

# FIRST AMENDMENT BATTLES OVER ANTI-DEPLATFORMING STATUTES: EXAMINING *MIAMI HERALD PUBLISHING CO. V. TORNILLO*'S RELEVANCE FOR TODAY'S ONLINE SOCIAL MEDIA PLATFORM CASES

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*Florida adopted a statute in 2021 barring large social media sites from deplatforming—removing from their sites—candidates running for state and local office. Soon thereafter, Texas adopted its own anti-deplatforming statute. A trade association representing several major social media companies is now challenging the laws in federal court for violating the platforms' First Amendment speech rights. A central issue in both NetChoice, LLC v. Moody (targeting Florida's statute) and NetChoice, LLC v. Paxton (attacking Texas's law) is the significance of the U.S. Supreme Court's 1974 decision in Miami Herald Publishing Co. v. Tornillo. In Tornillo, the Court struck down a Florida statute that compelled print newspapers that published attacks on political candidates' character or record to provide access in their pages for those political candidates' replies. This Article examines the relevance of Tornillo's aging precedent in conferring print newspapers with a right of editorial autonomy and a right not to be compelled to speak in today's social media, anti-deplatforming cases. The Article avers that while Tornillo may help the platforms with their legal challenges, its impact is cabined by several crucial factual and legal distinctions. The Article concludes that dicta regarding both access and social media platforms in the U.S. Supreme Court's 2017 decision in Packingham v. North Carolina could play a surprising role in pushing back against Tornillo.*

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## INTRODUCTION

In June 2021, a federal district court blocked Florida’s enforcement of a statute that prohibits prominent social media sites from deplatforming candidates running for state and local office.<sup>1</sup> Deplatforming is defined 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.”<sup>2</sup> The statute targets what Florida Governor Ron DeSantis called “big tech oligarchs” that act as a “council of censors.”<sup>3</sup> DeSantis, a possible Republican contender for President of the United States in 2024, proclaimed earlier in 2021 that “we cannot allow Big Tech to interfere in our elections by putting a thumb on the scale for political candidates favored by Silicon Valley.”<sup>4</sup>

In issuing a preliminary injunction, however, U.S. District Court Judge Robert Hinkle reasoned in *NetChoice, LLC v. Moody* that the anti-deplatforming statute, which is part of a cluster of Florida laws targeting social media sites, was preempted by a federal statute.<sup>5</sup> Judge Hinkle thus did not need, for the disposition of the case, to address whether the anti-deplatforming mandate, which applies only to large and fiscally robust platforms,<sup>6</sup> violates the platforms’ First Amendment free speech rights.<sup>7</sup>

<sup>1</sup> *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951 (N.D. Fla. June 30, 2021). The statute provides, in key part, that “[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.” FLA. STAT. § 106.072(2) (2021).

<sup>2</sup> FLA. STAT. § 501.2041(1)(c) (2021).

<sup>3</sup> Ana Ceballos, Colleen Wright & Kirby Wilson, *DeSantis Signs Bill to Crack Down on ‘Big Tech,’* MIAMI HERALD, May 25, 2021, at 1A.

<sup>4</sup> Ana Ceballos, Kirby Wilson & Lawrence Mower, *DeSantis Adds Conservative Flair to ‘State of the State’ Address as He Kicks Off Legislature,* MIAMI HERALD, Mar. 3, 2021, at 1A; see, e.g., Editorial, *Judge Says Republicans Misinterpreted Anti-Riot Law. Really?,* MIAMI HERALD, Sept. 14, 2021, at 10A (calling DeSantis “a potential 2024 presidential contender”).

<sup>5</sup> See *NetChoice*, 2021 U.S. Dist. LEXIS 121951, at \*19–20 (finding that the anti-deplatforming statute was inconsistent with 47 U.S.C. § 230(c)(2) and thus was preempted by 47 U.S.C. § 230(e)(3)); see also 47 U.S.C. § 230(c)(2) (prohibiting the imposition of civil liability on interactive computer services when, acting in good faith, they “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”); 47 U.S.C. § 230(e)(3) (providing, in pertinent part, that “no liability may be imposed under any State or local law that is inconsistent with this section”).

<sup>6</sup> The law only affects platforms that have either “annual gross revenues in excess of \$100 million” or “at least 100 million monthly individual platform participants globally.” FLA. STAT. § 501.2041(1)(g)(4)(a)–(b) (2021).

<sup>7</sup> 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 case now is pending before the U.S. Court of Appeals for the Eleventh Circuit.<sup>8</sup> In their opening brief filed in September 2021, Florida Attorney General Ashley Brooke Moody and the other Florida defendants argued that the law is *not* preempted by a federal statute,<sup>9</sup> and, moreover, that it passes muster under the First Amendment.<sup>10</sup> A key aspect of any First Amendment analysis before the Eleventh Circuit—and in front of the U.S. Supreme Court, if the politically charged case reaches that far—will be the relevance of the Supreme Court’s 1974 ruling in *Miami Herald Publishing Co. v. Tornillo*.<sup>11</sup> Indeed, NetChoice, a trade association that counts Facebook and Twitter among its members, leaned heavily on *Tornillo* at the district court level.<sup>12</sup> Conversely, the Florida defendants have attempted to factually distinguish *Tornillo* and diminish its significance in their opening brief with the Eleventh Circuit.<sup>13</sup>

In *Tornillo*, the Court struck down on First Amendment grounds a Florida statute that compelled print newspapers to provide candidates running for office with free and equally conspicuous space to reply to those newspapers’ attacks on their character or official record.<sup>14</sup> This right-of-reply statute amounted to what the Court variously called a “right-of-access

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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).

<sup>8</sup> *NetChoice, LLC v. Att’y Gen.*, No. 21-12355 (11th Cir. filed Sept. 7, 2021). In response, Appellees, *NetChoice, LLC*, filed a reply brief on November 8, 2021. Reply Brief, *NetChoice, LLC*, No. 21-12355 (11th Cir. filed Nov. 8, 2021).

<sup>9</sup> See Opening Brief of Appellants at 8, *NetChoice, LLC*, No. 21-12355 (11th Cir. filed Sept. 7, 2021) [hereinafter Opening Brief of Appellants] (“Plaintiffs are unlikely to succeed on the merits of their claim that any provision of the Act is facially preempted by 47 U.S.C. § 230.”).

<sup>10</sup> See *id.* at 2 (“Florida’s law is consistent with Section 230 as well as the First Amendment, and the injunction should be reversed.”) (emphasis added).

<sup>11</sup> 418 U.S. 241 (1974).

<sup>12</sup> See *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at \*24 (N.D. Fla. June 30, 2021) (“The plaintiffs push hardest of [sic] *Tornillo*, which . . . held unconstitutional the Florida statute requiring a newspaper to allow a candidate to reply to the newspaper’s unfavorable statements.”). NetChoice describes itself as “a trade association of businesses who share the goal of promoting free speech and free enterprise on the net.” *Media Hits and Press Statements*, NETCHOICE, <https://netchoice.org/media-hits-press-statements> [<https://perma.cc/J64T-7BFL>] (last visited Feb. 16, 2022). Among its members are Facebook, Google, TikTok, Twitter, and Yahoo!. *About Us*, NETCHOICE, <https://netchoice.org/about> [<https://perma.cc/M473-H8C6>] (last visited Feb. 16, 2022).

<sup>13</sup> See Opening Brief of Appellants, *supra* note 9, at 24 (noting NetChoice’s reliance on *Tornillo*, but contending that “in key respects, newspapers are unlike social media platforms making decisions about which users to deplatform, censor, or shadow ban”).

<sup>14</sup> *Tornillo*, 418 U.S. at 244 (observing that Florida’s right-of-reply statute “provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges”).

statute”<sup>15</sup> and “a compulsory access law.”<sup>16</sup> In other words, print newspapers in Florida were forced to host and disseminate the expressive content of political candidates if they criticized them.

Florida’s new anti-deplatforming law is similar. Because the law bars large social media platforms from permanently deleting candidates’ accounts, the platforms are compelled to host those individuals and to provide them with access to a digital venue from which they can widely disseminate their ideologies and opinions.<sup>17</sup> In short, the laws at issue in both *Tornillo* and *NetChoice* compel media entities—print newspapers in *Tornillo*, online platforms in *NetChoice*—to accommodate the speech of politicians.

This Article examines the relevance of *Tornillo* in cases such as *NetChoice*. Importantly, it is not the only legal battle in which *Tornillo* likely will play a pivotal role. To wit, *NetChoice* also sued Texas in September 2021 after the Lone Star State followed in Florida’s footsteps and adopted a similar, but not identical, statute that bans social media platforms from censoring and deplatforming users based on their viewpoints.<sup>18</sup> *Tornillo* is front and center in *NetChoice*’s complaint against Texas, appearing as the first case cited on the first page of its complaint.<sup>19</sup> *NetChoice* cites *Tornillo* to support the proposition that it and its fellow plaintiff, the Computer & Communications Industry Association, “are . . . trade associations whose members have First Amendment rights to engage in their own speech and to exercise editorial discretion over the speech published on their websites and applications.”<sup>20</sup>

Part I of this Article provides a primer on *Tornillo* and, in particular, its rejection of a compelled-access mandate in the print medium.<sup>21</sup> Part II illustrates and evaluates two related ways in which *Tornillo* might carry

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<sup>15</sup> *Id.* at 257.

<sup>16</sup> *Id.* at 258.

<sup>17</sup> See FLA. STAT. § 501.2041(1)(c) (2021) (“‘Deplatform’ means 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.”).

<sup>18</sup> See Complaint for Declaratory and Injunctive Relief at 23–24, *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP, 2021 U.S. Dist. LEXIS 233460 (W.D. Tex. Dec. 1, 2021) [hereinafter *Complaint Against Paxton*], <https://netchoice.org/wp-content/uploads/2021/09/1-main.pdf> [<https://perma.cc/229U-EDKR>] (describing the relevant portions of the Texas statutes at issue in the case); TEX. BUS. & COM. CODE ANN. § 120 (West 2021); TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001–008 (West 2021). On December 1, 2022, the Court released an opinion granting *NetChoice*’s preliminary injunction. *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP (W.D. Tex. Dec. 1, 2021). In March 2022, Texas Attorney General Ken Paxton appealed the district court’s decision to the U.S. Court of Appeals for the Fifth Circuit, arguing, among other things, that “*Tornillo* is inapposite right from the start” when compared to Texas’s statute. Brief for Appellant at 20, *NetChoice LLC v. Paxton*, No. 21-51178 (5th Cir. filed Mar. 2, 2022).

<sup>19</sup> *Complaint Against Paxton*, *supra* note 18, at 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Infra* notes 26–45 and accompanying text.

significance in lawsuits challenging anti-deplatforming statutes: 1) safeguarding the editorial independence and discretion of social media platforms, and 2) protecting the unenumerated First Amendment right not to be compelled to speak.<sup>22</sup> Part III contends that the Supreme Court’s failure in *Tornillo* to even mention, much less to apply *sub silentio*, the strict scrutiny standard of review to a blatantly content-based law is problematic.<sup>23</sup> The Court’s approach sows doubts about whether *Tornillo* provides an impenetrable barrier against government intervention in online marketplaces of ideas or whether it merely affords a First Amendment interest that can be weighed and balanced against competing governmental concerns. Finally, Part IV concludes that Justice Anthony Kennedy’s dicta in *Packingham v. North Carolina*<sup>24</sup> regarding access to internet fora will provide courts with a legal wildcard—a decision the importance, value, and relevance of which are difficult to predict—to play against *Tornillo* and in favor of state governments’ anti-deplatforming mandates.<sup>25</sup>

## I

### A PRIMER ON *TORNILLO*

*Miami Herald Publishing Co. v. Tornillo* pitted the government’s ability to intervene in the print marketplace of ideas against a newspaper’s First Amendment right of press freedom to control the content that appears in its publication.<sup>26</sup> The image of an unfettered, laissez-faire marketplace of ideas that allows the airing of all views and that helps society discover and test competing conceptions of the truth has permeated First Amendment jurisprudence since Justice Oliver Wendell Holmes Jr.’s famed 1919 dissent in *Abrams v. United States*.<sup>27</sup> The Florida law’s supporters in *Tornillo*,

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<sup>22</sup> *Infra* notes 46–72 and accompanying text.

<sup>23</sup> *Infra* notes 73–83 and accompanying text.

<sup>24</sup> 137 S. Ct. 1730 (2017).

<sup>25</sup> *Infra* notes 84–95 and accompanying text.

<sup>26</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254 (1974) (highlighting the “confrontation” between “an enforceable right of access” via “governmental coercion,” on the one hand, and “the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years,” on the other).

<sup>27</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he 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 . . . .”); see also RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992) (“The marketplace image is grounded in laissez-faire economic theory.”); Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 NOTRE DAME L. REV. 1725, 1728 (2019) (asserting that “[t]he marketplace of ideas theory has played a dominant role in the Court’s free speech jurisprudence”); 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 COMM’N L. & POL’Y 383, 384 (2016) (noting that “the marketplace-of-ideas metaphor was first utilized by the Court in Justice Oliver Wendell Holmes’s spirited dissent in *Abrams v. United States*”).

however, were concerned about the concentration of newspaper ownership that allegedly gave a few dominant businesses immense power in the marketplace of ideas to shape public opinion and jeopardized the public's ability to be informed of all viewpoints.<sup>28</sup> These proponents perceived the newspaper marketplace of ideas as being skewed in favor of the entities that owned it and the views those entities chose to publish—a situation that imperiled “[t]he First Amendment interest of the public in being informed.”<sup>29</sup> Conversely, the Miami Herald contended that the compelled-access mandate violated the constitutional guarantee of freedom of the press.<sup>30</sup>

Pat Tornillo, a candidate for the Florida legislature, sought declaratory and injunctive relief when he was refused access by the Miami Herald to its pages after the newspaper published editorials attacking him.<sup>31</sup> Tornillo was represented by Professor Jerome Barron,<sup>32</sup> who had penned an extremely significant law review article less than a decade before advocating for a First Amendment-grounded right of access to print newspapers.<sup>33</sup> In that article, Barron criticized the “romantic conception” of a “freely accessible” marketplace of ideas.<sup>34</sup> He averred that “[t]he mass media’s development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum.”<sup>35</sup> In turn, Barron contended that “our constitutional law authorizes a carefully framed right of access statute which would forbid an arbitrary denial of space, hence securing an effective forum for the expression of divergent opinions.”<sup>36</sup> Ultimately, his “proposal for a speakers’ right of access to the media . . . sparked decades of debate.”<sup>37</sup>

In *Tornillo*, however, the Supreme Court ruled that Barron’s compelled-access arguments, while perhaps legitimate,<sup>38</sup> were nonetheless outweighed

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<sup>28</sup> *Tornillo*, 418 U.S. at 248–54.

<sup>29</sup> *Id.* at 251.

<sup>30</sup> *Id.* at 245.

<sup>31</sup> *Id.* at 243–44; see L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 178 (1987) (“When Pat Tornillo was running for District 103 of the Florida House of Representatives, the *Miami Herald* savaged him in a pair of pre-election editorials. He demanded and was refused his statutory right of reply.”).

<sup>32</sup> Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 940–41 (2007).

<sup>33</sup> Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); see Samantha Barbas, *Creating the Public Forum*, 44 AKRON L. REV. 809, 812 n.15 (2011) (calling Barron’s article “pathbreaking”); Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War With Itself*, 35 HOFSTRA L. REV. 1211, 1211 (2007) (dubbing Barron’s article a “watershed” piece of scholarship).

<sup>34</sup> Barron, *supra* note 33, at 1641.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1678.

<sup>37</sup> Neil Weinstock Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 954 (2008).

<sup>38</sup> See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 53 (1991) (noting that “[t]he text and

by First Amendment concerns.<sup>39</sup> In striking down Florida's statute and thus ruling against Pat Tornillo, the Court was concerned with at least three items. One was the self-censorship in which newspapers might engage in order to avoid the application of the right-of-reply statute.<sup>40</sup> Such a chilling effect on the press would actually harm the marketplace of ideas, the Court reasoned, because a newspaper would not print its own viewpoint about a candidate in order to avoid being compelled to print that candidate's opinion in reply.<sup>41</sup> A second concern was the cost—both financial and spatial—imposed by the Florida statute on print newspapers.<sup>42</sup> In short, the Court was concerned that a newspaper would either need to jettison some of its own content to make space for a candidate's reply or add more pages if it wanted to keep its own content and to comply with the law.<sup>43</sup> Third, the Court was disturbed by the statute's intrusion on the editorial autonomy and independent judgment of newspaper editors, reasoning that:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.<sup>44</sup>

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footnotes of the Court's opinion are sprinkled with data about the twin phenomena of increasing chain ownership and one-newspaper cities"); Angela J. Campbell, *A Historical Perspective on the Public's Right of Access to the Media*, 35 HOFSTRA L. REV. 1027, 1079 (2007) (describing the Court's "lengthy and sympathetic discussion of the arguments for the public's right of access").

<sup>39</sup> See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974) ("[T]he implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this . . . brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment . . .").

<sup>40</sup> The Court reasoned that when "[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy." *Id.* at 257. The Court thus concluded that "under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.*

<sup>41</sup> In other words, instead of the public receiving two viewpoints under the law—a newspaper's viewpoint about a candidate and a candidate's viewpoint in rebuttal—the public would receive neither viewpoint because a newspaper would simply not publish its own editorial opinion about a candidate.

<sup>42</sup> The Court elaborated here that "the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." *Tornillo*, 418 U.S. at 256.

<sup>43</sup> See Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 864 (2011) ("An obligatory published reply would either heap additional costs on a newspaper or detract from other material that it intended to publish.").

<sup>44</sup> *Tornillo*, 418 U.S. at 258.

Put differently, editing is for editors, not the government, and ensuring fairness in a newspaper's pages is simply not the government's prerogative.<sup>45</sup>

With this encapsulation of *Tornillo* in mind, the next Part examines two critical ways in which the nearly fifty-year-old ruling may prove influential today in social media, anti-deplatforming battles such as *NetChoice, LLC v. Moody* and *NetChoice, LLC v. Paxton*.

## II

### THE INTEREST OF EDITORIAL AUTONOMY AND THE RIGHT NOT TO BE COMPELLED TO SPEAK

A threshold fact that could affect *Tornillo*'s relevance for today's online social media cases is that *Tornillo* involved the print medium while *NetChoice*'s cases against the anti-deplatforming laws in Florida and Texas implicate internet media. Might the distinctions between these forms of media make a difference? Probably not. That is because the Supreme Court made it clear in 1997 that speakers on the internet are entitled to full First Amendment protection.<sup>46</sup> The problem of spectrum scarcity and the long history of extensive regulation that allow the government to more easily regulate speech on the over-the-air broadcast medium "are not present in cyberspace."<sup>47</sup>

If the difference in medium thus does not diminish *Tornillo*'s relevance for analyzing the constitutionality of anti-deplatforming statutes, then *Tornillo* may be especially important on two issues: the scope of First Amendment protection for the editorial control and autonomy of social media platforms and the First Amendment right of such platforms not to be compelled to speak. These issues are addressed separately below.

#### A. Editorial Control and Autonomy

*Tornillo*'s concern with editorial control and autonomy at first blush seemingly provides a powerful weapon in the arsenal of social media platforms against the constitutionality of anti-deplatforming laws. As described above, the U.S. Supreme Court struck down Florida's compelled-

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<sup>45</sup> Jerome A. Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495, 1499 (1989) (asserting that the Supreme Court's theme in its *Tornillo* decision "is editorial autonomy: the right of editors to decide, without judicial oversight, what they will print and what they will not").

<sup>46</sup> See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (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 this medium").

<sup>47</sup> *Id.* at 868; see Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 309 (1989) (defining spectrum scarcity as "the shortage of electromagnetic frequencies available for public use").



access law partly because the statute intruded on the editorial control, judgment, and autonomy of newspaper editors.<sup>48</sup> The operators of social media platforms can similarly be viewed as making editorial choices about what speech they will allow on their sites when they create and enforce content-based terms of service. For example, Facebook bans hate speech, which it defined in late November 2021 “as a direct attack against people—rather than concepts or institutions—on the basis of what we call protected characteristics: race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity and serious disease.”<sup>49</sup> That same month, Twitter had a policy that users were not allowed to “glorify, celebrate, praise or condone violent crimes, violent events where people were targeted because of their membership in a protected group, or the perpetrators of such acts.”<sup>50</sup> As a result, Twitter will deplatform—i.e., permanently suspend—someone who violates this policy after an initial warning.<sup>51</sup> Deplatforming therefore amounts to a tool by which a social media platform can enforce its editorial choices about permissible content. When Florida bars large social media platforms from deplatforming political candidates, it strips those platforms of a mechanism to punish candidates who violate their editorial policies. The platforms are compelled to give enduring access to candidates who breach their boundaries of permissible content.

Yet, the editorial choices made by newspaper editors differ from those made by the operators of social media platforms. Indeed, Judge Hinkle noted this fact in *NetChoice, LLC v. Moody*. “[N]ewspapers, unlike socialmedia [sic] 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.”<sup>52</sup> In contrast, Judge Hinkle observed social media platforms “routinely use algorithms to screen all content for unacceptable material but usually not for viewpoint, and the overwhelming

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<sup>48</sup> See *supra* notes 44–45 and accompanying text (discussing the Court’s concern with editorial control and autonomy).

<sup>49</sup> *Hate Speech*, META: FACEBOOK CMTY. STANDARDS, <https://transparency.fb.com/policies/community-standards/hate-speech> [https://perma.cc/68WF-GFRR].

<sup>50</sup> *Glorification of Violence Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/glorification-of-violence> [https://perma.cc/7UD8-BK2F].

<sup>51</sup> See *id.* (“The first time you violate this policy, we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again. If you continue to violate this policy after receiving a warning, your account will be permanently suspended.”).

<sup>52</sup> *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at \*24–25 (N.D. Fla. June 30, 2021) (responding to the plaintiffs’ editorial autonomy arguments against the Florida anti-deplatforming law under *Tornillo* and other Supreme Court precedents).

majority of the material never gets reviewed except by algorithms.”<sup>53</sup> In brief, print newspapers seemingly exercise greater editorial control because they actively select all of the content that appears in their pages. Social media platforms, by contrast, do not actively select the content that appears on their sites; rather, they enforce terms of service that are used to remove objectionable content once it is posted. In other words, there is a crucial difference between *selection for inclusion* (what newspaper editors do) and *selection for removal* (what social media platforms do). This distinction might weaken *Tornillo*’s pushback against anti-deplatforming laws.

Another major weakness in applying *Tornillo*’s editorial autonomy principle to anti-deplatforming statutes is that the Supreme Court in *Tornillo* explicitly linked that principle to the First Amendment’s guarantee of a *free press* rather than tethering it to that amendment’s protection of *free speech*.<sup>54</sup> This went unaddressed in Judge Hinkle’s opinion in *NetChoice, LLC v. Moody*. The Court in *Tornillo* was unmistakably concerned with protecting the press from government interference with its judgment about content, stating that “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”<sup>55</sup> As Professor David Anderson explains, the Court in *Tornillo* “seems to recognize a distinct right of editorial autonomy arising from the Press Clause.”<sup>56</sup>

The obvious problem for social media platforms such as Twitter and Facebook is that courts may not consider them to be members of the press. They may not merit special, institutional-speaker protection under the Press Clause simply because their primary role is arguably not to play a journalistic watchdog role on the government or to inform listeners about news.<sup>57</sup> Twitter and Facebook clearly engage in the *speech* business and merit protection

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<sup>53</sup> *Id.* at \*24.

<sup>54</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . .”).

<sup>55</sup> *Id.* at 256.

<sup>56</sup> David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 494 (2002).

<sup>57</sup> See RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 548 (2019) (contending that acknowledgment of “the press as a special institutional speaker is an important starting point for analysis of the Press Clause, which should be read to give members of the institutional press both broad editorial discretion over their decisions in curating the institution’s news product and broad newsgathering rights in creating it”); Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 105 (2016) (suggesting that protection of the press under the Press Clause “was inextricably linked with a group of specialists who were discharging a particular set of functions by informing the citizenry about matters of public concern and checking government abuses”).

under the First Amendment's Free Speech Clause.<sup>58</sup>

Whether they are members of the *press* within the meaning of the Press Clause as it was invoked in *Tornillo* is a very different matter. Courts in social media, anti-deplatforming cases may choose to read *Tornillo* narrowly as a Press Clause case about protecting journalists who play a checking-value function in exposing government abuses of power.<sup>59</sup> If they do so, this would reduce, if not eviscerate, the usefulness of social media platforms citing *Tornillo*'s concerns with editorial autonomy to challenge such laws.

### B. *The Right Not to Be Compelled to Speak*

Even if *Tornillo* is narrowly construed as a Press Clause case with little or no bearing when it comes to protecting the editorial autonomy of social media platforms, the case still carries weight for those platforms as a right-not-to-speak case.<sup>60</sup> In brief, the First Amendment protects not only the right to speak freely, but also the right not be compelled by the government to speak.<sup>61</sup>

The Supreme Court in 1988 observed that *Tornillo* established “[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression.”<sup>62</sup> In 2006, it cited *Tornillo* as one of several “compelled-speech cases” in which the Court “limited the government’s ability to force one speaker to host or accommodate another speaker’s message.”<sup>63</sup> Still more recently, the Court suggested that compelling speech actually may be more harmful than—not simply

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<sup>58</sup> The term “speech business” has been used by the U.S. Supreme Court to refer to a business whose primary good or service is speech. See *Alexander v. United States*, 509 U.S. 544, 560, 566 (1993) (Kennedy, J., dissenting) (referring to a “book and film business” that sold and displayed sexually explicit content as “a speech business”). By way of contrast, “shopping centers aren’t usually in the speech business.” Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener’s Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 389 (1996).

<sup>59</sup> See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 261 (1991) (asserting that the decision in *Tornillo* “guaranteed the press the necessary autonomy to perform the checking function”); see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR. FOUND. RSCH. J. 521, 527 (1997) (identifying the First Amendment-based “value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials”).

<sup>60</sup> The right of editorial autonomy and the right not to be compelled to speak overlap, but they are not coextensive. See Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 99–100 (2021) (addressing the differences between editorial rights and the right not to be compelled to speak).

<sup>61</sup> See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (noting 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”).

<sup>62</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

<sup>63</sup> *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006).

equivalent to—silencing it.<sup>64</sup>

*Tornillo* was a compelled-speech case because Florida newspapers were forced to convey content penned by candidates who they attacked in their editorials.<sup>65</sup> Similarly, social media, anti-deplatforming cases such as *NetChoice, LLC v. Moody* are compelled-speech cases: The platforms are compelled to host and accommodate other speakers' messages because they cannot delete those speakers' accounts. Although the Florida statute does not bar a platform from removing a candidate's content that violates its terms of service, a platform seemingly is compelled to host and convey all other content that a candidate posts.<sup>66</sup> Indeed, another Florida statute related to the anti-deplatforming measure bars social media platforms from "apply[ing] or us[ing] 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."<sup>67</sup>

There is, however, an important distinction between the compelled-speech obligation in *Tornillo* and the one imposed by Florida's anti-deplatforming statute. Specifically, the compelled-speech mandate in *Tornillo* came into play only when a newspaper criticized a candidate's character or record; in other words, newspapers were penalized—forced to carry content against their wishes—only because they expressed their own political views.<sup>68</sup> The right-of-reply statute at issue in *Tornillo* thus amounted to what Professor Eugene Volokh aptly calls a content-triggered compulsion.<sup>69</sup>

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<sup>64</sup> See *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . .").

<sup>65</sup> *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (noting that "[c]ompelling editors or publishers to publish . . . is what is at issue in this case").

<sup>66</sup> The Florida defendants contend in their opening brief filed with the Eleventh Circuit Court of Appeals that "nothing in the Act prohibits platforms from censoring candidates; platforms are only restricted in their ability to deplatform candidates." Opening Brief of Appellants, *supra* note 9, at 33.

<sup>67</sup> FLA. STAT. ANN. § 501.2041(2)(h) (West 2021). The statute defines post-prioritization as "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." *Id.* § 501.2041(1)(e). It defines shadow banning as "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." *Id.* § 501.2041(1)(f).

<sup>68</sup> See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 360 (2018) (addressing the law at issue in *Tornillo* as "presumptively unconstitutional" because, in part, "compelling speakers who say something to also carry other speech . . . impos[es] a form of tax on certain kinds of speech").

<sup>69</sup> *Id.*; see also Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 18 (2020)

In contrast, the anti-deplatforming statute in *NetChoice, LLC v. Moody* is not triggered by any specific content that a social media platform hosts or conveys. A court that focuses on this distinction from *Tornillo* thus might view the compelled-speech obligation in *NetChoice, LLC v. Moody* as less problematic. It might, in turn, perceive the statute as more akin to the one at issue in *Turner Broadcasting System, Inc. v. FCC*.<sup>70</sup> The statute in that case compelled cable system operators, regardless of their own content, to carry the content of over-the-air broadcast stations.<sup>71</sup> The Court in *Turner* found that these must-carry provisions were constitutional, declaring that they “do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny.”<sup>72</sup>

In sum, using *Tornillo* to attack anti-deplatforming statutes either on the ground that they interfere with editorial autonomy or that they compel speech has both strengths and weaknesses. Judges in the anti-deplatforming cases will have leeway in terms of how much weight they afford *Tornillo*. A judge with strong, pro-First Amendment proclivities certainly could use *Tornillo* to strike down an anti-deplatforming statute such as that at issue in *NetChoice*. In contrast, a judge who is more concerned with political candidates having access to popular social media platforms so that they can disseminate their views to the public has the opportunity to distinguish *Tornillo*.

### III

#### TORNILLO’S ABSENT STRICT SCRUTINY ANALYSIS

In today’s First Amendment jurisprudence, content-based statutes generally are subject to review under the strict scrutiny test.<sup>73</sup> *Tornillo* involved a content-based statute because it compelled newspapers to print a specific type of subject matter—namely, the responses of candidates to

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(identifying *Tornillo* as “just such a case” in which “[t]he trigger for the compelled speech is prior private speech”).

<sup>70</sup> 512 U.S. 622 (1994).

<sup>71</sup> *Id.* at 643–44. As Justice Anthony Kennedy explained in *Turner*, the FCC’s “must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech.” *Id.* at 643. He added that while “the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators’ programming.” *Id.* at 643–44.

<sup>72</sup> *Id.* at 661. The Court in *Turner* held that the must-carry obligations were subject to review under “the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.” *Id.* at 662.

<sup>73</sup> *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (describing the different scrutiny standards applied to content-based and content-neutral laws).

attacks on their character or official record.<sup>74</sup> Strict scrutiny requires the government to prove that it has a compelling interest to support the law in question and that the law is narrowly tailored to serve that interest.<sup>75</sup>

In *Tornillo*, however, the Court never used the term “strict scrutiny.” It also never applied any balancing test that considered if Florida had a “compelling” interest to support its right-of-reply statute and whether the means to serve that interest were narrowly tailored.<sup>76</sup> The Court’s failure to apply strict scrutiny raises the question of whether the Court in *Tornillo* intended to create “absolutist and unequivocal . . . protection of press editorial sovereignty when it comes to thwarting governmental interference,” rather than a right that might be overcome in some instances by certain government interests.<sup>77</sup>

This is problematic for courts when considering the constitutionality of anti-deplatforming statutes because, assuming for the sake of argument that such statutes are content-based, the Supreme Court in *Tornillo* provided no guidance on how a strict scrutiny analysis might unspool.<sup>78</sup> As described earlier, the Court in *Tornillo* identified three primary problems with Florida’s right-of-reply statute: 1) the chilling effect and self-censorship that it might cause; 2) the spatial and financial toll it might impose; and 3) the intrusion on editorial autonomy and independence it would involve.<sup>79</sup> It is unclear whether any one of these interests, standing alone, would be sufficient in *NetChoice, LLC v. Moody* to rebut Florida’s possibly compelling interest in using anti-deplatforming statutes to provide its citizens with easy online access to the unfiltered views of candidates running for office so that those citizens might vote in a more well-informed manner.<sup>80</sup>

The *Tornillo* Court’s concern with a chilling effect on the press simply

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<sup>74</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (noting that “defining regulated speech by particular subject matter” makes a law facially content-based and subject to strict scrutiny).

<sup>75</sup> *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

<sup>76</sup> See *supra* notes 39–45 and accompanying text (addressing the *Tornillo* Court’s three reasons for ruling the way it did).

<sup>77</sup> 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, 41 (2020).

<sup>78</sup> Judge Hinkle concluded that Florida’s anti-deplatforming statute was content-based. See *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at \*29 (N.D. Fla. June 30, 2021) (reasoning that the anti-deplatforming statute “applies to deplatforming a candidate, not someone else; this is a content-based restriction”).

<sup>79</sup> See *supra* notes 39–45 and accompanying text (addressing these three interests).

<sup>80</sup> Such a possible compelling interest in support of Florida’s anti-deplatforming statute taps into philosopher-educator Alexander Meiklejohn’s belief that the purpose of free speech “is the voting of wise decisions” and that “the point of ultimate interest is not the words of the speakers, but the minds of the hearers.” See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25–26 (1948).

is absent in *NetChoice, LLC v. Moody*. That is because Florida's anti-deplatforming statute applies to platforms regardless of the material they host or post. Its application, in other words, cannot be dodged or avoided by choosing not to host or post certain media or messages. Additionally, the fret in *Tornillo* with a newspaper needing to pay the extra cost to add more printed pages to accommodate a candidate's response is non-existent on the internet; no new pages of newsprint must be paid for to accommodate the speech of a candidate on a social media platform. Thus, with both the chilling effect and the added cost interests that partly animated *Tornillo* rendered nugatory, the right of editorial autonomy is the only remaining relevant First Amendment interest from *Tornillo*'s trio of concerns. As discussed earlier, however, that interest arose from the Press Clause and thus may be irrelevant when applied to non-journalistic entities such as social media platforms.<sup>81</sup> And, if that third interest is indeed stripped away, then all that remains of *Tornillo* for social media platforms to contest anti-deplatforming statutes is *Tornillo*'s status as a right-not-to-speak case.<sup>82</sup> As noted earlier, the Court recently suggested that laws that compel speech can be even more dangerous than laws that restrict speech.<sup>83</sup> That logic certainly bolsters *Tornillo*'s usefulness in challenging anti-deplatforming statutes, but it does not guarantee its ultimate effectiveness.

#### CONCLUSION

Jerome Barron, the attorney who argued on behalf of Pat Tornillo before the Supreme Court in the case that bears the erstwhile candidate's name,<sup>84</sup> presciently predicted in 2008 that the same problems promulgated by private ownership that plague access to legacy media outlets, such as newspapers and television stations, may afflict the internet.<sup>85</sup> The question now is how much impact the print-centric *Tornillo* ruling that went against Barron's client and his right-of-access theory will have on today's internet-based anti-deplatforming cases.<sup>86</sup>

This Article addressed multiple problems that will hamper the use by

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<sup>81</sup> See *supra* notes 54–58 and accompanying text (addressing *Tornillo*'s discussion of editorial autonomy as being grounded in the Press Clause and limited to cases where the speaker plays an institutional role as watchdog on government action).

<sup>82</sup> See *supra* Section II.B (addressing *Tornillo* as a right-not-to-speak case).

<sup>83</sup> See *supra* note 64 and accompanying text.

<sup>84</sup> See *supra* note 32 and accompanying text.

<sup>85</sup> See Jerome A. Barron, *Access Reconsidered*, 76 GEO. WASH. L. REV. 826, 843 (2008) (noting “the increasing dominance of the Internet by just a few search engines” and “the growing importance and influence of Internet platforms owned and operated by the traditional media,” and contending that “[t]hese developments may be harbingers that the ownership and behavior patterns of the dominant traditional media will be replicated on the Web”).

<sup>86</sup> See *supra* notes 33–37 and accompanying text (addressing Barron's theory regarding a First Amendment-based right of access to the press).

social media platforms of *Tornillo* to strike down anti-deplatforming statutes such as the Florida mandate now under review by the Eleventh Circuit in *NetChoice, LLC v. Moody*. *Tornillo*, in brief, does not neatly superimpose onto *NetChoice*. Courts will have ample room to diminish *Tornillo*'s impact on anti-deplatforming laws and the cases that challenge them.

A final consideration is important here: whether Justice Anthony Kennedy's dicta in *Packingham v. North Carolina*<sup>87</sup> will be used by courts to weigh against *Tornillo* and in favor of anti-deplatforming statutes. Kennedy's dicta, which Justice Samuel Alito derided as "undisciplined"<sup>88</sup> and "loose rhetoric,"<sup>89</sup> suggested that cyberspace and "social media in particular" were "the most important places" today for people "to celebrate some views, to protest others, or simply to learn and inquire."<sup>90</sup> Kennedy equated social media with physical spaces such as public streets and sidewalks that are considered "quintessential forum[s] for the exercise of First Amendment rights."<sup>91</sup>

Moreover, Kennedy stressed in *Packingham* that individuals' access to social media was of paramount importance. He opined 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."<sup>92</sup> This point is important because Florida's anti-deplatforming law is a compelled-access mandate: Social media platforms cannot deny access to candidates running for local or statewide office.<sup>93</sup> Put differently, private entities must give candidates access.

Might not *Packingham* thus militate in favor of states compelling access in the face of *Tornillo*'s pushback against it? It is neither that clear nor easy. That is because, factually speaking, *Packingham* is a case about the government *denying* access to social media platforms, rather than enforcing

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<sup>87</sup> 137 S. Ct. 1730 (2017). In *Packingham*, the Court declared unconstitutional a state law that made it a crime for registered sex offenders to access a commercial social networking website. *See id.* at 1733. In striking down the statute, the Court reasoned that it "enacts a prohibition unprecedented in the scope of First Amendment speech it burdens," noting that "[s]ocial media allows users to gain access to information and communicate with one another about it on any subject that might come to mind." *Id.* at 1737. In delivering the Court's opinion, Justice Kennedy stressed the importance of people—registered sex offenders included—having access to social media platforms, writing that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.*

<sup>88</sup> *Id.* at 1738 (Alito, J., concurring).

<sup>89</sup> *Id.* at 1743.

<sup>90</sup> *See id.* at 1735 (majority opinion).

<sup>91</sup> *See id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See* FLA. STAT. ANN. § 106.072(2) (West 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.").



a law *granting* access to such digital venues.<sup>94</sup> Nonetheless, Kennedy’s observations linger, with Florida latching on to them in its opening brief with the Eleventh Circuit in *NetChoice, LLC v. Moody*.<sup>95</sup> Kennedy’s views about both the importance of social media platforms as forums for robust discussion and the need for people to have access to them ultimately could end up being the legal wildcard that shapes *Tornillo*’s relevance.

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<sup>94</sup> In particular, *Packingham* centered on a North Carolina statute that made “it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter.” *Packingham*, 137 S. Ct. at 1733.

<sup>95</sup> See Opening Brief of Appellants, *supra* note 9, at 37 (“As the Supreme Court has observed, ‘the vast democratic forums of the Internet, and social media in particular’ have become ‘the most important places . . . for the exchange of views.’” (quoting *Packingham*, 137 S. Ct. at 1735, 1743)).