MEMORANDUM

To: Ohio House Civil Justice Committee Members
From: NetChoice
Date: February 2, 2022
Subject: Ohio HB 441 and *PruneYard v. Robins*

By default, private businesses—even monopolies—have a First Amendment right to exercise editorial control over speech they host, publish, or otherwise present to the public. *See, e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-American Gay, Lesbian, Bisexual Group*, 515 U.S. 557 (1995). This is why, for example, two federal district courts recently held that social media platforms have a First Amendment right to moderate content on their sites, and held that *PruneYard* was inapplicable to social media businesses (more on this below).

But there is one narrow exception to this general right: In *PruneYard v. Robins* (1980), the Supreme Court held that the State of California could, through its State Constitution, augment the Federal Constitution's First Amendment protections. In other words, the Federal Constitution is a *floor*—not a ceiling—for protecting individual rights. From a bird's eye view, this holding suggests Ohio could, like California, amend its State Constitution to give individuals the right to disseminate their speech on a private business's property. But even if *PruneYard* is still good law—and recent cases cast doubt on that—the Supreme Court underscored that state constitutions may protect rights above the Federal Constitution ***only if doing so doesn't conflict with the Federal Constitution***. Federal law is supreme.

In California's case, the State Constitution did not violate the First Amendment because, even though it allowed students to protest in a private shopping center's parking lot—despite its owner's policy prohibiting all such expression—the protection (1) did not require the shopping center to espouse any views itself, (2) permitted the shopping center to "expressly disavow any connection with" any message shared on its property, and (3) "[t]he views expressed by members of the public" would "not likely be identified with those of the owner." *PruneYard v. Robins*, 447 U.S. 74, at 87 (1980). The Court also added that California's Constitution did not violate the First Amendment because, unlike in *Miami Herald*, the government did not intrude "into the function of editors." *Id.* at 88.

Because social media platforms have a First Amendment right to moderate content hosted on their websites, no state law or constitutional provision may infringe or otherwise conflict with that right. And because this bill would intrude on editorial functions, it is unconstitutional under the First Amendment *and* under *PruneYard*. In practical terms, that means the First Amendment prohibits Ohio (or

any government) from compelling social media platforms to host a third party's speech or to moderate (or not) speech in a certain way.

But even if that weren't the case, *PruneYard* offers no help:

- The public routinely associates the speech hosted on social media platforms with the platforms themselves. For example, advertisers have held Facebook and YouTube accountable for user-generated content that the advertisers disapproved of and wished not to be associated with. Likewise, Americans of all stripes believe the content social media platforms host is a reflection of those platforms' values. During this week's hearing, for example, some lawmakers questioned the judgment and values of platforms that allow hostile foreign actors to create accounts while blocking accounts of American politicians like former President Donald Trump. Put simply, who a platform accepts as a user and what content the platform tolerates from that user reflect on the platform's public image. So while Californians in the 1970s may not have associated the students protesting in a shopping center's parking lot or their messages with the shopping center's owner, the same is not true of the public and social media businesses today.
- And whereas California's Constitution did not require the shopping center to publish or otherwise disseminate the students' messages, this bill is premised on the exact opposite: It would force private businesses to devote resources to hosting and disseminating messages that they themselves disagree with or find harmful to their users. That is compelled speech that cannot survive strict scrutiny.

Another roadblock: the Supreme Court held in *PruneYard* that even though California could constitutionally require the shopping center to allow "orderly" protesters to assemble in its parking lot, the shopping center was still free to impose "time, place, and manner regulations" so as to "minimize any interference with its commercial functions." *Id.* at 83-84. So even if Ohio could constitutionally require social media platforms to "accept" everyone as a user, it can't prohibit them from promulgating rules meant to preserve their curative services for other users.

None of this is theoretical. In the NetChoice lawsuits against Florida and Texas – whose law is nearly identical to Ohio HB 441 – both district court judges dismissed *PruneYard*'s application because social media businesses (1) have a First Amendment right to exercise editorial control (e.g., moderate) and (2) the laws infringed on that right.

Here's what the Federal court said in Texas, whose law is very close to HB 441:

- **Texas (p. 19):** "*PruneYard Shopping Center v. Robins* is distinguishable from the facts of this case. 447 U.S. 74 (1980). In *PruneYard*, the Supreme Court upheld a California law that required a shopping mall to host people collecting petition signatures, concluding there was no "intrusion into the function of editors" since the shopping mall's operation of its business lacked an editorial

function. *Id*. at 88. Critically, the shopping mall did not engage in expression and "the [mall] owner did not even allege that he objected to the content of the [speech]; nor was the access right content based." *PG&E*, 475 U.S. at 12.