**In the Supreme Court of the United States**

No. 22-277

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL., PETITIONERS,

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., RESPONDENT.

---

No. 22-555

NETCHOICE, LLC, DBA NETCHOICE, ET AL., PETITIONERS,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS, RESPONDENT.

---

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

---

# BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF NETCHOICE AS RESPONDENT/CROSS-PETITIONER

---

JOHN BERGMAYER
*Counsel of Record*
PUBLIC KNOWLEDGE
*1818 N St. NW, Suite 410*
*Washington, DC 20036*
*(202) 861-0020*
*john@publicknowledge.org*

December 7, 2023

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Other Authorities**

**In the Supreme Court of the United States**

No. 22-277

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL., PETITIONERS,

V.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.
RESPONDENT.

---

No. 22-555

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
PETITIONERS,

V.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
RESPONDENT.

---

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

---

# BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF NETCHOICE AS RESPONDENT/CROSS-PETITIONER

---

## INTEREST OF AMICUS CURIAE[1]

Public Knowledge is a consumer rights organization dedicated to promoting freedom of expression, an open internet, and access to affordable communications tools and creative works. It has worked for many years to defend the pro-competitive, pro-free expression goals of common carriage in areas like broadband internet access service, while defending the right of users to use curated, expressive tools like social media where common carrier treatment is unlawful and inappropriate.

## SUMMARY OF ARGUMENT

1. Social media platforms are not common carriers. Unlike neutral transmitters of information, they are publishers who engage in First Amendment-protected editorial discretion in designing and applying content moderation policies.

2. The State Laws fail rational basis review because they have the unconstitutional purpose of promoting conservative points of view. They merit strict scrutiny because they are content-based restrictions on speech, and fail strict and intermediate scrutiny because they are not tailored to achieve a compelling or important government interest.

3. The State Laws undermine the free expression interests of social media users. By mandating the carriage of objectionable content, they drive users off platforms, disproportionately harm vulnerable groups, interfere with users' rights to access information and

---

[1] Pursuant to S. Ct. Rule 37.6, Public Knowledge states no counsel for a party authored this brief in whole or in part and no person or entity made a monetary contribution to its preparation or submission.

associate with others, and compel exposure to unwanted speech.

## ARGUMENT

### I. The Court Must Reject the States' Attempts to Silence Expression They Disagree With

In order to amplify conservative voices at the expense of other social media users, and to advance an openly-stated political agenda, Texas enacted HB20, 2021 Tex. Gen. Laws 3904, and Florida enacted SB7072, Ch. 202132 Laws of Fla., laws which they claim promote free speech, but actually suppress it. At a time when new social media platforms are being launched, some attracting millions of users,[2] each with content policies appealing to different user bases, including platforms with expressly conservative points of view,[3] the States have seen fit to override the editorial judgment and free expression interests of social media users nationwide and of private companies. This effort is driven by political animus, and required the States to discard conservative principles such as limited government and respect for constitutional rights they claim to protect.

---

[2] Sarah Perez, *Bluesky saw record usage after Elon Musk announced plans to charge all X users*, TECHCRUNCH (Sep. 22, 2023), https://techcrunch.com/2023/09/22/bluesky-saw-record-usage-after-elon-musk-announced-plans-to-charge-all-x-users; Hope King, Meta's Threads app exceeds 100 million users, Axios (Jul. 10, 2023), https://www.axios.com/2023/07/10/meta-twitter-threads-100-million-users.

[3] *See* Kayla Morrison, *Conservative Social Media—A New Norm?*, BROWN POLITICAL REVIEW (December 3, 2022), https://brownpoliticalreview.org/2022/12/conservative-social-media.

In doing this the States, and the Fifth Circuit below, made a tangled mess of the First Amendment, and the law of common carriage. In this brief, applying years of experience working to advance the interests of Internet users, including advocacy *for* common carrier treatment of transmission services such as broadband, Voice-Over-IP, and SMS,[4] amicus Public Knowledge will untangle this mess. Applied correctly, common carriage promotes the free expression of users. It would do nothing of the sort here, and in addition to being unlawful, both State Laws would have deleterious effects on the functionality and usefulness of social media platforms, including requiring or incentivizing them to publish pro-terrorist content, hate speech, spam, Holocaust denial, snake-oil "medical" claims, lies about the time and place of elections, and fraud. Many users, facing this deluge of worthless content that platforms are forbidden from moderating, and now-protected harassment and abuse, may stop using covered platforms entirely. Laws that target

---

[4] Petition of Public Knowledge et al. for Declaratory Ruling that Facilities-Based Interconnected VoIP and Nomadic Interconnected VoIP are Title II Services, March 2, 2022, https://publicknowledge.org/policy/voip-declaratory-ruling-petition (Voice-over-IP is a common carriage service); Petition of Reconsideration of Public Knowledge et al. on Regulatory Status of Wireless Messaging Service, January 28, 2019, https://publicknowledge.org/policy/public-knowledge-group-sms-text-messaging-petition-for-reconsideration-with-fcc (SMS is a common carriage service); Comments of Public Knowledge and Common Cause, Restoring Internet Freedom, WC 17-108, July 19, 2017, https://publicknowledge.org/policy/comments-for-the-fcc-on-the-net-neutrality-proposal (Broadband is a common carriage service); John Bergmayer, *We Need Title II Protections in the Uncompetitive Broadband Market*, PUBLIC KNOWLEDGE, April 26, 2017, https://publicknowledge.org/we-need-title-ii-protections-in-the-uncompetitive-broadband-market (Importance of common carriage for broadband).

communications platforms and harm disfavored users are not pro-free speech, and are not "conservative."

This brief focuses on Texas and Florida's unconstitutional requirement that they publish speech that violates their content policies. It does not argue that social media must be immune to regulation. Supported by a proper record, and tailored to a content-neutral purpose, economic regulation of media, like economic regulation of other industries, may be upheld. By contrast, the States have enacted laws intended to promote "conservative viewpoints and ideas,"[5] and to protect "our freedom of speech as conservatives."[6] They must be struck down, in part to ensure that social media platforms *can* be regulated in the public interest, rather than the interest of one ideological group. *See Nebbia v. New York*, 291 U.S. 502, 532 (1934).

## II. Social Media Platforms Are Not Common Carriers, But "Speakers" Within the Meaning of the First Amendment, and Common Carrier Requirements Applied to Social Media Platforms Harm Free Expression

Texas and Florida purport to designate social media platforms as "common carriers," arguing this allows them to restrict their editorial discretion and

---

[5] Governor's Office, State of Texas, Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship.

[6] Governor's Office, State of Florida, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech (statement of Representative Blaise Ingoglia.)

force them to publish speech that violates their standards. Texas, Resp't's Opp'n to Appl. to Vacate Stay of Prelim. Inj., at 20; Florida, Pet'n for Writ at 23. Their efforts fail. As Justice Thomas noted, merely labeling a service as a common carrier "has no real First Amendment consequences." *Denver Area Ed. Telecomm. Consortium. v. FCC*, 518 U.S. 727, 825 (1996) (concurring and dissenting in part).

Common carriage has deep roots. While common carrier obligations are codified by statute today, historically, common carriage is a common law legal category applicable to businesses that transport or house goods or people (transportation companies, inns, wharves, bridges, and warehouses), or messages (postal, telegraph, telephone, and broadband systems). Common carriers are obligated to serve members of the public upon reasonable request, without unreasonable discrimination, at just and reasonable prices, and to perform with adequate care. *See Munn v. Illinois*, 94 U.S. 113, 125-26, 130 (1887) (government may regulate private property in the public interest); *Budd v. New York*, 143 U.S. 517 (1892) (upholding Munn and reviewing its application); *Verizon v. FCC*, 740 F.3d 623, 630 (D.C. Cir. 2014) (common carriers must "'furnish… communication service upon reasonable request,' engage in no 'unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,' and charge 'just and reasonable' rates.") (citations omitted); *McKay v. Pub. Utils. Comm'n*, 104 Colo. 402, 413 (1939) ("A common carrier has the duty of giving adequate and sustained public service at reasonable rates, without discrimination. Any failure in that respect makes it civilly liable.")

Common (as opposed to private) carriers do not just transport people, goods, or messages, but must

hold themselves out to serve the public, "indifferently," on standard terms.[7] "The rationale was that by holding themselves out to the public at large, otherwise private carriers took on a quasi-public character. This character …. was seen to justify imposing upon the carrier" heightened legal obligations. *Nat. Ass'n of Regulatory Utility Com'rs v. FCC*, 525 F. 2d 630**,** 641 (D.C. Cir. 1976) ("NARUC I"). While common carriage can adapt to changing times and business models, it has never been the case that government can evade judicial scrutiny by simply labeling a service as a common carrier. *Nebbia*, 291 U.S. at 534, 536 (1934) ("It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts … is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.") While common carriage applied correctly promotes free expression, laws designed to limit the free expression rights of social media users and platforms cannot invoke common carriage as an end-run around the First Amendment.

Unlike social media platforms, communications common carriers do not engage in expressive activity when they provide transmission services — "carriage." *Denver Area Ed. Telecomm.*, 518 U.S. at 739. Thus common carrier requirements do not limit free expression. This distinction between providing a neutral transmission service, carrying messages from one place to another at the direction of a user, and

---

[7] *See* Barbara A. Cherry and Jon Peha, The Telecom Act of 1996 Requires the FCC to Classify Commercial Internet Access as a Telecommunications Service (Dec. 22, 2014), https://kilthub.cmu.edu/articles/journal_contribution/The_Telecom_Act_of_1996_Requires_the_FCC_to_Classify_Commercial_Internet_Access_as_a_Telecommunications_Service/6073607.

expressive conduct, such as publishing and organizing information, is critical to the application of common carriage to communications technology. The Communications Act of 1934, as amended, reflects this distinction. Several provisions disclaim any intention to subject non-common carrier activities to common carrier requirements. As the Court explained, "Congress rejected another proposal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues. Instead, Congress after prolonged consideration adopted §3(h), which specifically provides that 'a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.'" *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 109-110 (1973) (citing provision now codified at 47 U.S.C. § 153(11)) and describing how Congress intended "to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations."); 47 U.S.C. § 153(51)("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."); 47 U.S.C. § 326 ("no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"). Where editorial discretion is central to the service, this Court has recognized that government cannot mandate common carriage. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 (1984) (access requirements unlawful because they would "transform broadcasters into common carriers and would intrude unnecessarily upon the editorial discretion of broadcasters").

*Turner* does not teach otherwise. In that case, provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, requiring cable systems to retransmit broadcast signals, were upheld because they were content-neutral regulations that served "three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994). Further distinguishing these regulations from SB7072 and HB20, these Cable Act provisions were recognized by Justice O'Connor as falling short of common carriage requirements. *Id.* at 684 (concurring and dissenting in part). Unlike SB7072 and HB20, there was no evidence of a motivation to interfere with the expressive choices of providers. The Court viewed these rules as "analogous to the relief that might be appropriate for a threatened violation of the antitrust laws," *id.* at 672, approvingly quoting the characterization of the law as "industry-specific antitrust and fair trade practice regulatory legislation" in the form of "economic regulation designed to create competitive balance in the video industry as a whole." *Id.* at 635 (citing *Turner Broad. Sys. v. FCC*, 819 F. Supp. 32, 40 (D.D.C. 1993). *See Horton v. Houston*, 179 F.3d 188, 192, 194 (5th Cir. 1999) (Cable Act's broadcast carriage provisions further "nonspeech-related goals."). Because Florida and Texas enacted rules regulating speech, not the economic structure of an already highly-regulated industry, SB7072 and HB20 are unconstitutional.

### *A. Social Media Companies, Unlike Common Carriers, Engage in Expressive Activity*

The First Amendment protects expressive conduct broadly. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). But properly-applied common carrier rules "do not automatically raise First Amendment concerns on the ground that the material transmitted … happens to be speech instead of physical goods," *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 742 (D.C. Cir. 2016). Thus common carriers such as broadband providers and telephone companies "have long been subject to nondiscrimination and equal access obligations … without raising any First Amendment question. Those obligations affect a common carrier's neutral transmission of others' speech, not a carrier's communication of its own message." *U.S. Telecom*, 825 F.3d at 740.[8]

By contrast, social media companies do not act as 'dumb pipes' transmitting information "between or among points specified by the user."[9] They do not offer "carriage," and so cannot be designated as common carriers. Nor do they hold themselves out "indifferently" to the public, as carriers or otherwise. *See* infra Part II(B).

---

[8] Regulation of common carriers raises First Amendment issues when it burdens the speech of subscribers. *See Sable Comm'ns of Cal. v. FCC*, 492 U.S. 115 (1989) (reversing ban on transmission of indecent telephone communications); Id. at 133 ("[W]hile we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it.") (Scalia, J. concurring). *See also Packingham v. North Carolina*, 582 U.S. 98 (2017) (ban on registered sex offenders from accessing social media violates First Amendment).

[9] 47 U.S.C. § 153(50).

Instead, social media companies engage in First Amendment-protected editorial discretion when they design and apply their content moderation policies, including by using algorithms that determine what content is shown to what users and how, when they apply their policies to suppress or remove violative content, in how they differentiate from each other by adopting different content policies and practices, and in the different audiences and conversations they seek to facilitate. The Eleventh Circuit rightly found that

> When a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in 'speech' within the meaning of the First Amendment.

*NetChoice v. AG, Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022). This applies whether or not a platform is considered a traditional "publisher":

> [A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate … each item featured in the communication…. the presentation of an edited compilation of speech generated by other persons … fall[s] squarely within the core of First Amendment security[.]

*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569-70 (1995) (applying principle to parade organizers).

Far from neutral carriers of others' speech, social media companies actively shape conversations on their platforms. This is why the Ninth Circuit held that chat rooms, predecessors to social media "where subscribers can exchange messages in 'real-time'" are not common carriers in part because they "are under [the provider's] control and may be reformatted or edited." *Howard v. Am. Online*, 208 F.3d 741, 753 (9th Cir. 2000).

Over the past year, social media saw changes with Elon Musk's acquisition and subsequent rebranding of Twitter to "X", and Meta's launch of Threads. These developments demonstrated how content moderation serves as an expressive, distinguishing factor for social media platforms, reflecting varying commitments to user safety and political neutrality.

Musk's takeover of Twitter led to a shift in its content moderation policies. It adopted a "Freedom of Speech, Not Reach" policy, which entailed limiting the visibility of tweets that violated its policies instead of removing them outright.[10] This was a departure from the previous approach where violating content would be removed from the platform. The company determined that some categories of content that were previously considered "abusive" no longer would be,[11] removed "verified" status from journalists and other users, and began to promote posts from paid accounts

---

[10]Sheila Dang, *Musk-owned X's Content Moderation Shift Complicated Effort to Win Back Brands*, REUTERS (Sept. 7, 2023), https://www.reuters.com/technology/musk-owned-xs-content-moderation-shift-complicated-effort-win-back-brands-former-2023-09-07.

[11]Molly Sprayregen, *Twitter Just Made It Even Harder for Trans People to Report Online Abuse*, LGBTQ NATION (Oct. 8, 2023), https://www.lgbtqnation.com/2023/10/twitter-just-made-it-even-harder-for-trans-people-to-report-online-abuse/.

over those of other users.[12] The company even changed the way it displays links to news articles.[13] These changes to content policies under Musk's leadership, and the substantial criticism they engendered, are expressive activity protected by the First Amendment.

Contrarily, Threads emerged with a different approach to content moderation. Threads was intended from the beginning to be "more positive" than Twitter, according to Meta CEO Mark Zuckerberg.[14] Beginning with Meta's existing content moderation standards (which were already stricter than Twitter's), Threads seeks to foster a different kind of public conversation.[15]

These contrasting moderation policies are one way social media companies differentiate and compete. While X under Musk embraced a model prioritizing one vision of free speech, albeit one that carries certain risks, Threads pursued stronger moderation, seeking discourse less centered around controversial topics and news. This highlights the potential for

---

[12]Madison Czopek, *How Elon Musk Ditched Twitter's Safeguards and Primed X to Spread Misinformation*, POLITIFACT (Oct. 23, 2023), https://www.politifact.com/article/2023/oct/23/how-elon-musk-ditched-twitters-safeguards-and-prim.

[13]Yuvraj Malik, *Elon Musk's X Plans to Remove Headlines from Links to News Articles*, REUTERS (Aug. 23, 2023), https://www.reuters.com/technology/elon-musks-x-plans-remove -headlines-links-news-articles-2023-08-22.

[14]Andrew Griffin, *Threads Is Not Dying, Mark Zuckerberg Says as He Reveals Meta's Results*, THE INDEPENDENT (Oct. 26, 2023), https://www.independent.co.uk/tech/threads-instagram-meta-mark-zuckerberg-results-b2436478.html.

[15] Bridger Beal-Cvetko, *Twitter vs. Threads showdown highlights political differences on content moderation*, KSL (Jul. 7, 2023), https://www.ksl.com/article/50681971/twitter-vs-threads-showdown-highlights-political-differences-on-content-moderation.

social media platforms to carve out unique expressive viewpoints—opportunities the State Laws would unconstitutionally eliminate.

Contrast the function of social media with that of a broadband provider. A subscriber hires a broadband internet access provider to deliver content to the social media platform and bring content back. The user does not ask it to make judgments about what content to deliver. But such editorial judgements are intrinsic to the operation of the social media platform, which must decide what to do with the content delivered to it, how it is displayed, and what content to recommend. *See Twitter v. Taamneh*, 143 S. Ct. 1206, 1226 (2023). As the *U.S. Telecom* court recognized, were an ISP to change its business model to resemble that of social media, "for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience" common carriage would become inapplicable and "it might then qualify as a First Amendment speaker." 825 F.3d at 743. Briefing in the instant case and others has explained how platforms exercise editorial discretion in this way.[16] The State Laws therefore suppress editorial speech.

---

[16] *See* Brief of Integrity Inst. and Algotransparency as Amici Curiae Supporting Neither Party, in *Gonzalez v. Google*, 598 U.S. 617 (2023), at 9 (describing algorithms that "analyze whether the content involved is harmful, as defined by law or platform policy"); Brief of Computer & Communications Industry Association, NetChoice, et al, as Amici Curiae in Support of Petitioner, in *Twitter v. Taamneh*, 143 S. Ct. 1206 (2023), at 21 ("[O]nline services remove 'lawful but awful' speech that they find counterproductive to their communities.").

### *B. Social Media Companies Are Publishers, Not "Carriers"*

Social media platforms, like their online predecessors, are publishers. *Reno v. ACLU*, 521 U.S. 844, 853 (1997). In the common law, to "publish" something is to communicate it to at least one other person. Restatement (Second) of Torts §§ 577, 558 (1977). Social media companies do this: like a newspaper or magazine, they communicate content to the public, or to select audiences. *Klayman v. Zuckerberg*, 753 F. 3d 1354, 139 (D.C. Cir. 2014) ("Although the statute does not define 'publisher,' its ordinary meaning is 'one that makes public,' and 'the reproducer of a work intended for public consumption.' … the very essence of publishing is making the decision whether to print or retract a given piece of content[.]"); *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997) (Section 230 prohibits liability for the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content"). The "presentation of an edited compilation of speech generated by other persons … fall[s] squarely within the core of First Amendment security." *Hurley,* 515 U.S. at 570. *See also Miami Herald Publ'g v. Tornillo*, 418 U.S. 241, 256-258 (1974) ("editorial control and judgment" protected by the First Amendment; compelled publication is unconstitutional). Because the State Laws attempt to force social media companies to publish content they would prefer not to publish, they are unconstitutional.

By contrast, common carriers like broadband and telephone companies are not publishers, because they do not have "a direct hand" in disseminating messages. *Anderson v. N.Y. Tel. Co.*, 35 N.Y.2d 746, 750 (1974) (Gabrielli, J., concurring). "The telephone company is not part of the 'media' which puts forth

information after processing it in one way or another." *Id.* Unlike social media platforms, a telephone company furnishes a service, equipment, and facilities, but it does not "publish" its users' calls. In fact it is *forbidden* from doing do.[17]

The telephone company does not, and has no right to, decide what you can or cannot say on a call, nor does a broadband provider dictate the content you can access online. Nor, unlike social media platforms, do common carriers decide *who* speakers may communicate with. *See* 47 U.S.C. § 153(50) (telecommunications common carriers provide "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."). Their responsibility is to provide equipment and services facilitating communication, but they have no say as to its content. *Chi. Lawyers' Comm. for Civ. Rights Under Law v. Craigslist*, 519 F.3d 666, 668 (2008) ("common carriers such as telephone services … neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks. Ditto courier services such as FedEx and UPS, which do not read the documents inside packages and do not make or publish any of the customers' material.") *See also Twitter v. Taamneh*, 143 S. Ct. 1206, 1226 (2023) ("[W]e generally do not think that internet or cell

---

[17] As this Court found, a common carrier may not "publish" communications and may only deliver them to the addressee. *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 605 (1926) ("As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for all alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender."). *See also* 47 U.S.C. § 605.

service providers incur culpability merely for providing their services to the public writ large.")

Section 230 demonstrates that Congress viewed interactive computer services such as social media companies as "publishers." *See* 47 U.S.C. § 230. A liability shield against "treatment" as a publisher for third-party material presupposes that, absent the shield, there might be liability. Congress would not have enacted Section 230 unless interactive computer services were publishers, since unless they were publishers, they could not be liable to begin with. Prior to Section 230, these services in fact *were* held liable as publishers. *See Stratton Oakmont v. Prodigy Serv.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

According to Rep. Goodlatte, among 230's purposes was to protect providers who "edit the smut from their systems." Statement of Rep. Goodlatte, 141 Cong. Rec. H 8460, 8471 (1995). It does this by removing "serious obstacles," S. Rep. No. 104-230, at 194 (1996), that would otherwise disincentivize them from this editorial function.

Section 230 shields providers from liability for removing or limiting access to material they "consider[]… objectionable," "whether or not such material is constitutionally protected." 47 U.S.C. 230(c)(2)(A). Both the words "consider" and "objectionable" indicate that providers are expected to use their own, independent editorial judgment in determining both what criteria to apply, and how to apply them.[18] This reservation of editorial discretion

---

[18] *Subjective* terms are not *ambiguous* terms and there is no role for any government actor to attempt to "interpret" or clarify them. *Contra* Petition for Rulemaking of the NTIA to the FCC in the matter of Section 230 of the Communications Act of 1934 (Jul. 27, 2020), https://www.ntia.gov/sites/default/files/publications/ntia_petition_for_rulemaking_7.27.20_0.pdf.

is constitutionally necessary, since the government may not pick and choose between constitutionally-protected categories of speech, even when some of that speech has minimal social value.

In addition to being a constitutional necessity, ensuring that online publishers use their independent judgment to curate content best achieves the statute's objective to protect the Internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). The legislative history of this provision shows that this is consistent with Congressional intent. Rep. Barton, for instance, saw the provision as offering providers a way "to help them self-regulate themselves without penalty of law." Statement of Rep. Barton, 141 Cong. Rec. H 8460, 8470 (1995). Numerous statements in the legislative record saw Section 230 as a means for private actors, rather than the government, to make editorial choices. *See* Congressional Research Service, Section 230: An Overview (Apr. 7, 2021), at 5.

Social media platforms are publishers that curate content using human moderators and algorithms designed to enforce platforms' content policies. Because they have an active role in shaping the information on their platforms and are not mere conduits, they are "publishers" with editorial discretion in the same sense as newspapers. Laws burdening that discretion are unconstitutional.

### *C. Social Media Platforms Make Individualized Decisions as to Content and Users*

As discussed above, social media companies do not provide neutral "carriage" of messages on behalf of a user. Like other publishers, they edit and review material and communicate it to the public. Because

they are not carriers, they cannot be *common* carriers. But even overlooking these fatal flaws to the State's arguments, the nature of the service social media companies offer, unlike that of common carriers, is individualized, not "indifferent." Even to the extent social media platforms try to *apply* their content policies in a neutral and fair manner, those policies themselves constitute choices designed to favor some kinds of speech, and disfavor other kinds, in a context-specific, individualized, and ultimately subjective way. This is a proposition with which Texas and Florida would undoubtedly agree, and which can be seen in the different editorial choices of social media platforms and how they distinguish themselves from each other. *See supra* Part II(B).

Common carriage is a legal status that derives from a service's functionality. "A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." *NARUC I*, 525 F. 2d at 644. Carriers who hold themselves out to the public to serve indifferently are *common* (not private) carriers, subject to heightened legal duties. *Id.* at 640. "A common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video*, 440 U.S. 689, 701 (1979). A provider that makes individual choices as to content and users, as social media companies do, is not a common carrier. As the *NARUC I* court explained, "the characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and private carriers." 525 F. 2d at 642.

Common carriers are required to transact with "all similarly situated customers equally." *Verizon Cal. v. FCC*, 555 F.3d 270, 275 (DC Cir. 2009). But "[t]he essential truth of every social network is that the

product is content moderation[.]"[19] Content moderation is, by its nature, discriminatory — not in the pejorative sense, but in the sense of making distinctions. On social media platforms, similarly situated users *are* treated differently, based not on objective criteria, but on the platform's subjective evaluation of the user's speech.[20] This goes beyond "content moderation" in the form of removals: X's "For You" tab that algorithmically prioritizes some posts over others is discrimination incompatible with common carriage. That such features are essential to social media shows again that social media platforms cannot be common carriers.

Even though social media platforms apply the same "terms of service" to most users, *Twitter v. Taamneh*, 598 U.S. 471, 143 S. Ct. 1206, 1227 (2023), the content-based nature of those terms, their subjectivity, and the discretion that social media platforms exercise to interpret and apply them, are

---

[19] Nilay Patel, *Welcome to hell, Elon*, THE VERGE (Oct. 28, 2022), https://www.theverge.com/2022/10/28/23428132/elon-musk-twitter-acquisition-problems-speech-moderation.

[20] In transportation, "[f]rom the earliest days, common carriers have had a duty to carry all goods offered for transportation." *Am. Trucking Ass'ns. v. Atchison, T. & SFR Co.,* 387 U.S. 397, 406 (1967). However common carriers may set "just and reasonable classifications" as to categories of property based on objective criteria such as "shipping weight per cubic foot," "liability to spontaneous combustion," or "perishability." *All States Freight. v. New York, N. H. & H. R. Co.*, 379 U.S. 343, 345, n.2 (1964). But social media platforms like Facebook have policies that state "We remove content that's meant to degrade or shame," Meta, Bullying and Harassment, https://transparency.fb.com/policies/community-standards/bullying-harassment, which is commendable, but depends on context-specific judgement and "review teams" who must be "audited on a regular basis to ensure we're consistently applying our policies[.]" Meta, Helping reviewers make the right calls (Jan. 19, 2022), https://transparency.fb.com/enforcement/detecting-violations/making-the-right-calls.

akin to the "individualized decisions, in particular cases, whether and on what terms to deal," *Midwest Video*, 440 U.S. at 701, which necessarily remove a provider from common carrier status.

## III. HB20 and SB7072 Fail Strict, Intermediate, and Rational Basis Scrutiny

Because social media platforms are First Amendment speakers and not common carriers, HB20 and SB7072 are subject to, and fail, First Amendment scrutiny.

Texas's HB20 prohibits social media platforms from moderating content based on a user's viewpoint. HB20 merits strict scrutiny because it discriminates based on content, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and speaker, *Minneapolis Star & Tribune v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983). While speaker-based discrimination does not trigger strict scrutiny per se, it is highly suspect, as speaker-based distinctions are often a proxy for content-based discrimination. "Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers," *Citizens United v. FEC*, 558 U.S. 310, 312 (2010), particularly when speaker-based distinctions are "a subtle means of exercising a content preference," *Turner*, 512 U.S. at 645, as they are here. HB20 is content- and speaker-based because it applies to some "social media platforms" but not others, nor to other kinds of publishers.

Compounding its unconstitutionality, it makes further content-based distinctions: requiring platforms to publish content even if it expresses a "viewpoint" (such as Holocaust denial, white supremacy, or abusive disinformation, *see infra* Part

IV(A)), that violates their community standards, but allowing them to moderate content for other reasons. Texas concedes that HB20 does not "prohibit the platforms from removing entire categories of content. So, for example, the platforms can decide to eliminate pornography without violating HB20. The platforms can also ban foreign government speech without violating HB20, so they are not required to host Russia's propaganda about Ukraine." Respondent's Opp'n to App. to Vacate Stay of Prelim. Inj., at 11-12. As this Court has squarely held, laws that distinguish between "categories" of speech are content-based and subject to strict scrutiny, and claims of "viewpoint neutrality" do not save them. *Reed*, 576 U.S. at 169 ("a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter….That is a paradigmatic example of content-based discrimination."). Likewise, laws that disfavor certain categories of speaker "demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner* at 658.

Even if Texas's law were facially content-neutral, the Court has "recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [it] conveys.'" *Reed* at 165 (citing *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). This is the case here.

HB20 fails strict scrutiny because it is not "the least restrictive means of achieving a compelling state interest." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Texas's desire to regulate the editorial discretion of private platforms (while

harming the free expression interests of ordinary social media users) under the guise of promoting free speech is not a compelling government interest, even if it is purportedly to remedy "vast accumulations of unreviewable power in the modern media empires[.]" *Tornillo*, 418 U.S. at 249, 250-51. As the Court held, deciding what to publish, 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[.]

*Id.* at 258. *See also Hurley*, 515 U.S. at 578 (restrictions on free expression not permissible even to counteract discrimination and bias).

SB7072 fails strict scrutiny for similar reasons. It singles out particular speakers and content for special treatment: journalistic entities (immune from platforms taking action "based on the content" of their publications) and political candidates are favored speakers (who may not be "deplatformed"), and speech "about" political candidates is favored content. Fla. Stat. § 501.2041 ("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.").

This goes further than current law. The speech *of* political candidates is regulated in several ways. For example, the Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155 (2002), requires disclosures to allow the public to know the sources of funding for political advertising. But BCRA does not mandate that any "broadcasting station, newspaper, magazine, outdoor advertising facility" carry or

publish unwanted political speech. 52 U.S.C. § 30120. Further, while the broadcast "Equal Time Rule" gives "legally qualified candidates" the right to buy broadcast advertising at the same rates as their opponents, broadcasters are not required to air political ads at all. 47 U.S.C. § 315 ("if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office…No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."). SB7072 does not give social media platforms that choice.[21]

No law can constitutionally favor speech *about* political candidates. As the Supreme Court held in finding that it is unlawful to favor political speech over other kinds: "That is about as content-based as it gets." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality). Like with Texas, Florida's purported reasons for enacting this law have been rejected in *Tornillo*. No one claims that social media platforms have always exercised their editorial prerogatives perfectly, and many of their actions deserve criticism in the public sphere. But "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided." *Columbia Broad. Sys.*, 412 U.S. at 120-21 (broadcast regulations

---

[21] Different First Amendment standards apply to broadcast versus other media because of "the scarcity of radio frequencies." *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969). This rationale does not apply to social media.

do not abrogate "broad journalistic discretion" on the part of speakers).

Even under intermediate scrutiny, *see United States v. O'Brien*, 391 U.S. 367 (1968), HB20 and SB7072 must be "narrowly tailored to serve a significant government interest." *Packingham*, 137 S. Ct. at 1736. But neither law advances a "substantial" interest "unrelated to the suppression of free expression," *Turner*, 512 U.S. at 662, as they are intended to suppress the editorial discretion of social media platforms, and to favor conservative speech. Even taking at face value the motivations Texas and Florida advance in litigation, rather than the contemporaneous statements of the lawmakers and governors who enacted these laws,[22] countering "[t]he abuses of bias" is an insufficient government interest to regulate editorial speech. *Tornillo*, 418 U.S. at 250. *Accord Am. Sec. Council Educ. Found. v. FCC*, 607 F.2d 438, 444 n.17 (1979) ("A responsible press is an undoubtedly desirable goal, but press responsibility …like many other virtues cannot be legislated."). But if "an interest asserted by the State is simply not implicated on the facts …we need not ask whether *O'Brien*'s test applies." *Texas v. Johnson*, 491 U.S. at 407.

Here, the facts do not implicate *any* legitimate government interest. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (legislation must "[bear] a rational relation to some legitimate end" or it will not be upheld). *See also Los Angeles v. Preferred Comm.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.") A law that has no

---

[22] *Supra*, notes 5 and 6.

legitimate government interest of any kind, such as the suppression of a particular religion or of free expression, does not merely fail both strict and intermediate scrutiny, but rational basis review.

As this Court explained in *Church of Lukumi Babalu Aye v. Hialeah*, courts do not merely accept the representations government may put forth justifying their law in allegedly neutral terms. 508 U.S. 520, 542 (1993). Nor is a law saved if it is drafted in an (arguably) "facially neutral" way. *Id.* at 534 ("Facial neutrality is not determinative."). Determining whether a law has an unlawful purpose and is therefore unconstitutional requires looking at the facts:

> Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.

*Hialeah*, 508 U.S. at 540. The district court in Moody found that there was "substantial factual support" to demonstrate SB7072 was motivated by an unconstitutional motive. *NetChoice v. Moody*, 546 F. Supp. 3d 1082, 1094 (N.D. Fla. 2021). The court was right to find that an unconstitutional motivation dooms the entire law, "root and branch," under strict scrutiny. *Id.* "[H]ostility to the social media platforms' perceived liberal viewpoint," *Moody*, 546 F. Supp. 3d at 1093-94, is neither a "substantial" nor a "compelling" government interest. The district court in *Paxton* made similar findings. *NetChoice v. Paxton*, 573 F. Supp 3d 1092, 1113 (W.D. Tex. 2021) ("The record in this case confirms that the Legislature intended to target large social media platforms perceived as being biased against conservative views

and the State's disagreement with the social media platforms' editorial discretion over their platforms.") These are not legitimate government objectives.

These findings are enough to invalidate these laws. But while the Eleventh Circuit applied the Constitution more faithfully than the Fifth Circuit, *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022), in the opinions below, its attempt to distinguish the First Amendment right to free exercise of religion from the First Amendment right of free expression context is unsupportable. *Contra NetChoice v. AG, Fla.*, 34 F.4th at 1224. Neither the Eleventh Circuit nor this Court should create a hierarchy of First Amendment rights. While *O'Brien* teaches that courts should not engage in "guesswork" or put excess weight on what "fewer than a handful" of lawmakers may have said, 391 U.S. at 384, when there is manifest evidence of unlawful motivations on the part of key legislators and the governors who enact a law, who do not hide, but openly boast of their unlawful purpose, "[w]e are thus outside of *O'Brien*'s test altogether," *Texas v. Johnson*, 491 U.S. at 410. Here, because the asserted interest is unlawful, only rational basis scrutiny applies, which both HB20 and SB7072 fail. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (restrictions on "freedoms of speech and of press, [and] of assembly" cannot be upheld on "slender grounds" of rational basis test.)

Regardless of which unconstitutional purpose the States advance, their restrictions on speech are significantly "greater than is essential" to furthering those interests. *Turner*, 512 U.S. at 662. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415,

438 (1963) (citations omitted). By contrast both laws are "burning the house to roast a pig." *NetChoice v. Moody*, 546 F. Supp. 3d 1082, 1095 (N.D. Fla. 2021); *NetChoice v. Paxton*, 573 F. Supp. 3d 1092, 1116 (W.D. Tex. 2021).

## IV. HB20 and SB7072 Harm the Free Expression Interests of Social Media Users

### *A. HB20 and SB7072 Would Silence Vulnerable Users*

Ordering platforms to host speech that violates their standards harms the free expression of other users. While government-mandated posts may be more widely available on platforms subject to must-carry laws, those same laws may drive even more users off the platform, or to curtail their usage. "The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Ent. Group*, 529 U.S. 803, 812 (2000).

Platforms that choose to foster an environment conducive to free expression must set content and conduct rules consistent with their vision of civil and respectful discourse. Congress recognized this when it insulated platforms from liability for removing speech they deem "objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A). As the then-general counsel of Twitter put it, such content "[a]t times takes the form of hateful speech in tweets directed at women or minority groups; at others, it takes the form of threats aimed to intimidate those who take a stand on issues. These users often … create multiple accounts

expressly for the purpose of intimidating and silencing people."[23]

Online abuse often targets women. As a result, "[t]o avoid future abuse, women assume gender-neutral pseudonyms or go offline, even if it costs them work opportunities. Others curtail their online activities. For the 'digital native' generation, forsaking aspects of the internet means missing innumerable social connections."[24] One study found that "Online abuse is driving girls to quit social media platforms including Facebook, Instagram and Twitter, with nearly 60% experiencing harassment."[25] According to Irene Khan, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "gendered disinformation" can silence women users. She writes,

> Gendered disinformation weaponizes gender bias, stereotypes, sexism, misogyny and social and cultural norms based on patriarchal values to threaten, intimidate, silence and exclude women and gender nonconforming persons from public spaces and positions of power. Its most virulent attacks are reserved for those who belong to

---

[23] Vijaya Gadde, *Twitter executive: Here's how we're trying to stop abuse while preserving free speech*, WASH. POST (Apr. 16, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/16/twitter-executive-heres-how-were-trying-to-stop-abuse-while-preserving-free-speech.

[24] Danielle K. Citron, Law's Expressive Value in Combatting Cyber Gender Harassment, 108 Mich. L. Rev. 373, 375 (2009).

[25] Emma Batha, *Social Media Abuse Drives Girls Off Facebook, Instagram, Twitter*, REUTERS (Oct. 5, 2020), https://www.reuters.com/article/socialmedia-girls-abuse-idAFL8N2GW1ZG.

minority or marginalized communities. It chills both speech and aspirations.[26]

Texas and Florida may believe that they are protecting the "right" of some speakers to use social media platforms in contravention of the platform's content policies. But it is not permissible for government to burden the free expression of one set of users to benefit its preferred category. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

Government policies which drive people from social media can harm their right of association. "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972). Laws burdening free association can be inconsistent with this right. It may mean users are unable to join social media platforms that align with their values. Or it may mean that content moderation restrictions force users to engage with users or content against their will. As this Court found, "Freedom of association … plainly presupposes a freedom not to associate," *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

### *B. HB20 and SB7072 Would Prevent People from Accessing the Information of their Choosing*

The State Laws interfere with the ability of social media users to use communications tools to access the

---

[26] United Nations Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, A/78/288, ¶ 115 (Aug. 7, 2023).

content of their choice, as opposed to state-mandated political messages or extremist political content. The First Amendment protects people's right to access information of their choosing. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (unconstitutional to require that people register with the government to receive "communist political propaganda" by mail); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1250-1255 (3d Cir. 1992) (discussing cases). Laws burdening a platform's ability to moderate unwanted content interfere with users' ability to access desired content, because government-mandated posts may crowd out organic material. From spam filters, to policies against scams and harassment, to restrictions on hateful or dangerous content, many communications tools are only useful because of "content moderation." Laws mandating publication of favored content burden users who wish to access information of their choosing.

Just as the First Amendment protects against compelled speech, *West Virginia Board of Ed.*, 319 U.S. 624 at 642, HB20 and SB7072 can amount to a form of "compelled listening" or "compelled reading" where users must sift through mandated posts to access the content they are looking for. But "[e]very individual's right to speak, precious and paramount as it is, does not include every individual's right to be given the possibility of an audience by government fiat[.]" *Midwest Video*, 571 F. 2d at 1054. *See* Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U.L. Rev. 939 (2009). This is in tension with people's interest in avoiding unwanted speech. *Hill v. Colorado*, 530 U.S. 703, 718

(2000) ("our cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'); *FCC v. Pacifica Found.*, 438 U.S. 726, 759 (1978) (no absolute right to avoid speech in public but "a different order of values obtains in the home"); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) ("no one has a right to press even 'good' ideas on an unwilling recipient.")

## CONCLUSION

For the above reasons, the Court should uphold the Eleventh Circuit, reverse the Fifth Circuit, and strike down HB20 and SB7072.

Respectfully submitted,

JOHN BERGMAYER
*Counsel of Record*
PUBLIC KNOWLEDGE
*1818 N St. NW, Suite 410*
*Washington, DC 20036*
*(202) 861-0020*
*john@publicknowledge.org*

*Counsel for Amicus Curiae*