to act in these ways, however elemental and repressive they might at first seem. Autonomy will be sacrificed, and content regulation sometimes allowed, but only on the assumption that public debate might be enriched and our capacity for collective self-determination enhanced.[5]

---

[1] OWEN M. FISS, THE IRONY OF FREE SPEECH 83 (1996) [hereinafter FISS, THE IRONY].

[2] The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[3] FISS, THE IRONY, *supra* note 1, at 83.

[4] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) [hereinafter Fiss, *Social Structure*].

[5] *Id.* at 1415. Fiss was concerned that marketplace economic forces skew debate and that sometimes government intervention is necessary to counter that situation in order to benefit a democratic society. *See* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) [hereinafter Fiss, *The State*] ("The state is to act as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy. The purpose of the state is not to supplant the market . . . nor to perfect the market . . . but rather to supplement it.").

In today's portmanteau parlance, Fiss seemingly suggested that the government might turn out to be a frenemy of free speech.[6] As such, he encouraged the United States Supreme Court, when interpreting the First Amendment, to commit "to do all that it can possibly do to support and encourage the state in efforts to enrich public debate."[7] An unfettered marketplace of ideas—a time-honored central tenet of First Amendment jurisprudence[8]—simply cannot be counted on to produce such fruitful discourse, and thus some government meddling is needed.[9]

Fiss was not the first academic to contend that such marketplace intervention might benefit what he called "[t]he democratic aspirations of the [F]irst [A]mendment."[10] In the 1960s, Professor Jerome Barron directly addressed the issue of the government compelling private mass media entities to afford access to speakers.[11] Barron submitted that "nongoverning minorities in control of the means of communication should perhaps be inhibited from restraining free speech (by the denial of access to their media) even more than governing majorities are restrained by the [F]irst [A]mendment."[12] As with Fiss, Barron was concerned about problems generated by an unregulated marketplace of ideas.[13] He asserted that providing speakers with

---

[6] Fiss, *Social Structure*, *supra* note 4, at 1416 (contending that "[w]e should learn to recognize the state not only as an enemy, but also as a friend of speech" because "it has the capacity to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them").

[7] *Id.* at 1424.

[8] Justice Oliver Wendell Holmes, Jr., famously instantiated the marketplace of ideas metaphor into First Amendment law when he wrote that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMMC'N L. & POL'Y 437, 437 (2019) ("The 'marketplace of ideas' metaphor in First Amendment law is usually traced to the famous dissenting opinion of Justice Oliver Wendell Holmes in *Abrams v. United States*.").

[9] *See* L. A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 180–81 (1987) (encapsulating Fiss's position regarding the need to regulate the marketplace of ideas).

[10] Fiss, *Social Structure*, *supra* note 4, at 1421.

[11] Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[12] *Id.* at 1656.

[13] *See id.* at 1678 ("With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition."); s*ee also* Jared Schroeder*, Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 COMMC'N L. & POL'Y 383, 394 (2016) (noting that Barron's access theory "criticizes the marketplace approach and posits that freedom of the

a right of access to the mass media—a right secured by the First Amendment – would promote "an informed citizenry."[14] This informed-citizenry telos jibes with philosopher-educator Alexander Meiklejohn's view that the ultimate purpose of free expression in a self-governing democracy is making voters as informed as possible so that they might vote wisely.[15] To accomplish this goal, Barron contended that "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view."[16] Viewed collectively, Fiss's scholarship regarding government intervention in speech marketplaces to enrich public debate and Barron's call for a First Amendment right of access to the mass media still carry force several decades later.[17] That is particularly so when considering if laws mandating access to internet fora sufficiently advance First Amendment interests in promoting public debate and an informed citizenry so as to be constitutional.[18]

Indeed, Fiss and Barron's writings are now likely to get another serious intellectual workout and a much closer inspection from First Amendment scholars than this

---

press means members of the public should have freedom to access society's vehicles of mass communication," and adding that Barron "contended that the marketplace approach fails because it assumes that keeping the government out of the marketplace is sufficient to create a free exchange of ideas").

[14] Barron, *supra* note 11, at 1676.

[15] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) ("The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them."); *see also* Ronald J. Krotoszynski, Jr., *The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation*, 2020 U. CHI. LEGAL F. 145, 169 (2020) (asserting that "[m]any, if not most, serious theories of the First Amendment place the relationship of freedom of expression to the process of democratic self-government at the epicenter of the First Amendment," and therefore "we should be open to the idea that the First Amendment imposes not only negative limitations on the ability of the government to censor speech, but also affirmative duties to facilitate speech related to the process of democratic deliberation").

[16] Barron, *supra* note 11, at 1656.

[17] *See* Jeremy K. Kessler & David E. Pozen, *Introduction: The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 2003 (2018) (noting how the First Amendment scholarship today of individuals such as Marvin Ammori "builds on the work of leading First Amendment theorists of media regulation," including both Fiss and Barron).

[18] *See* Theodore L. Glasser, *Barron, Jerome A., Access to the Press—A New First Amendment Right,* 80 Harv. L. Rev. 1641 (1967), 25 COMMC'N L. & POL'Y 340, 343 (2020) (asserting that "many of today's access issues—from the net neutrality debate to concerns about the obligations of platforms like Facebook and Twitter to yield to local customs and mores—would come into focus in interesting and useful ways if viewed through the lens of Barron's article").

Introduction affords them. That is because Florida adopted a statute in 2021 which provides that "[a] social media platform may not willfully deplatform a candidate for office . . . beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate."[19] In other words, social media platforms must provide access to political candidates even if the office seekers would otherwise be deplatformed for violating terms of use or service.[20] The anti-deplatforming measure thus amounts to a compelled-access mandate: social media platforms cannot revoke access—i.e., cannot willfully deplatform—candidates for any reason, thereby compelling them to provide candidates with a vast digital venue to post whatever content they please, free from fear of being kicked off.[21] The Florida law breathes statutory life into former Justice Anthony Kennedy's suggestion that the First Amendment supports a right of access to social media platforms, given their status today as "the most important places . . . for the exchange of views."[22]

Flouting Florida's statute can prove fiscally painful, as it permits daily fines of $250,000 for deplatforming candidates for statewide office.[23] The law only applies, however, to very large or very lucrative platforms, and it conveniently—at least for the owners of Florida-based Walt Disney World and Universal Studios Florida—exempts companies that own and operate theme parks.[24]

---

[19] FLA. STAT. § 106.072(2) (2021). Although Florida's definition of a social media platform includes several components, it applies broadly to "any information service, system, Internet search engine, or access software provider that . . . [p]rovides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site." FLA. STAT. § 501.2041(1)(g)(1) (2021).

[20] Florida defines "deplatform" as "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." FLA. STAT. § 501.2041(1)(c) (2021).

[21] *See* FLA. STAT. § 106.072(2) (2021) ("A social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.").

[22] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017). In delivering the Court's opinion in *Packingham*, Kennedy wrote that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Id.*

[23] *See* FLA. STAT. § 106.072(3) (2021) (providing that "the social media platform may be fined $250,000 per day for a candidate for statewide office and $25,000 per day for a candidate for other offices").

[24] *See* FLA. STAT. § 501.2041(1)(g) (2021) (providing that a social media platform must either have "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants globally" to fall within the statute's confines, and specifying that a social media platform, as defined the law, "does not

Does Florida's anti-deplatforming statute, the first of its ilk in the United States, breach the First Amendment speech rights of the social media platforms to which it applies?[25] That question was put into play in May 2021 when two trade associations, NetChoice and the Computer & Communications Industry Association ("CCIA"), filed a lawsuit in federal court in Tallahassee, Florida.[26] The complaint alleges that the anti-deplatforming statute, along with several other measures emanating from Florida Senate Bill 7072, unduly restricts the editorial control and judgment of social media platforms by "compel[ling] them to host speech and speakers they disagree with."[27] The plaintiffs emphasize that the anti-deplatforming statute "essentially immunizes any candidate from whatever content and conduct rules apply to all other users."[28] In other words, the statute not only requires the affected platforms to host political candidates, but allows those candidates to post whatever content they choose, regardless of the terms-of-service content policies applicable to everyone else and without

include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex").

[25] *See* David McCabe, *Florida, in a First, Will Fine Social Media Companies That Bar Candidates*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/technology/florida-twitter-facebook-ban-politicians.html ("Florida . . . became the first state to regulate how companies like Facebook, YouTube and Twitter moderate speech online, by imposing fines on social media companies that permanently bar political candidates in the state.").

[26] Complaint for Declaratory and Injunctive Relief, NetChoice, LLC v. Moody, 546 F. Supp. 3d 1084 (N.D. Fla. 2021) (No. 4:21-cv-220 RH-MAF), 2021 U.S. Dist. LEXIS 121951 [hereinafter Complaint], https://netchoice.org/wp-content/uploads/2021/05/NetChoice-CCIA-Complaint-for-Declaratory-and-Injunctive-Relief-5.27.21.pdf.

NetChoice describes itself as working "to make the [i]nternet safe for free enterprise and free expression." *About Us*, NETCHOICE, https://netchoice.org/about/ (last visited Feb. 23, 2022). Its members include, among others, Amazon, Facebook, Google, Paypal, Pinterest and Twitter. *Id.* The Computer & Communications Industry Association touts itself as "a not-for-profit membership organization for a wide range of companies in the computer, internet, information technology, and telecommunications industries" that "promotes open markets, open systems, open networks, and full, fair, and open competition." *Who We Are*, COMPUT. & COMMC'N INDUS. ASS'N, https://www.ccianet.org/about/who-we-are/ (last visited Feb. 23, 2022). Its members include, among others, Amazon, Facebook, Google, Pinterest, Twitter and Vimeo. *Members*, COMPUT. & COMMC'N INDUS. ASS'N., https://www.ccianet.org/about/members/ (last visited Feb. 23, 2022).

[27] Complaint, *supra* note 26, at 5.

[28] Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 12, NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 4:21-cv-220 RH-MAF), 2021 U.S. Dist. LEXIS 121951 [hereinafter Plaintiffs' Memorandum], https://netchoice.org/wp-content/uploads/2021/06/30_Memorandum-of-Law-ISO-Motion-for-Preliminary-Injunction.pdf.

trepidation of suspension or deletion of their accounts. Perhaps a platform could remove individual posts by candidates featuring content that violates a platform's terms of service.[29] There is nothing, however, to stop such candidates from repeatedly reposting the same violative content again and again, given that they cannot be deplatformed for doing so.[30] There is, in other words, no meaningful penalty for candidates who violate a platform's content-based, terms-of-service policies. The plaintiffs aver that this one-two punch interferes with their First Amendment "right to decide whether to host or moderate specific categories of speech and speakers."[31]

On June 30, 2021, just one day before it was scheduled to take effect, U.S. District Judge Robert Hinkle issued a preliminary injunction impeding enforcement of the anti-deplatforming statute.[32] In doing so, he reasoned that the Florida statute was preempted by 47 U.S.C. § 230(e)(3) because it is inconsistent with 47 U.S.C. § 230(c)(2).[33] The latter federal provision, part of the Communications Decency Act of 1996, provides interactive computer services with immunity from civil liability when, acting in good faith, they remove material they deem objectionable, regardless of whether that content is constitutionally protected.[34] In other words, the statute allows social media platforms to exercise a certain degree of editorial control and judgment without fear of civil liability for their

[29] This is a point that the Florida defendants raise in their brief to the U.S. Court of Appeals for the Eleventh Circuit. *See* Opening Brief of Appellants at 33, NetChoice, LLC v. Moody, No. 21-12355 (11th Cir. Sept. 7, 2021) ("And nothing in the Act prohibits platforms from censoring candidates; platforms are only restricted in their ability to deplatform candidates or to use algorithms to shadow ban posts by or about them during their campaigns.").

[30] *See* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 125 (2021) (asserting that under Florida's deplatforming law, "politicians can be secure in the knowledge that the worst that can happen to them for violating platform policies is to have individual posts removed. As such, it obviously incentivizes serial violations on the hopes that some will get through the platform's enforcement mechanisms").

[31] Plaintiffs' Memorandum, *supra* note 28, at 18.

[32] *See* NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1096 (N.D. Fla. 2021).

[33] *Id.* at 1089.

[34] 47 U.S.C. § 230(c)(2)(A) (2021). There is some dispute, however, regarding the meaning that Congress intended when it used the phrase "otherwise objectionable" in 47 U.S.C. § 230(c)(2)(A). *See* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(C)(2)*, 1 J. FREE SPEECH L. 175, 176–77 (2021) (suggesting that "objectionable" is limited in meaning such that a state law barring a social media platform from engaging in viewpoint discrimination would not be preempted).

decisions.[35] Because the Florida statute fines—i.e., imposes civil liability on—social media outlets for deplatforming candidates who post objectionable material that violates otherwise legitimate, generally applicable standards of use, it is inconsistent with 47 U.S.C. § 230(c)(2)(A).[36] Due to this conflict, Judge Hinkle concluded that the Florida statute is preempted by 47 U.S.C. § 230(e)(3), which bars a state from imposing civil liability under a state law that is inconsistent with 47 U.S.C. § 230.[37] In July 2021, Florida Attorney General Ashley Brooke Moody and the other Florida defendants filed a notice of appeal with the U.S. Court of Appeals for the Eleventh Circuit.[38] They filed their opening brief with the Eleventh Circuit in September 2021.[39] NetChoice and CCIA then filed their initial brief with the appellate court in November that year, and the Florida defendants filed their reply brief a month later.[40]

What would happen if Florida's anti-deplatforming law was not preempted due to its inconsistency with 47 U.S.C. § 230(c)(2)(A) and, instead, its fate hinged solely on whether it could pass muster under the First Amendment? That is the issue at the heart of this Article, which ultimately concludes that the statute would fail First Amendment review. Part I explores how Florida Governor Ron DeSantis publicly framed the need for this measure as an anti-censorship statute that facilitates free expression and enriches debate.[41] Part II then turns to Judge Hinkle's opinion in *NetChoice*, which offers significant clues about why the anti-deplatforming statute would be struck down

---

[35] *See* Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 694–98 (2017) (addressing how 47 U.S.C. § 230(c)(2)(A) has been interpreted by various courts).

[36] *NetChoice*, 546 F. Supp. 3d at 1090. Judge Hinkle explained that "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2)." *Id.*

[37] *See* 47 U.S.C. § 230(e)(3) (2021) (providing, in relevant part, that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section").

[38] Notice of Appeal, NetChoice, LLC v. Moody, No. 21-12355 (11th Cir. July 13, 2021). In August 2021, Judge Hinkle stayed proceedings in his court pending the outcome in the Eleventh Circuit. Order Staying Proceedings, NetChoice, LLC v. Moody, No. 4:21-cv-220 (N.D. Fla. Aug. 25, 2021), https://netchoice.org/wp-content/uploads/2021/08/Order-Granting-Stay.pdf.

[39] *See* Opening Brief of Appellants, NetChoice, LLC v. Moody, No. 21-12355 (11th Cir. Sept. 7, 2021); Brief for Appellees, NetChoice, LLC v. Moody, No. 21-12355 (11th Cir. Nov. 8, 2021); Reply Brief of Defendants-Appellants, NetChoice, LLC v. Moody, No. 21-12355 (11th Cir. Dec. 20, 2021).

[40] *See supra* note 39.

[41] *See infra* notes 45–71 and accompanying text.

on First Amendment grounds.[42] In the process, Part II assesses the continued relevance in the internet era of the U.S. Supreme Court's 1974 opinion in *Miami Herald Publishing Co. v. Tornillo*,[43] as well as the increasing importance of the Court's compelled-speech cases and its speaker-discrimination principle. Finally, Part III concludes that a constellation of First Amendment principles makes it extremely difficult for Florida's anti-deplatforming statute to survive constitutional review.[44]

I. FRAMING THE FIGHT AGAINST DEPLATFORMING: ENHANCING SPEECH AND TAKING ON THE CENSORIAL POWERS OF BIG TECH

Shortly after the violent insurrection at the Capitol Building in Washington, D.C., on January 6, 2021, Twitter and Facebook banned then-President Donald J. Trump's personal accounts on their platforms.[45] Trump quickly fired back at the former entity, stating that "Twitter is not about FREE SPEECH. They are all about promoting a Radical Left platform where some of the most vicious people in the world are allowed to speak freely."[46] Trump later sued Twitter and Jack Dorsey, its chief executive officer, claiming they violated his First Amendment right of free speech by deplatforming him.[47] Trump's contention, of course, clashes with the fact that the First Amendment only safeguards against censorship by government entities and officials, not private ones.[48] But Trump, as his statement quoted above indicates, tried to flip the script away from government censorship in framing his own fight by claiming that the real enemy of free expression and the champion of the "Radical Left" was the private platform that unceremoniously jettisoned him.[49]

---

[42] *See infra* notes 72–173 and accompanying text.
[43] 418 U.S. 241 (1974).
[44] *See infra* notes 174–188 and accompanying text.
[45] Sarah E. Needleman, *Trump Banned from Twitter*, WALL ST. J., Jan. 9, 2021, at A1; Tony Romm & Elizabeth Dwoskin, *Trump Banned from Facebook Indefinitely as Critics Say Too Little, Too Late*, WASH. POST, Jan. 8, 2021, at A16.
[46] Kate Conger & Mike Isaac, *Citing Risk of Violence, Twitter Permanently Suspends Trump*, N.Y. TIMES, Jan. 9, 2021, at A1.
[47] Complaint for Injunctive and Declaratory Relief at 27, Trump v. Twitter, Inc., No. 1:21-cv-22441 (S.D. Fla. July 7, 2021), https://www.wsj.com/media/TrumpvTwitter.pdf?mod=article_inline.
[48] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (opining "that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech").
[49] *See* Conger & Isaac, *supra* note 46 (quoting Trump's statement about Twitter).

Framing, in fact, is an important concept for defining problems, diagnosing their causes and suggesting ameliorative remedies.[50] As explicated by Professor Robert Entman, "[t]o frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described."[51] Politicians use words, images and phrases to frame issues for audiences and to make clear what they see "as relevant to the topic at hand."[52] In short, they frequently take advantage of framing by attempting to define issues for the news media and the public.[53]

When Florida Governor Ron DeSantis, a Republican with possible presidential aspirations,[54] held a press conference in February 2021 touting legislation that would penalize social media platforms for deplatforming candidates, he proclaimed that "[w]e've seen the power of their censorship over individuals and organizations, including what I believe is clear viewpoint discrimination."[55] DeSantis referred to a "big tech oligarchy" that posed "more of a clear and present danger to the rights of free speech than the government itself."[56] He also accused social media platforms of being biased against conservatives, asserting "[t]hey did not censor people when they were using those platforms for the rioting that occurred over the summer."[57]

DeSantis's invocation of the phrase "clear and present danger" was shrewd. It tracks one of the U.S. Supreme Court's most well-known articulations of when speech may lawfully be suppressed without violating the First Amendment.[58] DeSantis's

---

[50] Robert N. Entman, *Toward Clarification of a Fracture Paradigm*, 43 J. COMMC'N 51, 51–52 (1993).
[51] *Id.* at 52.
[52] Dennis Chong & James N. Druckman, *A Theory of Framing and Opinion Formation in Competitive Elite Environments*, 57 J. COMMC'N 99, 100 (2007).
[53] *See* Lindsey Meeks, *Defining the Enemy: How Donald Trump Frames the News Media*, 97 JOURNALISM & MASS COMMC'N Q. 211, 213 (2020) ("Politicians often use framing to their advantage.").
[54] *See* Bret Stephens, *Liberals for DeSantis*, N.Y. TIMES, Apr. 13, 2021, at A23 (noting that in April 2021, DeSantis "became the apparent front-runner for the 2024 Republican presidential nomination").
[55] Mary Elen Klas, *DeSantis Proposal Would Protect Candidates*, MIAMI HERALD, Feb. 3, 2021, at 6A.
[56] *Id.*
[57] *Id.*
[58] Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that

use of the expression "clear and present danger" thus might resonate with some voters about when the government may permissibly act against entities engaged in expression-related enterprises.

In a nutshell, DeSantis ripped a page out of Trump's anti-Twitter playbook when framing the need for anti-deplatforming legislation. The real threat to free speech was not "the government itself," but a handful of private companies—an "oligarchy," no less, a term evoking images of corrupt and despotic regimes that often is linked today with Russia[59]—that engage in "censorship" of conservative views while allowing rioters to speak freely.[60] The implication, of course, is that government intervention in the social media marketplace of ideas is imperative to thwart private censorship and to level the playing field for conservative views.

Indeed, when he signed the bill into law in May 2021, DeSantis contended that "Silicon Valley is acting as a council of censors; they cancel people when mobs come after somebody. They will pull them down."[61] A sign affixed to the lectern from which he spoke that day read "STOP Big Tech Censorship."[62] DeSantis implied that government intervention in the form of an anti-deplatforming statute was necessary to enrich public debate, with one newspaper reporting that DeSantis "noted that 'big tech oligarchs' have censored debates about the pandemic and policies that officials put in place to contain the deadly virus, such as lockdowns."[63]

Congress has a right to prevent."). *See also* Joel M. Gora, *The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate*, 29 CARDOZO L. REV. 1399, 1409 (2008) (describing the clear and present danger test as "well-known"); David L. Hudson, Jr., & Jacob David Glenn, *Fixed Stars: Famous First Amendment Phrases and Their Indelible Impact*, 15 CHARLESTON L. REV. 189, 194 (2020) (noting that Justice Oliver Wendell Holmes, Jr. "first used the terminology 'clear and present danger' more than a hundred years ago to help draw the line between protected and unprotected speech in *Schenck v. United States*").

[59] *See* Ben Zimmer, *Word on the Street: A Term for Russia's Elite Spurs Objections*, WALL ST. J., Aug. 11, 2018, at C2 (addressing the meaning of the term "oligarch" and how it became "so nefarious-sounding").

[60] Klas, *supra* note 55, at 6A.

[61] Ann Ceballos et al., *Social Media—DeSantis Signs Bill*, MIAMI HERALD (May 25, 2021), https://www.miamiherald.com/news/politics-government/state-politics/article251640638.html.

[62] *Id.*

[63] *Id.*

In fact, DeSantis suggested at the signing ceremony that social media platforms skew debate in the marketplace of ideas in favor of their own beliefs and ideologies:

> What we have seen in recent years is a shift away from internet platforms and social-media platforms from really being liberating forces to now being enforcers of orthodoxy. So, their primary mission, or one of their major missions, seems to be suppressing ideas that are either inconvenient to the narrative or which they personally disagree with.[64]

DeSantis also raised the issue of the deplatforming of Trump and tied Florida's legislation to it as a countermeasure. Specifically, in a May 24, 2021 tweet, DeSantis wrote "Big Tech deplatformed the President of the United States but let Ayatollah Khamenei talk about killing jews. This is wrong—that's why we are protecting Floridians and fighting back against censorship."[65] Using the phrase "Big Tech" instantly brands the operators of social media platforms as the enemy, given the pejorative use of "Big" against other powerful industries such as Big Pharma, Big Tobacco and Big Ag.[66]

Viewing his statements as a whole, DeSantis framed the exigencies justifying Florida's anti-deplatforming legislation in terms of counteracting the evil forces of censorship from a faraway land—namely, the Big Tech oligarchs hailing from Silicon Valley—that stifle robust debate and the conservative ideas with which they disagree. Big Tech engages, as DeSantis put it, in "viewpoint discrimination."[67] The use of that last term likely was strategic because viewpoint discrimination, when deployed by the government against private speech, is especially

---

[64] Jim Saunders, *Industry Groups File Federal Lawsuit Challenging Florida's New Laws Aimed at Big Tech*, MIAMI HERALD (May 27, 2021), https://www.miamiherald.com/news/politics-government/state-politics/article251739288.html.

[65] Governor Ron DeSantis (@RonDeSantisFL), TWITTER (May 24, 2021, 11:40 PM), https://twitter.com/RonDeSantisFL/status/1397029716624822273.

[66] *See* Will Oremus, *Big Tobacco. Big Pharma. Big Tech?*, SLATE (Nov. 17, 2017), https://slate.com/technology/2017/11/how-silicon-valley-became-big-tech.html (noting that "the history of the label 'Big X' suggests that society does not prepend the label 'Big,' with a capital 'B,' to an industry out of respect or admiration. It does it out of loathing and fear – and in preparation for battle," and adding that "labeling an industry 'Big X' is a prelude to a political battle").

[67] Klas, *supra* note 55, at 6A.

egregious and faces rigorous judicial review.[68] As former Justice Anthony Kennedy explained, "it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys."[69] More bluntly put by Justice Samuel Alito, "[v]iewpoint discrimination is poison to a free society."[70] DeSantis thus suggested, *sub silentio*, that if the government may not engage in viewpoint discrimination, then surely the owners of powerful platforms from Silicon Valley, "acting as a council of censors,"[71] should not be able to do so either. Thus, to prevent these corporate censors from taking such speech-deleterious actions against the views of conservative politicians, government intervention in the marketplace of ideas via a law barring the deplatforming of candidates is vital.

With Governor DeSantis's framing in mind regarding the supposed need for anti-deplatforming legislation, the Article next turns to Judge Hinkle's analysis of the First Amendment issues in *NetChoice*. Hinkle's opinion, either through direct statements or via references to certain cases and concepts, illustrates that multiple free-speech principles push back forcefully against the constitutionality of the anti-deplatforming measure.

II. AN ARRAY OF FIRST AMENDMENT FORCES PITTED AGAINST FLORIDA'S ANTI-DEPLATFORMING STATUTE

Judge Hinkle did not squarely tackle the First Amendment issues raised by the anti-deplatforming law because he concluded it was preempted by a federal statute.[72] Nonetheless, Hinkle's analysis of First Amendment questions affecting related statutes targeting social media platforms that were spawned by the same legislation, Florida Senate Bill 7072, sheds light on the constitutional hurdles the anti-deplatforming law would need to clear. Among other things, the associated statutes at issue in *NetChoice*: 1) detrimentally affect the platforms' ability to prioritize or suppress the placement of

---

[68] *See* Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (calling viewpoint discrimination "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny").
[69] *Id.*
[70] Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).
[71] Ceballos, *supra* note 61, at 1A.
[72] *See supra* notes 32–37 and accompanying text (addressing Judge Hinkle's analysis of the preemption issue).

content posted by or about candidates in venues such as newsfeeds and search results,[73] and 2) bar platforms from limiting or eliminating a user's access to content posted by or about candidates.[74] The former measure targets post-prioritization, while the latter addresses so-called shadow banning.[75]

Examining Judge Hinkle's opinion on these and other matters in *NetChoice* illustrates how a First Amendment analysis of Florida's anti-deplatforming statute might unfold in court. These items are addressed separately below.

A. Speech and Speakers

A threshold question addressed by Judge Hinkle was whether the operators of social media platforms engage only in non-expressive conduct or whether they also speak when operating their platforms.[76] This issue taps into the key dichotomy in First Amendment jurisprudence between conduct and speech.[77] As Justice Clarence Thomas recently wrote, the Supreme Court has "long drawn" a "line between speech and conduct."[78] The line is significant because, as the late Justice Antonin Scalia explained, "a general law regulating conduct and

---

[73] *See* FLA. STAT. § 501.2041(2)(h) (2021) (providing, in key part, that "[a] social media platform may not apply or use *post-prioritization* or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate") (emphasis added); FLA. STAT. § 501.2041(1)(e) (2021) (defining, in key part, post-prioritization as an "action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results").

[74] *See* FLA. STAT. § 501.2041(2)(h) (2021) (providing, in key part, that "[a] social media platform may not apply or use post-prioritization or *shadow banning* algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate" (emphasis added)); FLA. STAT. § 501.2041(1)(f) (2021) (defining, in key part, shadow banning as an "action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform").

[75] *See supra* notes 73–74 and accompanying text.

[76] *See* NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (concluding that it cannot "be said that a platform engages only in conduct, not speech").

[77] *See* Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) ("From its beginning, the First Amendment speech guarantee has rested on two fundamental boundaries: speech versus conduct and liberty versus utility."); Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1202 (noting "broad dichotomy between speech (protected) and conduct (unprotected)" in First Amendment law).

[78] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018).

not specifically directed at expression . . . is not subject to First Amendment scrutiny at all."[79]

Conduct garners First Amendment protection only when it "is inherently expressive."[80] To constitute speech within the meaning of the First Amendment, expressive conduct typically requires both an intent on the actor's part to convey a specific message via conduct and a great likelihood that the intended message will be understood by those who view it.[81] Burning a cross, for instance, may amount to symbolic expression.[82]

Thus, if the statutes regulate only non-expressive conduct, then they are not subject to any First Amendment scrutiny.[83] Judge Hinkle, however, concluded this was not the situation and that the statutes therefore must survive First Amendment scrutiny to be constitutional.[84] In particular, he found that social media platforms "exercise editorial judgment," and that the Florida statutes at issue in *NetChoice* target "the editorial judgments themselves."[85]

What is the implication of this logic for, more specifically, the anti-deplatforming statute? It is that when a social media platform adopts terms of service regarding content that it deems objectionable and thus bans, it exercises its editorial judgment, and its terms-of-service policy constitutes its own message.[86] As NetChoice and the CCIA explained in a brief about the kind of content-based judgments that platforms make, "[e]nforcing standards about subjects like hate speech, pornography, or disinformation expresses a message about the nature of the online community and what its moderator finds objectionable. No additional speech is needed for such expression to be

---

[79] Barnes v. Glen Theatre, 501 U.S. 560, 572 (1991) (Scalia, J., concurring). A generally applicable law regulating conduct that is, in fact, directed at a person because of the particular message the person communicates is subject to rigorous First Amendment review. Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010).
[80] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006).
[81] Spence v. Washington, 418 U.S. 405, 410–11 (1974).
[82] Virginia v. Black, 538 U.S. 343, 360–61 (2003).
[83] *Cf.* Otto v. City of Boca Raton, 981 F.3d 854, 861 (11th Cir. 2020) (noting that if the ordinances at issue "restricted only non-expressive conduct, and not speech, then they would not implicate the First Amendment at all").
[84] *See* NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (holding that "neither can it be said that a platform engages only in conduct, not speech. The statutes at issue are subject to First Amendment scrutiny.").
[85] *Id.* at 1092.
[86] *See id.* at 1090 ("The plaintiffs say—correctly—that they use editorial judgment in making these decisions, much as more traditional media providers use editorial judgment when choosing what to put in or leave out of a publication or broadcast.")

protected."[87] For example, Twitter's hateful conduct policy conveys information to a platform's users about content they are barred from tweeting.[88] Creating and conveying this information to users is protected by the First Amendment because, as the Supreme Court has held, "the creation and dissemination of information are speech."[89]

In turn, when a platform decides to ban a candidate's account because the candidate failed to comply with its terms of service by posting objectionable content, the platform simply is enforcing its editorial-judgment policies. Eliminating a platform's power to ban a candidate due to the candidate's unacceptable content undermines the platform's editorial authority and autonomy. In brief, the power to deplatform adds teeth to a platform's content moderation policies; abolishing that capacity by statutory fiat defangs those policies. A more extensive analysis of the editorial autonomy issue appears later in Section C.

B. Strict Scrutiny

Because Judge Hinkle concluded that the speech rights of social media platforms were implicated by the Florida statutes, he then had to select the level of scrutiny to apply to test their validity.[90] Resolution of that question typically hinges on whether a statute is content based or content neutral, with content-based laws generally being subject to the rigorous strict

---

[87] Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction at 2, NetChoice v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 4:21cv220-RH-MAF), 2021 U.S. Dist. LEXIS 121951 [hereinafter Plaintiff's Reply Brief] (citing Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1243–45 (11th Cir. 2018)), https://netchoice.org/wp-content/uploads/2021/06/Reply-Brief.pdf.

[88] For instance, Twitter enforces a hateful conduct policy that, among other things, prohibits "targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category," and bars "content that wishes, hopes, promotes, incites, or expresses a desire for death, serious bodily harm, or serious disease against an entire protected category and/or individuals who may be members of that category." *Hateful Conduct Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Feb. 23, 2022). Violations of this policy "may eventually result in permanent account suspension." *Id.*

[89] Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).

[90] The scrutiny-selection phase of inquiry is standard in First Amendment cases. *See* R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 355 (2019) ("The preliminary decision that must be made in First Amendment free speech cases is what level of review to apply.").

scrutiny test and content-neutral measures facing the more relaxed intermediate scrutiny standard.[91]

Judge Hinkle directly determined that the anti-deplatforming statute is a content-based regulation of speech.[92] In particular, it applies only to content and ideas posted by candidates for public office in Florida, not to content and ideas posted by others.[93] In other words, it privileges political speech–or, at least, the speech of politicians (i.e., candidates)–over non-political speech.[94]

As such, Judge Hinkle concluded that the anti-deplatforming statute, as well as the other Florida statutes challenged in *NetChoice*, must pass strict scrutiny review.[95] Strict scrutiny is "demanding" and requires a law to be "justified by a compelling government interest and [be] narrowly drawn to serve that interest."[96] A compelling interest often is defined as one of the highest order or an overriding interest, while narrow tailoring under strict scrutiny requires that a statute embrace the least speech-restrictive means of serving that interest.[97]

---

[91] *See* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 292 (2016) (noting that "for regulations of free speech in a public forum or on individual private property, the Court uses strict scrutiny for content-based regulations of speech and intermediate review for content-neutral regulations").

[92] *See* NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) ("The Florida statutes at issue are about as content-based as it gets. Thus, for example, § 106.072 applies to deplatforming a candidate, not someone else; this is a content-based restriction.").

[93] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (noting that a content-based law "target[s] speech based on its communicative content").

[94] *See* Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 373 (2021) (interpreting Judge Hinkle's conclusion that the anti-deplatforming law is content based as being premised on the idea that "it singles out political speech for protection").

[95] *See NetChoice*, 546 F. Supp. 3d at 1093 ("That the statutes are content-based in these and other respects triggers strict scrutiny."); *see also* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) ("Content-based laws are subject to strict scrutiny.").

[96] Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 799 (2011).

[97] Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of a Strict Scrutiny World After Becerra and Janus, and a First Amendment Interests-and-Values Alternative*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 13 (2020); *see* R. Randall Kelso*, The Structure of Intermediate Review*, 25 LEWIS & CLARK L. REV. 691, 700–01 (2021) (noting that under strict scrutiny, a "statute must: (1) advance compelling/overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends," and adding that "[o]nly 'compelling' or 'overriding' interests can justify a statute at strict scrutiny").

Judge Hinkle also suggested another reason why the anti-deplatforming law must surmount strict scrutiny: It selectively discriminates against speakers, applying to large social media platforms but not to smaller ones.[98] Specifically, it only implicates platforms that either generate "annual gross revenues in excess of $100 million" or have "at least 100 million monthly individual platform participants globally."[99] Furthermore, the law makes a second speaker-based distinction by exempting from its reach "any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in [Section] 509.013."[100] As Judge Hinkle encapsulated it, "[t]he legislation applies only to large providers, not otherwise-identical but smaller providers, and explicitly exempts providers under common ownership with any large Florida theme park."[101]

Treating speakers differently is constitutionally suspect.[102] In 2010, the U.S. Supreme Court observed that in addition to guarding against subject-matter and viewpoint discrimination, the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others . . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[103] As such, the Court noted that "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."[104] Those statements from *Citizens United v. FEC* marked "the first time [the Court] gave full-throated articulation

---

[98] *See NetChoice*, 546 F. Supp. 3d at 1094 (concluding that "the application of these requirements to only a small subset of social-media entities would be sufficient, standing alone, to subject these statutes to strict scrutiny").
[99] FLA. STAT. § 501.2041(1)(g)(4) (2021).
[100] *Id. See also* FLA. STAT. § 509.013(9) (2021) ("'Theme park or entertainment complex' means a complex comprised of at least 25 contiguous acres owned and controlled by the same business entity and which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually.").
[101] *NetChoice*, 546 F. Supp. 3d at 1084.
[102] *See* Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 98 (2018) (contending that the U.S. Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), "clearly hinged on the premise that speaker-based distinctions are constitutionally problematic").
[103] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).
[104] *Id.*

to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment."[105]

In sum, either because it is content based or because it distinguishes between speakers, Florida's anti-deplatforming statute needs to survive strict scrutiny review to pass First Amendment muster. The first step of this analysis entails determining if Florida possesses a compelling interest in preventing candidates running for state and local office from being deplatformed by large social media outlets.[106] Judge Hinkle did not directly address this question, given his conclusion that the anti-deplatforming measure was preempted by a federal statute.[107] What's more, his analysis of whether Florida had a compelling interest sufficient to support its other related statutes affecting social media platforms was cursory, at best. It consisted of the lone observation that "leveling the playing field–promoting speech on one side of an issue or restricting speech on the other–is not a legitimate state interest."[108] Judge Hinkle cited the Supreme Court's ruling in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* to support that proposition.[109] He thus concluded that Florida's other statutes affecting social media platforms could not survive strict scrutiny.[110]

But what about another possible interest that might support the anti-deplatforming law, were Florida to assert it? In particular, would providing Florida voters with direct and easy access to statements made on popular social media platforms by candidates running for public office in the Sunshine State—statements that might influence voting decisions about those candidates and thus affect democratic self-governance—constitute a compelling interest? If, as the Supreme Court has reasoned, "[t]he right of citizens . . . to hear . . . and to use information to reach consensus is a precondition to enlightened

---

[105] Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766 (2015).
[106] *See supra* notes 96–97 (addressing the compelling interest facet of strict scrutiny).
[107] *See supra* notes 32–37 (addressing Judge Hinkle's analysis of the preemption issue).
[108] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1095 (N.D. Fla. 2021).
[109] *Id.* The Supreme Court wrote in *Bennett*: "[w]e have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech." Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011).
[110] *NetChoice*, 546 F. Supp. 3d, at 1094 ("To survive strict scrutiny, an infringement on speech must further a compelling state interest and must be narrowly tailored to achieve that interest. These statutes come nowhere close." (citation omitted)).

self-government and a necessary means to protect it,"[111] then does not the anti-deplatforming statute, which applies only to candidates running for office, facilitate this condition? Additionally, if "speech uttered during a campaign for political office" merits full First Amendment protection,[112] and if the First Amendment truly embraces an unenumerated right to receive speech,[113] then Florida seemingly possesses a compelling interest in informing voters about the views of candidates that would support its anti-deplatforming law. In sum, concerns about enriching public debate and facilitating democratic self-governance through government intervention in the marketplace of ideas that largely drove the work of Owen Fiss and Jerome Barron resonate decades later in the Florida law.[114]

Of course, even if this militates in favor of Florida possessing a compelling interest, it does not end the strict scrutiny inquiry. The reason for that is not simply because, as discussed later, the social media platforms' dual interests in safeguarding their editorial autonomy and protecting their right not to be compelled by the government to speak would push back against Florida's interest.[115] Before even considering those issues, a court would need to determine if the law was narrowly tailored to facilitate an ostensible interest in informing voters about the views of political candidates. As noted earlier, narrow tailoring under strict scrutiny demands that a law restrict no more speech than is necessary to serve the government's interest.[116]

At least two major obstacles would arise for Florida in clearing the narrow-tailoring hurdle: 1) an alternative mechanism for serving Florida's interest in informing voters about candidates' views could be adopted by the state that does not in any way impinge on the speech rights of social media platforms, and 2) the statute's application to only very large or very lucrative social media platforms raises problems of

---

[111] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).
[112] Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989).
[113] Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) (recognizing a right to receive speech, including information and ideas); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth is fundamental to our free society." (citation omitted)).
[114] *See supra* notes 1–18 and accompanying text (addressing the works of Fiss and Barron).
[115] *See infra* Part II, Sections C and D (addressing, respectively, the issues of editorial autonomy and the right not to speak that would affect the anti-deplatforming statute's constitutionality).
[116] *See supra* note 97 and accompanying text (addressing the meaning of narrow tailoring within strict scrutiny).

underinclusivity and red flags about both lawmakers' motives and the law's efficacy. As to the first of these hurdles, the Supreme Court has explained that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[117] Thus, as two scholars recently put it, "even if a law advances a compelling government interest, it will fail strict scrutiny . . . if there is any other way to advance the governmental interest that would restrict less speech."[118]

In fact, there is an alternative Florida could implement that does not impinge on the First Amendment speech rights of nongovernment-operated social media platforms. Specifically, it could create, operate and promote its own online platform. The platform would be dedicated exclusively for hosting accounts held by candidates running for public office, and it would allow citizens to post responses that everyone – candidates included – could see. The state could conduct a public-information campaign promoting this platform to educate Floridians about its existence and to encourage its use.[119] In brief, rather than compelling the likes of Twitter and Facebook to host candidates who violate their terms of service, Florida would enter into the online marketplace of ideas and run its own platform for the benefit of its own citizens.

The anti-deplatforming law also is plagued on the tailoring front by its underinclusivity.[120] That is because it exempts from its reach social media platforms that have less than $100 million in annual gross revenues and fewer than 100 million

---

[117] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).
[118] Dan V. Kozlowski & Derigan Silver, *Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 COMMC'N L. & POL'Y 191, 194–95 (2019).
[119] The U.S. Supreme Court recently suggested that state-run, public-information campaigns provide an important and viable method for a state to inform citizens about information that it deems essential. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2376 (2018) ("Further, California could inform low-income women about its services 'without burdening a speaker with unwanted speech.' Most obviously, it could inform the women itself with a public-information campaign." (citation omitted) (quoting Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 800 (1988))).
[120] *See* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles."); *see also* Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMMC'N L. & POL'Y 259, 264 n.16 (2001) (noting that underinclusivity is "part of the narrow tailoring inquiry").

monthly individual platform participants globally.[121] In other words, if Florida truly was concerned about candidates having unfettered access to social media platforms so that its citizens would know their views and positions, then it is doing too little to address the problem by not regulating more social media platforms.[122] The law covers what Judge Hinkle described as "only a small subset of social-media entities."[123]

Why not, in other words, target social media platforms that generate $1 million or more (rather than $100 million) in annual gross revenue or have at least one million (rather than 100 million) individual platform participants? Such an expansion would make the law more efficacious in serving both candidates and all Floridians who want to know those candidates' views. Indeed, underinclusion arises when "a law targets some . . . actors for adverse treatment, yet leaves untouched . . . actors that are indistinguishable in terms of the law's purpose."[124] For instance, the U.S. Supreme Court in 2018 held that a California statute enacted to inform women about low-cost and no-cost abortion services provided by the state was "wildly underinclusive" because it only compelled some clinics and not others to convey such information to patients.[125]

In addition to underinclusive laws failing to serve their intended purpose,[126] underinclusivity may indicate an impermissible legislative motive in targeting for regulation only a select number of disfavored speakers.[127] In fact, NetChoice suggested that was the situation in Florida, alleging that the law's:

---

[121] *See* FLA. STAT. § 501.2041(1)(g)(4) (2021) (setting forth the criteria for being a "social media platform" covered by the law).
[122] Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After Williams-Yulee*, 48 ARIZ. ST. L.J. 525, 528 (2016) (explaining that underinclusivity arises when "the government regulates too little speech to prevent or mitigate a particular type of harm").
[123] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, at 1094 (N.D. Fla. 2021).
[124] William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L. Q. 637, 637 (1993).
[125] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375–76 (2018).
[126] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 449 (2015) ("Underinclusiveness can . . . reveal that a law does not actually advance a compelling interest.").
[127] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.").

> undisguised singling out of disfavored companies reflects [its] true purpose, which its sponsors freely admitted: to target and punish popular online services for their perceived views and for certain content-moderation decisions that state officials opposed – in other words, to retaliate against these companies for exercising their First Amendment rights of "editorial discretion over speech and speakers on their property."[128]

Lurking *sub silentio* in that statement is the notion that the law was adopted to punish Twitter and Facebook for deplatforming former President Trump.[129] Furthermore, the statute's exemption of social media platforms operated by the owners of theme parks in Florida – as noted earlier, this carves out the owners of Disney World and Universal Studios Florida from the law's reach – compounds its underinclusivity.[130] As NetChoice averred, "[t]he decision to exempt those major companies confirms that the law's true objective is to control the private speech of politically disfavored companies who have online platforms, but not to control the speech of similarly situated but politically favored companies with power and influence in the State of Florida."[131]

In brief, while Florida might possess a compelling interest in serving the right of its citizens to know about the views of candidates running for public office in the Sunshine State, the anti-deplatforming law faces grave obstacles on the narrow tailoring prong of strict scrutiny.

C. Protection of Editorial Autonomy

A key First Amendment interest of the social media platforms impaired by Florida's anti-deplatorming statute is their ability to freely exercise editorial judgment and control regarding content that appears on their sites via enforcement of terms-of-service policies.[132] Because they are barred from deplatforming

---

[128] Complaint, *supra* note 26, at 4.
[129] *See supra* notes 45–46 and accompanying text (addressing the deplatforming of former President Trump).
[130] *Supra* note 24 and accompanying text.
[131] Complaint, *supra* note 26, at 32.
[132] *See id.* at 2–3 (contending that the Florida statutes stemming from Senate Bill 7072 "restrict the First Amendment rights of a targeted selection of online businesses by having the State of Florida dictate how those businesses must exercise their editorial judgment over the content hosted on their privately owned websites").

political candidates who violate their terms-of-service policies, the platforms must continue to host candidates who post material that contravenes their judgment about objectionable content. Put differently, the platforms are compelled to grant access to a specific class of speakers (candidates for public office), even if those speakers repeatedly fail to abide by generally applicable terms-of-service standards regarding content and otherwise would be booted off the platforms. As Professor Ashutosh Bhagwat explains, the Florida legislation "has the direct and obvious effect of denying platforms one powerful remedy – temporary or permanent deplatforming—against users who regularly violate content policies, which in itself interferes with editorial freedom."[133] He adds that the law "obviously incentivizes serial violations [of content policies by candidates] on the hopes that some [violative content] will get through the platform's enforcement mechanisms, which in turn strips platforms of effective editorial rights with respect to this class of speakers."[134]

The key U.S. Supreme Court ruling standing against a government-coerced, right-of-access statute for political candidates is *Miami Herald Publishing Co. v. Tornillo*.[135] The Court there considered a Florida right-of-reply statute that required print newspapers that criticized the character or record of candidates running for office to give those candidates an equal amount of space—both free of charge and in as conspicuous a location as where the criticism appeared – to respond to the attacks.[136] In other words, just as with the Florida anti-deplatforming law, the statute in *Tornillo* compelled media entities to provide candidates with access in order to be able to speak. The Supreme Court declared in *Tornillo* that this "government-enforced access"[137] policy "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[138] By analogy, internet-based social media platforms such as Twitter and Facebook are more than passive receptacles or conduits for content; they enforce terms-of-service policies that

[133] Bhagwat, *supra* note 30, at 121.
[134] *Id.* at 125.
[135] 418 U.S. 241 (1974).
[136] *Id.* at 244.
[137] *Id.* at 254.
[138] *Id.* at 258.

expressly forbid certain types of content.[139] And while the print medium and the internet certainly are different, the U.S. Supreme Court held in 1997 in *Reno v. ACLU*[140] that speakers on the internet are entitled to the full amount of First Amendment speech protection, just as are print-medium speakers.[141] Put another way, if the operators of social media platforms on the internet are indeed speakers, then they should be afforded the same level of editorial control and autonomy that the Court bestowed on the editors of print newspapers in *Tornillo*.

Of course, as Judge Hinkle pointed out, the editorial functions performed by print newspapers, in which human editors choose all of the content that makes it into a paper's pages, are different from the editorial judgments that social media platforms make, often using algorithms designed to enforce terms-of-service policies, regarding content posted by others on their sites.[142] Yet, Hinkle indicated that the Florida statutes at issue in *NetChoice* target editorial judgments not in terms of routine content moderation, but rather in "ideologically sensitive cases."[143] Judgments about deplatforming political candidates who breach terms-of-service policies regarding objectionable content seemingly fall into this bucket of cases.

---

[139] For instance, Meta will "remove content that's meant to degrade or shame, including, for example, claims about someone's sexual personal activity." *Bullying and Harassment*, META, https://transparency.fb.com/policies/community-standards/bullying-harassment/ (last visited Feb. 23, 2022). In addition, Meta "prohibit[s] the use of harmful stereotypes, which we define as dehumanizing comparisons that have historically been used to attack, intimidate, or exclude specific groups, and that are often linked with offline violence." *Hate Speech*, META, https://transparency.fb.com/policies/community-standards/hate-speech/ (last visited Feb. 23, 2022).

[140] 521 U.S. 844 (1997).

[141] *See id.* at 870 (agreeing with the district court's "conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to" the internet).

[142] Judge Hinkle explained here that:

> newspapers, unlike social media providers, create or select all their content, including op-eds and letters to the editor. Nothing makes it into the paper without substantive, discretionary review, including for content and viewpoint; a newspaper is not a medium invisible to the provider. Moreover, the viewpoint that would be expressed in a reply would be at odds with the newspaper's own viewpoint. Social media providers, in contrast, routinely use algorithms to screen all content for unacceptable material but usually not for viewpoint, and the overwhelming majority of the material never gets reviewed except by algorithms. Something well north of 99% of the content that makes it onto a social media site never gets reviewed further.

NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1091–92 (N.D. Fla. 2021).

[143] *Id.* at 1092.

That is because providing candidates with an online forum to disseminate their political views, ideas and beliefs rests in the balance of a social media operator's deplatforming decision. In other words, distribution of a candidate's ideologies will be thwarted by a decision to deplatform a candidate. The Florida statute, however, prevents such an editorial decision; it requires, instead, that candidates be given a platform on which they can espouse their ideologies.

Florida, however, argued to Judge Hinkle that the U.S. Supreme Court's 1980 decision in *PruneYard Shopping Center v. Robins*[144] was more relevant than *Tornillo*.[145] In *PruneYard*, the Court held that the right of individuals to engage in free speech and petition activities on the property of a privately owned shopping center—a compelled access right to engage in speech that was secured by California's constitution, not by the First Amendment—did not violate the First Amendment speech rights of the shopping center's owner to block expressive activities on its property.[146] The speech and petition activities in question involved distributing pamphlets and soliciting signatures.[147] The Supreme Court summarily distinguished *Tornillo*, reasoning that *Tornillo's* concern with intrusion into the function of newspaper editors was "obviously . . . not present" in *PruneYard*.[148]

The Florida anti-deplatforming statute can be distinguished from *PruneYard* in at least two respects. First, it directly targets entities—social media platforms—engaged in the business of hosting and conveying speech. Platforms such as Twitter and Facebook are open to the public specifically for purposes of posting, reading and responding to speech, subject to the platforms' terms of service regarding content. The platforms' very existence is all about speech, thereby ratcheting up First Amendment frets when the government interferes with how these speech-based businesses operate and enforce, via deplatforming, their policies affecting content.

Conversely, the access mandate in *PruneYard* targeted an entity—a shopping center—that was "open to the public for the

---

[144] 447 U.S. 74 (1980).
[145] *See NetChoice*, 546 F. Supp. 3d, at 1092–93 (addressing Florida's reliance on *PruneYard*).
[146] *PruneYard*, 447 U.S. at 88.
[147] *Id.* at 77.
[148] *Id.* at 88.

purpose of encouraging the patronizing of its commercial establishments," including "more than 65 specialty shops, 10 restaurants, and a movie theater."[149] The shopping center owner was not immersed in the speech business; only the movie theater apparently was involved in a speech-centric enterprise.[150] Indeed, the shopping center's policy was "not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that [was] not directly related to its commercial purposes."[151]

Furthermore, the shopping center's choice to ban "*any* publicly expressive activity"[152] meant that its policy applied evenhandedly to all varieties of content "not directly related to its commercial purposes."[153] The center's decision, unlike the editorial choices made by social media platforms, thus did not involve assessments about which types of content to permit and which types to ban.[154] To wit, *PruneYard* did not involve a decision about whether to prohibit hate speech or degrading and dehumanizing speech—content that social media platforms selectively choose to ban—but rather a decision to block all speech.[155] At bottom, the speech-based intrusion in *PruneYard* was peripheral to the purpose of the entity in question (the shopping center) and did not interfere with judgments affecting its core shopping center business. While a social media platform may not be a newspaper, it is a speech-based business that makes editorial choices affecting the content that others may permissibly post. It is not a shopping center engaged in the business of making decisions about which stores and restaurants may secure leases to sell goods and prepare meals.

A second key difference from *PruneYard* is that the battle in *NetChoice* centers on a platform's ability to *remove* a person

---

[149] *Id.* at 77.
[150] Movies are a form of speech protected by the First Amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding "that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments").
[151] *PruneYard*, 447 U.S. at 77.
[152] *Id.* (emphasis added).
[153] *Id.*
[154] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 12 (1986) ("Notably 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; nor was the access right content based.").
[155] *See supra* notes 88 and 139 (addressing bans on speech related to these matters imposed by Twitter and Facebook).

who already has access to it. The fight is *not* about a candidate initially gaining first-time access to a platform such as Twitter or Facebook. Instead, it regards the ability of a platform to eliminate access for someone who presently has it and who has failed to obey its rules regarding objectionable content. The question, therefore, is whether, consistent with the First Amendment, a candidate must be granted enduring access to a social media platform or whether access can be lost, via deplatforming, for failure to comply with content moderation rules.

PruneYard, in contrast, involved individuals who were attempting to gain access to a venue that enforced a policy designed to block their initial access to it.[156] *PruneYard* thus was not about eliminating access to a venue where individuals were already permitted to engage in expressive activities. *PruneYard* was about gaining initial access; *NetChoice* is about revoking it.

D. The Right Not to be Compelled to Speak

Closely related to social media platforms' interest in editorial control and autonomy is their unenumerated First Amendment right not to be compelled to speak and, more specifically, their interest in not being compelled to convey the political views of candidates who have violated their terms of service and thus would otherwise be deplatformed.[157] The right not to speak applies to business entities as well as individuals.[158] The Supreme Court has remarked that "measures compelling speech are at least as threatening" to the First Amendment as are ones restricting speech.[159] Indeed, Vikram David Amar and Alan Brownstein recently observed that the First Amendment right not to be compelled by the government to speak "is being

---

[156] The shopping center's policy was "not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion." *PruneYard*, 447 U.S. at 77.

[157] *See* Wooley v. Maynard, 430 U.S. 705, 714 (2014) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[158] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

[159] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2464 (2018).

invoked more frequently, more widely, and more aggressively than ever before."[160]

For example, in the 2018 case of *Janus v. American Federation of State, County & Municipal Employees,* the Supreme Court found an Illinois law unconstitutional because it "compell[ed] [public employees] to subsidize private speech on matters of substantial public concern" by requiring non-union members to fund the speech of the union that was designated to represent them in collective bargaining with the state.[161] Writing for the majority, Justice Alito was clear that topics such as government spending, education, child welfare, healthcare, minority rights, climate change, sexual orientation and gender identity all constitute matters of substantial public concern.[162] The Court stressed that "the compelled subsidization of private speech seriously impinges on First Amendment rights."[163]

Similarly, Florida's anti-deplatforming statute compels the hosting of private individuals' speech—namely, the speech of candidates running for public office. The speech of those individuals, in turn, likely addresses what the Court in *Janus* called "matters of substantial public concern,"[164] such as candidates' views regarding the political issues confronting them, as well as voters, in their races for office.[165] Specifically, candidates might express their views on some of the very same topics noted above that the *Janus* Court deemed to be of substantial public concern.[166] In other words, because candidates can never be deplatformed, the statute compels social media platforms to convey those candidates' political views whenever they choose to post them. The only meaningful difference between *Janus* and *NetChoice* is that the former case deals with

---

[160] Vikram David Amir & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, U. ILL. L. REV. 1, 3 (2020).
[161] *Janus*, 138 S. Ct. at 2460.
[162] *Id.* at 2475–77.
[163] *Id.* at 2464.
[164] *Id.* at 2460.
[165] The U.S. Supreme Court has adopted a very broad definition of when speech involves a matter of public concern. *See* Snyder v. Phelps, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" (citations omitted) (first quoting Connick v. Myers, 461 U.S. 138, 146 (1983); and then quoting City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004))).
[166] *See supra* note 161 and accompanying text (identifying topics of substantial public concern).

the compelled *subsidization* of speech and the latter involves the compelled *hosting* of speech. Both cases implicate speech about matters of substantial public concern.

The fact that the Florida statute compels one set of speakers—social media platforms—to host the political viewpoints of another class of speakers—candidates running for local or statewide office—is particularly troubling from a First Amendment right-not-to-speak perspective. Indeed, and as noted earlier, the Court in *Miami Herald Publishing Co. v. Tornillo*[167] struck down a state law compelling print newspapers to convey the viewpoints of candidates running for office in Florida.[168] To use Judge Hinkle's fine phrase, the Florida law similarly involves "ideologically sensitive" matters—namely, the ideologies of candidates running for political office and whether a platform must be compelled to provide candidates with a far-reaching venue for espousing those ideologies.[169]

In contrast, the Supreme Court is more tolerant when the speech being compelled is purely factual, uncontroversial information that relates to commercial advertising and is intended to prevent consumer deception.[170] In those situations, the Court has held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and are not "unduly burdensome."[171] This test approximates the deferential level of rational basis review.[172] Outside of this compelled-speech scenario and those involving informed-consent mandates incident to medical procedures, however, "strict scrutiny today is the default standard of review in compelled-speech cases."[173] Florida's anti-deplatforming law thus would not be immune from rigorous judicial review.

---

[167] 418 U.S. 241 (1974).
[168] *Id.* at 258.
[169] NetChoice, LLC v. Moody, 546 F. Supp. 1082, 1092 (N.D. Fla. 2021).
[170] Zauderer v. Off. of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
[171] *Id.*
[172] *See* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 521 (2014) ("*Zauderer* has led to considerable confusion in the lower courts about what sorts of commercial speech disclosure requirements are covered by *its rational basis standard of review*" (emphasis added)); Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 505 (2018) ("Many courts and commentators have treated the *Zauderer* 'reasonable relationship' test as a highly deferential test similar to rational basis review.")
[173] Calvert, *supra* note 97, at 109.

III. CONCLUSION

Owen Fiss and Jerome Barron asserted decades ago that government intervention in the marketplace of ideas might be necessary to facilitate democratic self-governance and bolster public debate.[174] By barring large, privately-owned social media platforms from deleting the accounts of candidates running for elected office, Florida has waded deeply into the online marketplace of ideas to manipulate its operation. The state's governor framed the need for the law in terms of fighting the forces of censorship from Silicon Valley; the danger to free speech, he suggested, was not the government, but a cadre of private businesses.[175]

This Article contended that a more compelling interest justifying the law would be in providing Floridians with easy access to the views of candidates running for public office so they might vote in a more informed manner.[176] In brief, Florida citizens would be able to quickly locate the views of candidates on popular social media platforms, including candidates who might otherwise be silenced via deplatforming. This rationale would comport, in part, with Fiss's view that the First Amendment's traditional protection of speaker autonomy—the speaker here being a social media platform—from government interference must sometimes be balanced against and yield to the First Amendment's "deepest democratic aspirations"[177] of "enrich[ing] public debate."[178] Under this justification, then, the unenumerated First Amendment right of Florida citizens to receive speech from candidates is paramount and trumps a platform's right not to speak.[179] The logic here is that to facilitate

---

[174] *See supra* notes 1–18 and accompanying text (addressing the work of Fiss and Barron).
[175] *See supra* Part I (addressing how Governor Ron DeSantis framed the need for legislation targeting large social media platforms).
[176] *See supra* notes 111–114 (addressing whether Florida might have a compelling interest). In fact, a friends-of-the-court brief filed by several conservative-leaning states with the U.S. Court of Appeals for the Eleventh Circuit in *NetChoice* asserts a very similar interest. *See* Brief of the States of Texas, Alabama, Alaska, Arizona, Arkansas, Kentucky, Mississippi, Missouri, Montana, and South Carolina as Amici Curiae in Support of Defendants-Appellants at 18, NetChoice, LLC v. Moody, No. 21-12355 (11th Cir. Sept. 14, 2021) (contending that Florida has a compelling interest in "ensuring that its citizens enjoy access to the free flow of information and ideas, unencumbered by arbitrary and erratic censorship, deplatforming, and shadow banning").
[177] Fiss, *Social Structure*, *supra* note 4, at 1424.
[178] *Id.* at 1411.
[179] *See supra* note 113 and accompanying text (addressing the right to receive speech).

this audience-centric right to receive speech, candidates must be given permanent access to social media platforms—i.e., they cannot be deplatformed—such that candidates would possess, as Barron put it, "a right to be heard."[180]

This Article illustrated, however, that multiple First Amendment interests and principles militate against the constitutionality of the anti-deplatforming statute. The First Amendment arguments against the law addressed in this Article unspool as follows. First, social media platforms exercise editorial judgment and control over speech when they decide—and create policies about – which varieties of content they will not tolerate.[181] Second, when the platforms disseminate information about these content-moderation policies to users, they are engaging in speech.[182] These first two points illustrate that social media platforms do more than simply engage in conduct; they make decisions about speech and disseminate speech-altering policies. This triggers First Amendment scrutiny of the statute.

Third, Florida's anti-deplatforming law is subject to strict scrutiny for multiple reasons. One is that the law is a content-based regulation of speech, given that it privileges political speech – the speech of candidates running for office—over speech uttered by non-candidates who possess no statutory right not to be deplatformed.[183] A second reason is that the law embraces speaker-based discrimination because it applies only to very large or very lucrative platforms, not to others, and because it exempts from its reach platforms operated by companies that own and operate theme parks.[184] A third reason why strict scrutiny applies is that the law compels platforms to convey political speech, and compelled-speech obligations affecting non-commercial speech are presumptively subject to strict scrutiny.[185]

Finally, the Article illustrated that the anti-deplatforming law would likely fail strict scrutiny even if one were to assume that Florida possessed a compelling interest in informing voters about candidates' viewpoints on political matters. Specifically, a less speech-restrictive alternative means of conveying this

[180] Barron, *supra* note 11, at 1678.
[181] *See supra* Part II, Section A.
[182] *See supra* Part II, Section A.
[183] *See supra* Part II, Section B.
[184] *See supra* Part II, Section B.
[185] *See supra* Part II, Section D.

information exists: Florida can create, run and promote its own online platform dedicated exclusively to hosting candidates running for state and local office.[186] Florida, in short, can get into the speech business for itself; it does not need to interfere with the business models and First Amendment rights of privately owned platforms.

Additionally, the law is fatally underinclusive in serving the ostensibly compelling interest in informing voters because it applies to only a few, very large social media platforms.[187] This underinclusivity also suggests an impermissible, discriminatory motive behind the anti-deplatforming law—namely, to punish Twitter and Facebook for deplatforming former President Trump. Finally, the law's interference with editorial autonomy that the Court privileged in *Tornillo* militates against it passing constitutional muster.[188]

The anti-deplatforming law's destiny now rests in the hands of the U.S. Court of Appeals for the Eleventh Circuit. Despite the anti-censorship rhetoric of Governor Ron DeSantis in framing the need for the statute, a host of First Amendment realities likely will seal its unconstitutional fate.

[186] *See supra* Part II, Section B.
[187] *See supra* Part II, Section B.
[188] *See supra* Part II, Section C.