Nos. 22-277 & 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioners,
v.
NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Respondents.

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 Eleventh & Fifth Circuits

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BRIEF OF *AMICUS CURIAE* KEEP THE REPUBLIC IN SUPPORT OF PETITIONERS IN No. 22-277 & RESPONDENT IN No. 22-555

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION & LAW

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF *AMICUS CURIAE* [1]

Keep the Republic is a research project that investigates issues of national democracy, and develops models for action through executive policy, legislation, and legal theory.

SUMMARY OF THE ARGUMENT

An investigation of common carriage is presented which demonstrates that there is a constitutionalized right of access to this public speech venue, that Internet public communications services are only the modern continuation of the carriage industry, and that where such services are large and general they qualify as common carriers.

An investigation of Section 230 is also presented which demonstrates that properly interpreted the statute produces a voluntary common carrier system with a limited allowance for restriction of material.

The analyses of the brief are then applied to the instant cases.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, or counsel for *Amicus*, made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

PART I.
AN INVESTIGATION OF COMMON CARRIAGE

A. Public access to common carriage is a constitutional free speech right.

The First Amendment prohibits a totalitarian information-control dictatorship that is operated by the government.[2] This leaves a seeming constitutional loophole that has become apparent over the past decade, of an Orwellian Ministry of Truth outsourced to the private sector.

But the loophole is not real. The First Amendment, of the codified U.S. Constitution, has an accompanying article inherited from the uncodified British constitution: the public right to common carriage.

This is as close to a concrete Ninth Amendment[3] right as there can be, legally recognized, well known, and in active use at the time of the Revolution.

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2. U.S. Const., amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

3. U.S. Const., amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

More consequentially, as a right to ship publications and travel to speaking engagements, it was also a real and practical part of "the freedom of speech" enjoyed by the citizens at that time, and so should be protected by the First Amendment from statutory abridgment.

Common carriers remain private actors. It is the common law that protects the free speech, while the First Amendment protects the common law. This can be viewed simply as a constitutionalized personal right to obtain service from a carrier. But structurally it creates a private-actor analog to a traditional public forum, alongside the state-actor public square.[4]

The claim sometimes found that the Free Speech Clause has only a narrow meaning, as held by early jurists such as Story,[5] has been rejected by the Court.[6] The fact that early analyses in general do not

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4. *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring) (a venue is a traditional public forum "[w]herever the title . . . may rest," if for "time out of mind," it has "been used for purposes of . . . communicating thoughts between citizens . . . .").

5. *E.g.*, 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1884 (Thomas Cooley, ed., 1873) (concurring with Blackstone's doctrine of limited press freedom).

6. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.3 (1941).

examine the public square as a protected forum, known today to be central to the clause, proves their incompleteness. They can have no bearing on the second protected venue of common carriage, if they do not notice the first one. In any event, the drafters did not write a Blackstonian "no law imposing prior restraint on the press," and it is the plain and broad text that was ratified by the state legislatures.

Benjamin Franklin testifies that the citizens, whose representatives ratified the Free Speech Clause, understood that they needed not only a freedom in theory, but a practical means to exercise it:

> In the conduct of my newspaper, I carefully excluded all libelling and personal abuse, which is of late years become so disgraceful to our country. Whenever I was solicited to insert any thing of that kind, and the writers pleaded, as they generally did, the liberty of the press, and that a newspaper was like a stage-coach, in which any one who would pay had a right to a place, my answer was, that I would print the piece separately if desired . . . .

Benjamin Franklin, *Autobiography* 237 (John Bigelow, ed., 1868).

Franklin correctly asserts that his *newspaper* was not an open forum—while illustrating that exactly the principle of common carriage of free speech was very much alive in the public mind of the era. What would he and his contemporaries have said if the early Congress had legislated away their "right to a place" even on a stagecoach, to travel to a speaking engagement, or to ship a bundle of their publications, whenever the carrier disagreed with their viewpoints?

The fact that such eventualities are absent from early debate on the First Amendment is because no one, king or carrier, had ever tried to abridge this ancient right that everyone took for granted. *And that circumstance pertained* until Internet carriers started censoring political speech a decade ago. The presentation in this brief of common carriage as a free speech right is no new invention. It is the abridgment of the right that is.

To the extent that some new form of public communications might not be regarded as carriage, the same constitutional circumstances apply to the common law of public accommodations, a free speech right to travel to speaking engagements, bring luggage containing publications, and make use of services such as public meeting rooms.

There is a further constitutional protection of public free speech. The enumerated Guarantee Clause[7] must properly include the unenumerated obligation to assure the means for public communications, without which the citizens cannot even operate election campaigns, let alone conduct the national political debate necessary for popular governance. The Court's precedent has held that a state law is nonjusticiable under the clause. But that is not relevant to an act of Congress that perversely *blocks* a State from guaranteeing public free speech, nor a failure of Congress to itself positively guarantee it, nor an assertion by a State under First Amendment scrutiny of an interest in a state free speech law that is *literally* "compelling"—constitutionally compelled.

The 18th century Constitution has not in fact left the Republic defenseless against 21st century dictatorship, whether operated as a new East India Company, a new East Germany, or a new hybrid of the two.

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7. U.S. Const., Art. IV, §4, ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

B. Carriage is a purpose not a particular technological means.

Carriage means carrying something. It is not a type or process of technology. The common law right to common carriage did not end with horses and wagons any more than freedom of the press ended with hand-cranked printing machines. Both have proceeded in full vigor into the electronic age as broad principles, with no statutory permission required to enable, update, or apply them.

> [W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press . . . do not vary when a new and different medium for communication appears.

Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (internal quotation marks omitted).

> The authorities are numerous . . . that [ ] companies, using [railroad] cars for the purpose of carrying goods for all persons indifferently . . . are common carriers . . . . There needs no legislative declaration to make them such . . . .

Chicago & Aurora R.R. Co. v. Thompson, 19 Ill. 578, 584 (1858).

> There is no difference in the general nature of . . . carrying a message along a wire and carrying goods or a package along a route.

Parks v. Alta California Tel. Co., 13 Cal. 422, 424 (1859).

Whether a carriage service is operated by horse power or motor power, by telegraph line or Internet line, is irrelevant to inherent status as a common carrier under the common law of 49 States and the District of Columbia.

There needs no legislative declaration to make a common carrier such, but notably Texas provides one anyway for large social media carriers in section 1 of HB20.[8]

It is true that in *Primrose*[9] the Court treated telegraph carriage as a different type of public calling, that is the same as common carriage, except not subject to the law of bailments. The distinction of that, from a type of common carriage, that is not subject to the law of bailments, is only semantic and was not maintained.[10]

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8. Tex. H.B. No. 20, 87th Leg., 2d Spec. Sess. § 1(4) (2021).

9. *Primrose v. Western Union Tel. Co.*, 154 U.S. 1, 14 (1894).

10. *E.g.*, *Western Union Tel. Co. v. Crovo*, 220 U.S. 364, 367 (1911).

It is true that a technological aspect to common carrier definition has been introduced into federal law with the FCC's "information service" classification, but as will be discussed in another section, this is not material to definition under the common law in multiple regards.

C. A three-pronged test can determine status as an Internet common carrier.

A service for transmission of digital data is common carriage if:

1. it is held out primarily through standard contracts to carry material for the public;
2. it carries material primarily for the public's own general communicative purposes; and
3. it is in a class of carriers for which a lack of substantial public need has not been established.

The first prong covers the most typical traditional criteria for common carrier status.[11]

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11. *E.g.*, *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960) ("[To] become a common carrier . . . would require a holding out on the part of the operator . . . of a willingness to carry on the same terms and conditions any and all . . . ."). *See also*, *e.g.*, *Gisbourn v. Hurst*, I Salk. 249, 250, 91 Eng. Rep. 220,

However, the nature of Internet communications services, with a spectrum from carriers to publishers, and from mega-corporations to 12-year-olds with personal websites, requires further distinction.

The principle for the second prong is explained in *Midwest Video II*.[12] In the communications context, a common carrier service must be offered for the public's own general communicative purposes. This should exclude Internet carriers that have a business model limited to specific subject-matter, such that the public is making contributions to the operator's communicative purpose, as a kind of collaborative quasi-publication.

Carrying material for the public's own general communicative purposes does not necessarily mean carrying *all* communications that the public wishes. A restriction on the basis of a traditional common carrier allowance to refuse material, or Section 230,

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220 (1710); *Chicago & Aurora R.R. Co. v. Thompson*, 19 Ill. 578, 584 (1858); *Nat'l Ass'n of Reg. Utility Com'rs v. FCC* (*NARUC I*), 525 F.2d 630, 641 (D.C. Cir. 1976).

12. *FCC v. Midwest Video Corp.* (*Midwest Video II*), 440 U.S. 689, 701 (1979) ("A common-carrier service in the communications context is one that makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.") (cleaned up).

or an operator's policies prior to coming under common carrier regulation, does not alter the commercial function that whatever is actually carried is primarily for the public's own purposes.

Subject-matter should not be confused with *medium*. Software apps, financial transfers, and handmade crafts sold through an Internet marketplace, may have any communicative purpose.

The principle for the third prong is found in the fact that the original and general common law of public callings (or common callings, public employment), is fundamentally based on public *need* of access to commerce. As the English economy developed in the early modern era, enforcement of the law against various trades fell away, because it was no longer *needed*.[13] In the United States, enforcement was then re-expanded for civil rights purposes,[14]

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13. *See*, *e.g.,* 1 Bruce Wyman, *The Special Law Governing Public Service Corporations, and All Others Engaged in Public Employment* § 8 (1911) ("Under modern conditions of trade, however, the public need is not so imperative as to keep the blacksmith in the class of public servants."); *id.* § 20 ("Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it . . . .").

14. *See*, *e.g.*, the New Jersey Law Against Discrimination, https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/public-accommodation-discrimination/

because African-Americans and others *needed* equal access to commerce. This demonstrates that the law is not always applicable; there must be grounds to enforce it. Meanwhile, there indeed exists the countervailing right of exclusion from property.[15] The right of access under public callings law is stronger than the right of exclusion, when the public need is strong. But as public need for access weakens, the right of exclusion becomes able to push back against it.

Unlike an inn, where one available bed fully serves a traveler's need, the more people that a communications service can reach, the more useful it is. Thus the public always needs the class of Internet carriers that can reach the largest numbers of people, with particular features and styles. This does not mean only market-share, as some carriers such as ISPs, website-hosts, and email providers can inherently reach anyone on the Internet. With those largest-reach services as common carriers, there may not be remaining substantial public need for a class of smaller carriers. This should be a defense for an operator against a demand for carriage, and the States or Congress can step in to give statutory definitions.

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15. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *id.* at 179–80.

The three-pronged test presented here generally addresses the practical and associational concerns of NetChoice's amici. Services such as user-review sites and single-subject discussion forums are excluded. Reddit is a common carrier, but the user-operators it hosts rarely or never would be. It can provide them with neutral filtering tools, and is immune from suit under Section 230 for their moderating decisions. A user-voting system on Reddit is editorial selection by the users, not the carrier. The social media carriers ProAmericaOnly, The Democratic Hub, Vegan Network, Shabbat, and GodTube may qualify as specific subject-matter, and are too small for substantial public need. But they could also convert their censoring to neutral labeling, and give their users a simple filter control to choose the viewpoints that they wish to self-associate with, e.g., "Receive Pro-Vegan/All/Anti-Vegan Posts."

D. Common carrier status properly requires no market power, but larger Internet carriers have it anyway, whether individually or as a constructive cartel.

The supposed criterion for common carrier status of market power is not well supported.[16]

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16. *E.g.*, *Semon*, *Gisbourn*, *Chicago & Aurora*, *NARUC I*. *See also* Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 149 (1914–1915) ("When we consider the principle of

The famous Lord Hale treatise on being "affected with a publick interest"[17] actually seems to describe a *private-contract* carrier ("what rates he or his customers can agree"), who is obligated by monopoly circumstance to open to the public. This is properly a distinct class from the willing public-contract carriers of most of the precedent.

Nonetheless, if market power is regarded as necessary, the major Internet carriers have it.

Some, such as the Apple and Google app stores, Google Search, and ISPs in certain markets, are traditional monopolies. Each of the dominant social media carriers is a monopoly or oligopoly for its particular type of service, with a distinct combination of features and reachable audience. Any Internet carrier has a monopoly over reaching a particular person who uses only that service.

Most broadly and powerfully, the Internet industry today forms a monopolistic constructive cartel[18]

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monopoly . . . its failure is clearly apparent, for no evidence of any kind is offered that carriers were less numerous than butchers, or innkeepers were fewer than carpenters . . . .").

17. Matthew Hale, *De Portibus Maris*, in 1 *A Collection of Tracts Relative to the Law of England* 45, 77–78 (Francis Hargrave ed., 1787).

18. *Cf. Munn v. Illinois*, 94 U.S. 113, 131 (1876) (independent but closely-aligned grain elevator operators).

from the perspective of public free speech, through the similarity of its censorship policies, with participation forced on any unwilling companies through their own service dependencies. The cartel becomes obvious with the phenomenon of synchronous cross-platform banning.[19]

E. Common carrier status properly requires no countervailing benefit, but carriers receive it anyway as liability protection.

The supposed criterion for common carrier status of a countervailing public benefit is also not well supported.[20]

Nonetheless, common carriers do indeed receive the special public benefit of tort liability protection (under both state common law and Section 230), without which they could not operate, as well as right-of-way for their data carriers' fiber-optic lines, without which they could not deliver their services to the public.

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19. Post Editorial Board, *Big Tech's assault on Parler proves it's gone full cartel*, New York Post, Jan. 10, 2021, https://nypost.com/2021/01/10/big-techs-assault-on-parler-proves-its-gone-full-cartel/

20. Again, *e.g.*, *Semon*, *Gisbourn*, *Chicago & Aurora*, *NARUC I.*

F. The FCC "information service" definition is not material to the common law.

The FCC has devised a dichotomy between a common carrier "telecommunications service"[21] that is solely a pipeline, and a non-common-carrier "information service"[22] that has any interaction with communications.

What should be understood is that absolutely no such principle exists in the common law. It is a federal administrative invention that intentionally breaks with traditional common carrier definition[23] as recognized by *NARUC I*,[24] and takes federal common carrier law off on a separate tangent, in the separate federal legal sovereignty.

The dichotomy itself is conceptually significant at the federal level only because the Communications Act of 1934 is limited to regulating common carriers.

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21. 47 USC § 153(46).

22. 47 USC § 153(20).

23. *See*, *e.g.,* Michael Jansen, *After* NARUC I*: the FCC Communicates Its Intention to Abandon the Common Carrier / Private Carrier Distinction*, 6 U. Miami Ent. & Sports L. Rev. 109, 117 (1989) ("[T]he FCC justified its decision not to apply the *NARUC I* distinction by arguing that data processing is an exception to the Title II regulation because it is not explicitly mentioned in the statute.").

24. 525 F.2d at 640.

The common law also regulates the category of public accommodations, which overlaps with "information services."[25] An FCC information service classification should mean that the federal government has effectively defined a type of public accommodation, and chosen to leave any regulation of it to the States.

It can also be noted that the FCC's current interpretation of the information service definition is irrational. The definition states plainly that the processing it lists can define an information service only if *not* used for the purpose of telecommunications common carriage. The only example given for what *can* qualify as an information service is "electronic publishing." The definition of "telecommunications"[26] only requires information not to change in "form or content . . . as sent and received." The form of *text message* or *video*, and the idea contained in it, do not change when sent through a social media carrier, except marginally for language translations or closed captioning.

All of the processing listed in the information service definition was done by common carrier

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25. The question of whether "online" services can be public accommodations is illusory. They all have physical premises somewhere, and communication with them by app or website is not different in nature than by telephone.

26. 47 USC § 153(43).

telegraph services. And according to the FCC, Fedex would not be a carrier because of "acquiring, storing, . . . retrieving, . . . or making available" packages. It certainly would not be when it lets a customer arrange to have a package held for pickup, just like a voicemail. These last points demonstrate that the FCC's information service classification is not only in a different legal sovereignty than the common law, but in a different logical universe.

G. The FCC "Net Neutrality" cases have confused a common carrier's holding-out of contracts indiscriminately, with indiscriminate contract provisions.

Under the common law, the central criterion for common carrier status is that a carriage service is held out to the public "indiscriminately,"[27] or more correctly "indifferently." This is the distinction between public contracting, where standard offers are held out for the public to accept, and private contracting, where the service-provider selects persons to offer a contract to.

> A common carrier was defined, in *Gisburn v. Hurst* (1 Salk. 249), to be, any man undertaking, for hire, to carry

27. *NARUC I*, 525 F.2d at 641 ("[T]o be a common carrier one must hold oneself out indiscriminately . . . .").

> the goods *of all persons indifferently* . . . . The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire.

Allen v. Sackrider, 37 N.Y. 341, 342 (1867) (emphasis in original).

The term "indiscriminate service," as found until recently, is only shorthand for this external holding-out. *E.g.*, Wyman writes:

> § 231. Indiscriminate service—irrigation. The test . . . is whether service is rendered upon special contract to certain persons selected by the owners or whether all applicants are served without discrimination.[28]

What is potentially confusing is that, in addition to indifferently holding-out contracts, a common carrier must then also not discriminate unfairly in the actual service provided. The first is a *criterion for common carrier status*. The second is the *result* of the

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28. Wyman, *supra*, § 231.

status. Under the common law, if a common carrier has a contract with an unfair provision, the provision will simply be unenforceable.[29]

Exactly this issue becomes confused in the FCC's 2015 "Net Neutrality" order[30] and ensuing D.C. Circuit cases.[31] For broadband providers, the criterion for common carrier status mutates into a contract with internal provisions that do not discriminate as to what websites a user can reach. It further merges with the FCC's technical definition of common carriage as pipelines that have no interaction with the carried material. The resulting indiscriminate-ness is a strange fusion in which "users communicate indiscriminately between NANP and IP endpoints on the public switched network,"[32] and there are "ISPs that hold themselves out as neutral, indiscriminate conduits to internet content."[33] A broadband provider can opt-out of common carrier status by adding a contract provision

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29. *E.g.*, *Central Union Tel. Co. v. Swoveland*, 42 N.E. 1035 (Ind. App. 1895).

30. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

31. *U.S. Telecom Assoc. v. FCC* (*USTA I*), 825 F.3d 674 (D.C. Cir. 2016); *U.S. Telecom Assoc. v. FCC* (*USTA II*), 855 F.3d 381 (D.C. Cir. 2017).

32. *USTA I*, 825 F.3d at 229–30.

that certain websites will be blocked, and advertising this,[34] turning common carriage into nothing more than a consumer disclosure law.

NetChoice seizes on this novel indiscriminate-contract-provisions doctrine for the SB7072 and HB20 cases (*e.g.*, *Paxton* Pet.Br.31) and presents it as the historical standard.[35] The Eleventh Circuit (*Moody* Pet.App.45a) and the Texas district court (*Paxton* Pet.163a) rule that social media carriers are not common carriers based on it.

Just how clearly the doctrine is alien to the common law can be understood by applying it to public accommodations. A hotel can either be held out as open to the public, subject to nondiscrimination duties, or, with considerable effort today, operate as a discriminatory private club. The indiscriminate-contract-provisions doctrine creates a new third option, of a hotel open to the public, that simply adds

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33. *USTA II*, 855 F.3d at 389 (Srinivasan, J., concurring in denial of rehearing en banc).

34. *Id.*

35. "[T]he centuries-old definition . . . ." Pl's' Repl. Br. for Prelim. Inj. 18, *NetChoice, LLC v. Paxton*, 573 F.Supp.3d 1092 (W.D. Tex. Nov. 29, 2021). "[L]ong-settled principles . . . ." Appellees' Br. 39, *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. Nov. 8, 2021).

a provision to its terms-of-service: "we choose to discriminate on the basis of race or religion."

In fact, the D.C. Circuit is treating only the FCC's Net Neutrality rule, in its federal statutory universe. The SB7072 and HB20 cases seem to be the first time the doctrine has been transported to a common law context. This should be stopped, before a hotel in the Eleventh Circuit can put its "Whites Only" sign back up, and thereby *not be* a public accommodation, subject to public accommodations law.

H. Social media carriers are simply modern common carriers with one-to-many delivery, and allowance for restriction of material.

Social media services are not inherently a new type of hybrid publisher-carrier. They are simply modern common carriers, with two notable characteristics: they engage in one-to-many delivery, through algorithms that can be entirely neutral, and they engage in certain restriction of material like spam and indecency, as traditionally allowed for common carriers[36] and authorized by Section 230.

One-to-many delivery depends on the ability of persons who wish to receive material to discover it. This is what various types of algorithmic promotion enable, from a search engine, to a simple list of

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36. *See*, *generally*, Wyman, *supra*, pt. 4.

most-popular topics, to a sophisticated analysis of a particular user's preferred types of material. When designed neutrally, algorithmic promotion is a machine being operated by the users, through their own conduct, for their own communications.

Currently the companies manipulate the machine to some extent, to impose their own viewpoint through editorial selection. This can cease at any time, without altering what a social media carrier is and does. It *will* cease if the Court properly interprets Section 230 as protecting only neutral conduits, or if the next Congress amends the statute to make that clear.

I. Carriers other than social media are even more certainly common carriers.

Social media services can properly be common carriers, however, if the Court finds otherwise, it should not forget the rest of the Internet. While HB20 is limited to social media, SB7072 encompasses any carrier of sufficient size.

Many types of Internet carriers have minimal content management, including ISPs, website-hosts, financial transfer services, blog-hosts, and services for private communications. App stores manage largely on neutral business, technical, and indecency criteria. Internet search carriers are overtly held out as *tools* for users to operate.

Surprisingly, the Eleventh Circuit below agrees that services with minimal management are common carriers (*Moody* Pet.App.5a–6a), before forgetting it has done so, and ruling based only on social media. In parallel, NetChoice has not even contested the email must-carry rules of HB20 sections 3–6.

With common carrier status for the "infrastructure" services needed to operate other Internet services, the constructive cartel at least cannot directly shut down its free-speech competitors.

J. Internet carriers are also regulable as statutory quasi-common-carriers.

Must-carry regulation does not prohibit a carrier from speaking, but rather prohibits discrimination in commerce. As a secondary effect, the operator may not engage in the discriminatory manipulation of public communications, that would form its own speech. Employment nondiscrimination law likewise prohibits a fashion company from curating a message, through unlawful discrimination, by hiring only slim and attractive sales staff for its retail stores.

Must-carry regulation cannot prevent a social media platform from speaking, because a platform is software, not a person who can speak. And it does not prevent the person who operates the platform from speaking without limit, in its corporate voice

through press releases, etc., or through any publishing operation.[37]

Must-carry regulation requires *carrying* the public's communications, not speaking them, and compelled speech through misattribution to a speech-host is impossible in an industry known to the public to be common carriage.

Packingham[38] establishes that nondiscriminatory public access to Internet communications services is now as essential a governmental interest as non-discriminatory public access to electricity and running water, and the Guarantee Clause properly compels the States to assure the means for public free speech necessary to operate popular governance. Both also ace the *Pike v. Bruce Church* interstate commerce burden test.[39]

A high size-threshold in an act like SB7072 or HB20 is narrow tailoring, and must-carry rules are

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37. It should be noted that *PG&E* relates to a corporate-voice newsletter, not cutting off electricity to a disfavored political organization. In *Turner*, a separated quasi-common-carrier business operation is mandated, over which the company has almost no editorial control. *PG&E v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986). *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

38. *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).

39. 397 U.S. 137, 142 (1970).

less restrictive than the available alternatives of eminent domain, or expansion of the sovereign postal monopoly.

A carrier subject to must-carry regulation itself needs to evaluate whether it has lawful grounds for a certain restriction of material, so a requirement to provide the evaluation to a user is compelled reporting not compelled speech. From another perspective, such explanations are an advance deposition for discovery, to prevent the courts from being overwhelmed with petitions for suspected violations.

K. What restriction of public speech by an Internet common carrier is permissible?

By default, the nondiscrimination duties of an Internet common carrier might require it to carry and deliver anything demanded by the public. But in fact there are several means for needed restriction of spam, indecency, etc., to be effected.

Common carriers have a traditional allowance to restrict material that is unlawful, harmful or burdensome to their systems, or outside a specialized type of carriage.[40] Passenger common carriers have a further traditional allowance to maintain appro-

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40. *See*, *generally*, Wyman, *supra*, pt. 4.

priate decorum in a public venue.[41] This was applied to carriage-by-wire to protect telegraph clerks and telephone switchboard operators,[42] and should be applicable to public contexts of Internet carriage such as social media. Indeed an airline today may prohibit expression in the same obscene, lewd, lascivious, filthy, excessively violent, and harassing manners that Section 230 lists.

Section 230 itself might provide the needed allowance for restriction, just as it is intended to do. However, if the Court recognizes common carriage as part of "the freedom of speech," First Amendment scrutiny would come into play, and even the proper interpretation of the statute, as discussed in the next section, might be violative.

It is not clear what sort of time-place-manner restrictions would qualify as not being abridgment in this distinct public speech domain, with its private operator. The line between manner and content might be different than for the physical public square, and it is also not entirely certain where it lies in the Court's current doctrine. The *loud manner* of chanting civil rights slogans outside a school,[43] and

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41. *Id.* §§ 627–634.

42. *Id.* § 633.

43. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

indecent manner of pornography,[44] are both integral to communicative value, but only one has been included in content. The practical distinction seems to be between live-action speech in public, and fixed works on private property. But social media blurs that, with live-speech-through-fixed-media, and private-property-opened-to-the-public. In *Hill v. Colorado*, content is limited to "viewpoint or [ ] subject matter,"[45] and Justice Scalia worries in dissent[46] that the ruling allows *happy manner* to be required or *poetic manner* to be prohibited.[47] In *Reed v. Town of Gilbert*, content is "the topic discussed or the idea or message expressed."[48] Does that extend beyond the speech *substance* of a topic, information about the topic, and a viewpoint on the topic or information, which can be expressed portably in different speech *styles*? Is a social media carrier's

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44. *United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000).

45. 530 U.S. 703, 723 (2000).

46. *Id.* at 742–43.

47. This is so, but a school board's social media service for toddlers actually should be happy, and a planning board should be addressed in prose. *Inappropriate* regulation of such "broad manner" may be preventable with careful examination of governmental interest in intermediate scrutiny.

48. 576 U.S. 155, 163 (2015).

rule that prohibits nudity in the new public square a manner or content restriction—in an appearance before an online city hall meeting, and in a pornographic video?

It is to be emphasized that this manner discussion is merely academic, if the passenger carrier's traditional decorum allowance is properly applied to public Internet venues, making an equivalent statutory enablement superfluous.

The purest approach to content moderation from the First Amendment perspective is for carriers to provide neutral tools for users to themselves filter what they wish. Carriers can convert their present censoring to neutral labeling for this purpose. It is likely constitutional for them to turn on filters for accounts of known or reasonably-suspected minors, according to national community standards.[49] This leaves the problem of unidentified minors, which Congress can solve by requiring communication devices to have a setting that indicates minor age, that parents can easily turn on, and apps can detect.

Finally, a dedicated carrier of material for minors should be able to operate with material always restricted according to national community stan-

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49. *Cf.*, *e.g.*, *Reno v. ACLU*, 521 U.S. 844, 875 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.").

dards. This falls within the passenger carrier's traditional responsibility to protect minors *in loco parentis*,[50] and *Reno* should allow it as it does not burden adult speech.

PART II.
AN INVESTIGATION OF SECTION 230

A. Section 230 properly interpreted protects only conduits not publishers.

The issue of Section 230 is outside the questions presented in the instant cases, but it might still be raised, and the Court should keep its implications in mind while developing a doctrine for Internet public free speech carriage.

The lower courts have dramatically misinterpreted the statute as a protection for editorially-selective publishers.

§230(c)(1) provides liability protection only for material of "another" person. Under §230(f)(3), someone who engages in "development" of material becomes co-speaker of it, so the material is no longer that of another person. Logically, and under the common law, editorial development means selection or editing. In a pool of material, restriction and

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50. *E.g.*, *Smith v. Wilson*, 31 How. Pr. 272 (S.D. Ala. 1872).

promotion are two sides of the same coin, each producing the inverse effect on all the other material in the pool. Thus an Internet service that engages in any editorially-selective intervention in a pool of material becomes co-speaker of the whole pool. This is exactly the basis of the *Stratton* ruling[51]—which was correct, except for not first recognizing that Prodigy was a common carrier under the common law.

The Zeran court overlooked (f)(3) and thereby invented a protection for publishers.[52] In subsequent cases the courts discovered (f)(3),[53] and the restriction/promotion duality.[54] But in order to maintain the Zeran law, they invented a criterion that development must "materially contribut[e] to [ ] alleged unlawfulness."[55] That is simply and plainly absent from (f)(3), which to the contrary specifies development "in whole or in part."

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51. *Stratton Oakmont v. Prodigy Srvcs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

52. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997).

53. *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

54. *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1170 n.29 (9th Cir. 2008).

55. *Id.* at 1167–68.

Development means editorially-selective pool curation. Publishers are inherently excluded from (c)(1) protection, as they co-speak all of the material they carry.

§230(c)(2) allows an Internet service to restrict some class of material, without becoming liable under (c)(1) for the whole pool that the material is in. It may also protect against liability arising from the act of restriction itself.[56] Because restriction and promotion are two sides of the same coin, if the allowance were for unlimited restriction, this would enable unlimited promotion, and make the key criterion of (c)(1) of "another" person meaningless surplusage. Internally, it would be comedic surplusage for (c)(2) to first present detailed qualifications, only to conclude: "but never mind, just restrict whatever you feel like." The restriction must be limited in some way, therefore the term "otherwise objectionable" must be an *ejusdem generis* clause. None of the items in the list is the speech *substance* of a topic, information, or a viewpoint. This leaves the list class as speech *styles*, or *manners* of expression in the broad sense.

The (f)(4) definition might be misunderstood as describing publishers eligible for (c)(1) protection. Its purpose is to make sure that Prodigy, and dedicated

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56. The Fifth Circuit below finds it does not. *Paxton* Pet.54a.

filtering services, are not excluded from the (f)(2) definition because they engage in any kind of *processing* of communications. The processing might be done by neutral algorithms, or be directed by users, or be allowed under (c)(2). The (f)(4) definition is a sub-definition of (f)(2), which encompasses every server on the Internet, including publishers like online newspapers. Arriving at (c)(1), no (f)(2) service gets protection except for undeveloped material of "another" person.

Whether through emulation, or reinventing the wheel, Section 230 produces a voluntary common carrier system, that codifies the passenger carrier's decorum allowance.

Former U.S. Rep. Christopher Cox, and Sen. Ron Wyden, authors of Section 230 and amici in the instant cases, claim that Congress instead intended for the statute to operate just as the lower courts later constructed it. But they do not explain why, then, their legislative staff wrote fundamental structural surplusage into the bill, and floor speeches including their own discuss a purpose solely of restricting indecency, not financing mass censorship of America's political speech.

Another witness has a memory not clouded by time, and is actually qualified to testify on the intent of the whole Congress, not two members.

It is the famous Section 230's little-known sibling, Section 231, enacted with the Child Online Protection Act of 1998.

> [A] person shall not be considered to make any communication . . . made by another person, **without selection or alteration** of the content of the communication, except that such person's deletion . . . consistent with . . . section 230 of this title shall not constitute such selection or alteration . . . .

47 U.S.C. § 231(b) (emphasis added).

This says that editorial selection makes a carrier co-speaker of material of another person. It says that "deletion" normally *does* inversely produce selection. The particular deletion allowed by §230(c)(2) is not specified, but unlimited deletion would produce unlimited selection, making the general §231(b) prohibition on selection meaningless.

Reading the Section 230 text with a few implicit clauses sums up the central points:

> [I]nformation provided by another information content provider [**and not subject to development**];

47 U.S.C. § 230(c)(1) (proper implicit clause added); *accord Roommates*, 521 F.3d at 1162 ("[I]mmunity

applies only if the . . . provider is not . . . responsible . . . for . . . development . . . .") (internal quotation marks omitted);

> [M]aterial that the provider or user considers to be [**expressed in an**] obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable [**manner**] . . . ;

47 U.S.C. § 230(c)(2) (proper implicit clauses added); *cf.* Fifth Circuit in case below, *Paxton* Pet.53a–54a ("§ 230(c)(2) . . . says nothing about viewpoint-based . . . censorship.").

> [A]ny person . . . responsible, in whole or in part, for the creation or development [**through selection or editing**] of information . . . ;

47 U.S.C. § 230(f)(3) (proper implicit clause added); *accord* 47 U.S.C. § 231(b) ("without selection or alteration").

B. The Court should not fall back on Section 230 to save free speech in place of common carrier status.

Although if properly interpreted Section 230 functions as a common carrier status, the Court should not consider falling back on it to save freedom of speech in the United States. Its mechanism for

preventing censorship is indirect and difficult to enforce. Its liability protection may become unnecessary with artificial intelligence able to predict tort litigation outcomes. Most fundamentally, as a statute that can be revoked by Congress at any time, it is no bedrock for constitutional democracy of the 21st century to stand upon.

PART III.
APPLICATION TO THE INSTANT CASES

A. The real First Amendment violation by SB7072 and HB20 would be a state actor's attempt to *reduce* the protection of public free speech through common carriage.

SB7072 and HB20 provide less protection for public free speech through common carriage than the common law does. Thus, if either Act had the effect of *replacing*, rather than supplementing, the common-law provisions, this would be a potential First Amendment violation.

The situation is seen most clearly with HB20, where the Texas legislature first finds that large social media service are common carriers (section 1), then goes on to specify that they may not restrict material on the basis of *viewpoint* (section 7). Under the common law, they may not restrict material on the basis of *topic* or *information* either. Textually,

HB20 never actually overrides the broader common law protections, so section 7 in effect does nothing other than adding new enforcement mechanisms for viewpoint discrimination.

SB7072 is similar, with an extremely reduced subset of common-law speech protections described, and new enforcement mechanisms provided for that subset.

As neither Act implements an overt textual derogation of the common law, it is not certain what the intent of either legislature was.

If the Court recognizes common carriage as part of "the freedom of speech," protected by the First Amendment from statutory abridgment, such derogation by the Acts would be plainly violative. It would be equivalent to converting a traditional public forum to a limited public forum. In any circumstance, intentional state action to restrict a long-established and essential public speech venue should properly get scrutiny as to whether there is a sufficiently-countervailing governmental interest.

Separately, SB7072 does have an evident First Amendment violation. Its "social media platform" definition encompasses every Internet service that is large enough, including publishers. However, no NetChoice/CCIA member is identified in the record

as subject to the Act, that is not properly a common carrier.

HB20 has a potential First Amendment violation, which is its list of seeming exceptions to the viewpoint protection that it otherwise provides.[57] This would be a remote-controlled state censorship, but in fact the items may all be unlawful communications that a carrier can restrict anyway.

Also, according to the three-pronged test described above, SB7072 and HB20 do not properly exclude all non-general carriers. Again no affected NetChoice/CCIA member is identified.

B. The analyses of this brief answer the questions presented.

The two questions presented for the instant cases are whether the SB7072 and HB20 content moderation restrictions and individualized explanations requirements comply with the First Amendment. If the Court finds the analyses of this brief to be valid, the following points can answer them.

A service for transmission of digital data is common carriage if it is held out primarily through standard contracts to carry material for the public, it carries material primarily for the public's own

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57. Tex. Civ. Prac. & Rem. Code § 143A.006(a).

general communicative purposes, and it is in a class of carriers for which a lack of substantial public need has not been established.

Common carriage is a type of business operation that inherently cannot be used for the operator's own expression, because the nondiscrimination duties of the carrier prevent it from engaging in the editorial manipulation of the pool of public communications, that would form its own speech.

Compelled speech through misattribution to a speech-host is impossible in an industry known to the public to be common carriage.

The common law may overtly require a common carrier to explain a refusal of service.[58] But in any event, the operator must itself evaluate whether it has lawful grounds for a certain restriction of material, so a requirement to provide the evaluation to a user is compelled reporting not compelled speech.

Thus SB7072 and HB20 do not violate the corporate free speech rights of NetChoice's or CCIA's members that are common carriers under the common law.

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58. *E.g.*, *Stevenson v. West Seattle Land & Improvement Co.*, 60 P. 51, 52 (Wash. 1900) ("[W]hen a common carrier refuses to furnish transportation, he must specifically state his reason therefor . . . .").

It appears that SB7072 and HB20 encompass Internet services other than common carriers, and that HB20 may have improper exceptions to its viewpoint protection, but these issues have not been developed in the record for the instant review.[59]

The first question presented asks broadly whether SB7072's or HB20's content moderation restrictions comply with the First Amendment. While NetChoice's allegations relate only to the corporate free speech rights of Internet services, its members are also persons that might be present in Florida or Texas, using the Internet service of *another* company. Thus their free speech rights from the perspective of the general public are also at issue.

Because the right to free speech through common carriage pre-exists the First Amendment, it is part of "the freedom of speech." This makes common carriage a private-actor analog to the traditional public forum of the public square. As common carriers are not state actors, they are not themselves subject to the First Amendment. Rather, the common law protects the free speech, and the

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59. The services of NetChoice/CCIA members discussed in the record as being subject to SB7072 or HB20 are prima facie all common carriers. Etsy, Facebook, Instagram, Pinterest, TikTok, Vimeo, X/Twitter, YouTube. *Moody* Resp.Br.3; *Paxton* Pet.Br.1.

First Amendment protects the common law from statutory abridgment.

The must-carry rules of SB7072 and HB20 provide less protection of public free speech than the common law of common carriers does. Thus if either Act functioned as a derogation of the common law, rather than a supplement to it, the reduction in protection would be violative of the First Amendment, to the extent that it abridged public free speech through common carriage.

The Court has not yet had cases to develop its doctrine of allowable restriction in this distinct public speech domain, with its private operator. However, some initial principles can be observed.

Common carriers have a traditional allowance to restrict material that is unlawful,[60] harmful or burdensome to their systems,[61] or outside a specialized carriage purpose.[62] Passenger common carriers have a further traditional allowance to maintain

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60. *E.g.*, *Godwin v. Carolina Tel. & Tel. Co.*, 48 S.E. 636 (N.C. 1904) (installation of telephone in brothel).

61. *E.g.*, *Gardner v. Providence Tel. Co.*, 49 A. 1004 (R.I. 1901) (unauthorized telephone equipment); *Dowd* v. *Albany Ry.*, 62 N.Y.S. 179 (N.Y. App. Div. 1900) (cumbrous parcels on street car).

62. *C.f.*, *e.g.*, *Tunnel v. Pettijohn,* 2 Harr. 48 (Del. Super. Ct. 1836) (common carriage excludes goods outside usual business).

appropriate decorum in a public venue, which is likely applicable to public contexts of Internet carriage such as social media.[63] Internet common carriers can also likely protect minors, both through their individual user accounts, and through dedicated services for them, according to national community standards.[64] For adults, on the other hand, viewpoint, topic, and lawful information can likely never be restricted.[65] Any kind of editorial control exercised by users, through neutral tools or algorithms, is not a carrier's own restriction, and so presumably would be outside constitutional consideration.[66]

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63. *E.g.*, an airline today seemingly may prohibit expression in an "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" manner, equivalent to the allowance of Section 230(c)(2). *Cf.*, *e.g.*, *Atchison, T. & S.F. Ry. Co. v. Wood*, 77 S.W. 964 (Tex. Civ. App. 1903) (indecent language and conduct).

64. *Cf.*, *e.g.*, *Reno* 521 U.S. at 875 ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.").

65. *Cf.*, *e.g.*, *Reed*, 576 U.S. at 163 ("[R]egulation of speech is content based if a law applies . . . because of the topic discussed or the idea or message expressed.").

66. *Cf.*, *e.g.*, *Roommates*, 521 F.3d at 1169 ("[P]roviding *neutral* tools . . . does not amount to 'development' . . . .") (emphasis in original).

CONCLUSION

If the Court finds the analyses of this brief valid it should explain its Internet common carrier doctrine, vacate the Eleventh Circuit's affirmation and the Fifth Circuit's reversal, and remand both cases for proceedings consistent with its opinion.

Respectfully submitted,

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JANUARY 2024