

April 8, 2022



The Honorable Michael Doyle
Chairman, Communications & Technology Subcommittee
House Energy & Commerce Committee
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Washington, DC 20510

The Honorable Robert Latta
Chairman, Communications & Technology Subcommittee
House Energy & Commerce Committee
2322 Rayburn House Office Building
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cc: Members of the House Energy & Commerce Committee, Commissioner Brendan Carr

**Re: Testimony of Brendan Carr at “Connecting America: Oversight of the FCC”
Hearing (March 31, 2022)**

Last week, in testimony to your subcommittee, Federal Communications Commissioner Brendan Carr made a series of proposals unrelated to the FCC.¹ Taken together, these proposals amount to a new Fairness Doctrine for the Internet that would be far more vague, intrusive, and arbitrary than the original version. Where broadcasters were required only to “adequately cover issues of public importance” and ensure that “the various positions taken by responsible groups” were aired, Commissioner Carr would bar “Big Tech” companies from “discriminating” in deciding what content, viewpoints and speakers they will carry. This is, in effect, a must-carry mandate requiring popular websites to publish and recommend speech they find antithetical to their long-held community standards. Non-discrimination, mandatory carriage are classic aspects of common carrier regulation; Carr would impose these concepts, which he has long steadfastly opposed applying even to the

¹ Connecting America: Oversight of the FCC: Hearing Before the Subcomm. on Communications and Technology, 117 Cong. (2022) (statement of Brendan Carr, FCC Commissioner).

lowest layers of the Internet, to the applications layer of the Internet, where they are least applicable.²

Commissioner Carr’s proposals would violate the First Amendment. What the Supreme Court has said of newspapers is no less true of digital publishers: “compulsion to publish that which reason tells them should not be published is unconstitutional.”³ His arguments also misunderstand Section 230’s protections for content moderation. We write to clarify how both the First Amendment and Section 230 protect the editorial judgments of social media publishers as to what content, viewpoints, or speakers they will publish.

I. The First Amendment

CARR: a handful of corporations with state-like influence shape everything from the information we consume to the places we shop.⁴

FACT: Tech companies clearly aren’t state actors, so unless the government coerces them to remove content, the First Amendment protects their editorial discretion.

Concern about media consolidation and power is nothing new. In 1974, the Supreme Court noted that the “elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper’s being owned by the same interests which own a television station and a radio station” had “place[d] in a few hands the power to inform the American people and shape public opinion.”⁵ Complaints about old media were strikingly similar to complaints made now about new media: “The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. ... The First Amendment interest of the public in being informed is said to be in peril because the ‘marketplace of ideas’ is today a monopoly controlled by the owners of the market.”⁶

Yet even if all this were true, ruled the Court in *Miami Herald v. Tornillo*, it did not justify compelling newspapers to publish content they did not want to publish. Thus, the Court

² In the Open Society Institute’s 7-layer model of the Internet, “net neutrality” regulation governs the deepest layers of the Internet (1—physical, 2—data link, and 3—network), while Carr’s proposals involve the highest layer (7—applications). *See, e.g.*, Cloudflare, *What is the OSI Model?*, <https://www.cloudflare.com/learning/ddos/glossary/open-systems-interconnection-model-osi/>

³ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255 (1974).

⁴ Carr, *supra* note 1, at 6.

⁵ *Id.* at 250.

⁶ *Id.*

struck down a 1913 state law that required newspapers to carry replies by any political candidates subject to attack by the newspaper. “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”⁷ Subsequent courts have recognized that even newspapers with “substantial” or “virtual” monopolies have a First Amendment right to refuse to carry content the government seeks to compel them to carry.⁸

Carr goes further than the critics of media consolidation in the 1970s. He alleges that “Big Tech” firms have “state-like influence.” Such hyperbole trivializes what repressive states can do. Today, the Russian government is not merely banning critics of Vladimir Putin’s “special military operation in Ukraine” from VK, the leading Russian social network; it is imprisoning those Russians who criticize Putin’s war. When Twitter suspended the account of Fox News host Tucker Carlson for mocking Assistant Secretary of Health Dr. Rachel Levine, a transwoman, as Babylon Bee’s “Man of the Year,” the publisher of social media was not engaging in “censorship,” as Carlson claimed. ⁹ Twitter was simply enforcing its policy against “targeting others with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category. This includes targeted misgendering or deadnaming of transgender individuals.”¹⁰ To equate what Twitter can do in removing content—only within the confines of its own platform—with what governments can do is absurd and insulting to the victims of repressive governments around the world.

Arguments about the power of social media publishers and other online services are often intended to evoke a sense that these private parties should be held to the constitutional limitations imposed on state actors, that is, the government. But the Supreme Court has recognized that private entities become state actors only in a “few limited circumstances”:

⁷ *Id.* at 258; see also *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987).

⁸ Eugene Volokh & Donald Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 896 (2012) (“the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a ‘substantial monopoly’ could not be ordered to run a movie advertisement that it wanted to exclude, because ‘[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.’ *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that, ‘[n]ewspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication.’ *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).”).

⁹ Caleb Howe, *Tucker Carlson Tweet on Babylon Bee Suspension Over Rachel Levine Tweet Now Also Removed by Twitter*, MEDIAITE (Mar. 23, 2022, 5:54 PM), <https://www.mediaite.com/politics/tucker-carlson-tweet-on-babylon-bee-suspension-over-rachel-levine-tweet-now-also-removed-by-twitter/>.

¹⁰ Hateful Conduct Policy, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

“(i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.”¹¹ In a case involving public access cable channels, the Court ruled that “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”¹²

Courts have routinely applied this principle to social media platforms, holding them to be private actors owing no First Amendment obligations to users or the public. In February 2020, for example, the U.S. Court of Appeals for the Ninth Circuit ruled that YouTube was not a state actor and therefore could not possibly have violated the First Amendment rights of the conservative YouTube channel Prager University by flagging some of its videos for “restricted mode,” which parents, schools, and libraries can turn on to limit children’s access to sensitive topics.¹³

If a plaintiff can prove that the government forced or coerced a social media company to remove specific content or ban a specific user, that might constitute state action adequate to trigger the First Amendment. But the bar for such coercion is high. For example, in 1985 a deputy county attorney in Arizona threatened to prosecute a telephone company if it did not terminate a customer offering sexual pay-per-call services.¹⁴ The U.S. Court of Appeals for the Ninth Circuit found the government, with its threat of criminal prosecution, “exercised coercive power” over the company, thereby transforming its termination of the customer’s account into state action.¹⁵ But while it is arguably unseemly and inappropriate for government officials to suggest, request, or state a preference for particular content moderation policies and actions, the cases brought thus far have been far afield from the level of coercion presented by a direction “to a specific entity to take a specific [unconstitutional] action against a specific person.”¹⁶

Nor does Section 230’s immunization of content moderation decisions transform those decisions into state action. Plaintiffs and commentators have argued that Section 230 “encourages” social media publishers to “censor” content in ways that the government itself

¹¹ *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

¹² *Id.*

¹³ *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).

¹⁴ *Carlin Commc’ns. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (1987).

¹⁵ *Id.* at 1295.

¹⁶ *See, e.g., Children’s Health Defense v. Facebook Inc.*, No. 20-cv-05787-SI (N.D. Cal. Jun. 29, 2021) (holding that Facebook was not transformed into a state actor simply because government actors pressured it to remove “vaccine misinformation” and hinted towards legislative reform to reporters).

could not, creating state action and thus First Amendment violations. In support they often cite to the Supreme Court's decision in *Skinner v. Railway Labor Executives' Association*.¹⁷ In *Skinner*, the Court held that a federal regulation enabling railroads to conduct certain breath and urine tests on employees created a cognizable Fourth Amendment claim because the ostensibly private testing was not "primarily the result of private initiative."¹⁸ Underpinning the Court's decision was the excessive government interest and coercion; the government retained access to samples and test results, the railroads were prohibited from divesting themselves of the testing authority through collective bargaining, and the regulations mandated removal from duty of employees who refused testing. Courts distinguishing *Skinner* from challenges to Section 230 and content moderation decisions have correctly explained that Section 230 is a permissive law that takes no position on whether or what content moderation should be done. Rather, the law simply broadens the ability of social media publishers to make those decisions for themselves and therefore does not create state action or First Amendment violations.¹⁹

The law in this matter is clear and well-established: private Internet services are not government actors, their products are not public forums for First Amendment purposes, and absent extraordinary circumstances not present in any of the cases decided to date, their moderation decisions do not bear the imprimatur, or liability as an action of, the government.

CARR: These corporate behemoths are not merely exercising market power; they are abusing dominant positions. ... Indeed, it is hard to imagine another industry where a greater gap exists between power and accountability.²⁰

FACT: Neither traditional nor new media are immune from antitrust law, but antitrust plaintiffs can sue only for business practices, not editorial "bias."

In a landmark 1945 decision, the Supreme Court held that the First Amendment did not bar an antitrust suit against the Associated Press and some of its member newspapers.²¹ The

¹⁷ 489 U.S. 602 (1989).

¹⁸ *Id.* at 615.

¹⁹ *See, e.g.,* Divino Grp. v. Google LLC, No. 19-cv-04749 at *9–10 (N.D. Cal. Jan. 6, 2021) ("Unlike the regulations in *Skinner*, Section 230 does not require private entities to do anything, nor does it give the government a right to supervise or obtain information about private activity. Furthermore, nothing in the SAC suggests that any governmental actor has actively encouraged, endorsed, or participated in particular conduct by YouTube.").

²⁰ Carr, *supra* note 1, at 6.

²¹ *Associated Press v. United States*, 326 U.S. 1 (1945).

venerable press pool was accused of operating like a cartel: member newspapers could veto potential competitors in their local markets from joining the association, denying them access to the reporting made available by member newspapers exclusively to other member papers. “The fact that the publisher handles news while others handle food does not,” wrote the Court, “afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his *business practices*.”²²

But therein lies the rub: while the First Amendment does not protect the “business practices” of media companies from general business regulation, it *does* protect their editorial discretion, as in *Tornillo*. In *Lorain Journal* (1951), the Court ruled that a newspaper could be sued when it refused to carry ads from local advertisers who refused to join in a boycott of a new radio station.²³ Because the refusal to carry ads rested not on the nature of their content but on the whether the advertiser did business with a rival, this tactic was clearly a “business practice” subject to economic regulation. But the flipside is also true: “[t]he *Lorain Journal Co.* rule ... does not authorize restrictions on a speaker’s editorial judgment about what content is more valuable to its readers.”²⁴ Thus, if a newspaper refused to carry ads from local advertisers because the ads were racially insensitive, or if a newspaper vetoed another newspaper from joining the Associated Press because the applicant was owned by the Ku Klux Klan, the First Amendment would protect such editorial judgments.

The difference lies in the level of constitutional scrutiny: in cases involving editorial judgments, the courts apply “heightened” scrutiny rather than the “rational basis” review, the lowest level of scrutiny, under which most constitutional challenges to economic or business regulations are assessed.²⁵

CARR: Congress as well as state governments have long and lawfully applied certain antidiscrimination obligations to corporations, including in appropriate cases where those laws regulate a corporation’s decision about what speech to carry.²⁶

FACT: The courts have upheld must-carry mandates only in cases that did not involve strict scrutiny, which the courts will apply here.

²² 326 U.S. at 7.

²³ *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951).

²⁴ Volokh & Falk, *supra* note 8, at 896 (emphasis added) (“[T]he First Amendment does not allow antitrust claims to be predicated solely on protected speech.”).

²⁵ See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

²⁶ Carr, *supra* note 1, at 7.

Under *Tornillo*, must-carry mandates are generally unconstitutional. Only in exceptional circumstances justifying lower levels of scrutiny has the Supreme Court upheld such mandates for other media. Most notably, *Turner Broadcasting v. FCC* (1994) upheld provisions of the 1992 Cable Act providing that cable companies “must carry” local broadcasters’ channels for free.²⁷ The *Turner* Court rejected the government’s arguments that rational basis review should apply, as in *Associated Press* and *Lorain Journal*. Those cases involved “a law of general application” but “laws that single out the press, or certain elements thereof, for special treatment ‘pose a particular danger of abuse by the State,’ and so are always subject to at least some degree of heightened First Amendment scrutiny.”²⁸ On the other hand, the Court also rejected cable operators’ arguments that strict scrutiny (the highest level of scrutiny) should apply because, in giving some broadcasters a right to cable carriage, the law favored their speech over the cable providers’.²⁹ Instead, the majority nonetheless concluded that the law was not content-based and therefore applied only intermediate scrutiny.³⁰

The most important fact justifying the *Turner* Court’s decision not to apply strict scrutiny what the cable operators did *not* say: they never objected to any content or viewpoints expressed in the broadcasters’ programming. Rather, as the majority noted, the law “interfere[d] with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations,” which caused them to suffer an *economic* loss.³¹ That cable operators never objected to the content of broadcast channels is unsurprising. Broadcast content is usually highly sanitized—policed by the FCC for indecency and by broadcasters themselves for anything that might offend advertisers targeting mass audiences, including young children. More recently, in *Manhattan Community Access Corp. v. Halleck* (2019), the Court expressly declined to address the constitutionality of forcing cable operators to carry content or viewpoints they find objectionable.³² Such a case would be altogether different from, and harder than, *Turner*.

But to complain about the “political bias” of “Big Tech” is to concede the essential point: when social media publishers moderate content, they make editorial judgments based on content and viewpoint. Cable companies refused to carry some channels because they had limited capacity and wanted to carry those channels for which subscribers would pay the most.

²⁷ 512 U.S. 622.

²⁸ *Id.* at 641 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

²⁹ *Id.* at 653.

³⁰ *Id.* at 662.

³¹ *Id.* at 644.

³² *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019).

Because cable operators were making editorial decisions based on purely economic grounds rather than content or viewpoint, “no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that ‘the safe course is to avoid controversy’”³³ and refrain from making those judgments. By contrast, the entire purpose of proposed must-carry mandates for social media publishers is to force companies to “avoid controversy”: to force them not to moderate content they would otherwise take down for fear of being sued. The kind of editorial interference in the two cases could hardly be more different.

Social media and cable also differ profoundly in what consumers expect. A second reason *Turner* did not apply strict scrutiny was its conclusion that forcing cable companies to carry local broadcasters’ channels would not “force cable operators to alter their own messages to respond to the broadcast programming they are required to carry.”³⁴ Noting that the FCC had first instituted some form of must-carry mandate in 1966,³⁵ the Supreme Court concluded: “Given cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”³⁶ Thus, cable companies were not compelled to try to disclaim association with broadcast content.

Users cannot reasonably expect social media publishers to operate as pure conduits, but they can and do associate websites with the content they allow. Social media publishers have *always* curated participation in their communities. “You agree not to use the Web site,” Facebook’s terms of service said in 2005, to post “any content that we deem to be harmful, threatening, abusive, harassing, vulgar, obscene, hateful, or racially, ethnically or otherwise objectionable.”³⁷ Indeed, one can go back much further than that. As early as 1990, Prodigy, one of the first social networks, made its curation function a central part of its marketing appeals. “We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve,” it declared.³⁸ “Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.”³⁹

³³ *Id.* at 655 (quoting *Tornillo*, 418 U.S. at 257).

³⁴ *Id.* at 655.

³⁵ See *United States v. Midwest Video Corp.*, 406 U.S. 649, 653 (1972).

³⁶ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

³⁷ Wayback Machine, *Facebook Terms of Use*, <https://bit.ly/3w1gYC5> (Nov. 26, 2005).

³⁸ *Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995).

³⁹ *Id.*

Like newspapers, and unlike telephone networks, social media publishers are increasingly held accountable for the consequences of the speech they carry—in large part because, unlike the generally *private* conversations facilitated by telephone networks (telephony being the quintessential common carrier communications service), social media carry very public conversations. Social media sites are regularly boycotted by users—and, increasingly, by advertisers,⁴⁰ under growing pressure from their own investors⁴¹—for refusing to take down objectionable content. This is business reality for Facebook, as reflected in the multiple references in its most recent quarterly report to “risk factors” related to how the company’s handling of content is perceived.⁴² In Facebook’s last quarterly earnings call, CEO Mark Zuckerberg spent most of his time explaining how the company would handle misinformation about the then-impending election.⁴³ Such pressures are not fundamentally different in kind from the pressures newspapers face. This is no accident; both new media and traditional publishers rely on the same essential business model: convincing advertisers to trust that their brands will not be tarnished by association with the content it appears next to. If anything, the challenge is far greater for new media publishers: publishing content created by users at the vast scale of the Internet and without, in general, prior editorial review inevitably results in content that, without moderation, would alienate advertisers who do not want their brands associated with, say, abuse of other users, denial of the Holocaust, Russian government propaganda and the like. In short, social media publishers already struggle to disassociate themselves from objectionable content even more than in *Tornillo*, while *Turner* involved companies that felt no such pressure.

Turner rested in part on *PruneYard* (1980), where the Supreme Court upheld a provision of the California constitution that compelled shopping malls to allow pamphleteering on their property. Critically, mall owners could “expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.”⁴⁴ But there’s nothing “simple” about online disclaimers. A general disclaimer, as evidenced by the regular

⁴⁰ Afdel Aziz, *Facebook Ad Boycott Campaign ‘Stop Hate For Profit’ Gathers Momentum And Scale: Inside The Movement For Change*, FORBES (June 24, 2020), <https://www.forbes.com/sites/afdelaziz/2020/06/24/facebook-ad-boycott-campaign-stop-hate-for-profit-gathers-momentum-and-scale-inside-the-movement-for-change/?sh=66b595501668>.

⁴¹ *Shareholders Target Social Media Ad Buyers Over Civil Rights Concerns for First Time*, OPENMIC (Jan. 15, 2021), <https://www.openmic.org/news/home-depot-omnicom-advertising-resolution>.

⁴² Facebook, Inc., Quarterly Report (Form 10-Q) (Sep. 30, 2020), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/518957aa-c936-455b-8ba0-9743ca4c3855.pdf#page=53>.

⁴³ Facebook, Inc. (FB) Third Quarter 2020 Results Conference Call October 29, 2020, transcribed at https://s21.q4cdn.com/399680738/files/doc_financials/2020/q3/FB-Q3-2020-Earnings-Call-Transcript.pdf.

⁴⁴ *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

boycotts of social media platforms discussed above, is simply ineffective.⁴⁵ Affixing disclaimers to every piece of content that a social media publisher chooses to disassociate with would be no “simple” undertaking; it would fundamentally change the nature of these services, where the placement of every pixel is subject to careful design decisions. Nor is it “simple” to craft disclaimers that effectively communicate disavowal. Consider Twitter’s attempts to label tweets by President Donald Trump prior to banning him: the message they communicated was often ambiguous, partly because the labels were so short (generally requiring a user to click on them to go to a separate webpage to find more context) and partly because the company was attacked for labeling such tweets as a form of partisan intervention.⁴⁶ In crafting such labels, social media “editors might well conclude that the safe course is to avoid controversy”⁴⁷ even if that means making only a partial or ambiguous disavowal, or no disavowal at all.

A third key reason *Turner* applied intermediate scrutiny rather than *Tornillo*’s strict scrutiny was “an important technological difference between newspapers and cable television”:

When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.⁴⁸

By contrast, “when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.”⁴⁹ The same goes for social media: banning someone from Twitter does not prevent them from speaking in many other fora, both online and offline. Even banning an app from an app store does not prevent that outlet from reaching mobile phone users through their web browsers or by sideloading. Carr accuses tech companies of “abusing dominant

⁴⁵ An imagined law requiring companies to publish any constitutionally protected speech users submitted would similarly not address these concerns. The argument that “a reasonable observer would think [the platform] is merely complying with [the law] . . . would justify any law that compelled protected speech.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring).

⁴⁶ TechFreedom, Comment Letter on Petition for Rulemaking to Clarify provisions of Section 230 Of the Communications Act of 1934, 43-46 (Sep. 2, 2020), <https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-%E2%80%93-9.2.2020.pdf>.

⁴⁷ *Tornillo*, 418 U.S. at 257.

⁴⁸ 512 U.S. 622, 656 (1994).

⁴⁹ *Id.*

positions” but, even if that were true, it would be a far cry from the “bottleneck” or “gatekeeper” power exercised by cable providers in the early 1990s. “The central dilemma of cable,” noted the *Turner* Court, “is that ... all of the [content] producers and publishers use the same physical plant. If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system.”⁵⁰ But the “physical plant” used for online speech is not social media (the applications or highest layer of the Internet in the OSI model), it is the broadband networks that deliver social media, *like any other website*, to consumers (the lowest layers of the Internet).⁵¹ As we explain below, courts have upheld nondiscrimination requirements for broadband in the form of net neutrality regulations (something Carr has long opposed), but with caveats that make clear that neutrality obligations cannot be imposed on social media.⁵²

CARR: [Tech companies] are not simply prevailing in the free market; they are taking advantage of a landscape that has been skewed—in many cases by the government—to favor their business models over those of their competitors... [T]he federal government conferred special benefits on Internet companies in the 1990s.⁵³

FACT: The federal government has granted no special privileges to large tech companies.

In the early 1990s, cable providers enjoyed “gatekeeper” or “bottleneck” power because of government: “construction of [cable networks’] physical infrastructure entails the use of public rights-of-way and easements, and often results in the disruption of traffic on streets and other public property...” and thus “the cable medium may depend for its very existence upon express permission from local governing authorities.”⁵⁴

Unlike cable companies (and their physical networks, Layer 1), social media publishers (operating chiefly at Layer 7, applications) have never been granted any exclusive monopoly privileges. While critics of Section 230 routinely portray the law as a “subsidy to Big Tech,”⁵⁵ none of today’s leading tech companies existed when Section 230 was enacted in 1996, and

⁵⁰ *Id.* at 657 n. 8 (quoting I. de Sola Pool, *Technologies of Freedom* 168 (1983)).

⁵¹ *See supra* note 2.

⁵² *See infra* at 15-17.

⁵³ Carr, *supra* note 1, at 6.

⁵⁴ *Turner*, 512 U.S. at 628.

⁵⁵ *See, e.g., The Evening Edit* (FOX Business television broadcast Nov. 17, 2017) (recording at <https://www.foxbusiness.com/technology/ted-cruz-facebook-twitter-google-collectively-pose-single-greatest-threat-to-free-speech-in-america>).

the law has always applied equally to *all* operators of websites insofar as they publish content created by others.⁵⁶

Likewise, the 1998 Internet Tax Freedom Act (ITFA), extended repeatedly by Congress until it was made permanent in 2016, broadly protected *all* online services from discriminatory and multiple taxation. While some critics of “Big Tech” decry it as providing “unprecedented special tax treatment,”⁵⁷ what is “special” about the law is how it handles the Internet, which the Supreme Court has recognized as “a unique and wholly new medium of worldwide human communication.”⁵⁸ The law has never provided any special privilege to any specific Internet services.

CARR: No discussion of First Amendment scrutiny whatsoever.

FACT: Carr’s proposals will be subject to strict scrutiny.

Social media publishers are thus different from cable providers in each of the dimensions that justified applying mere intermediate scrutiny in *Turner*. But even if social media differed in only one of these dimensions, that alone would suffice to justify strict scrutiny, which generally covers all laws that apply specifically to part of the media or that are not content-neutral.⁵⁹ While the regulations in *Turner* discriminated among speakers (favoring broadcasters’ speech over cable operators’ control of their channel capacity),⁶⁰ the must-carry regulation was at least content-neutral. By contrast, the must-carry mandates Carr and others propose for social media explicitly favor some kinds of speech over others. Carr proposes that websites should not be required to carry “illegal content, child pornography, terrorist speech, indecent, profane, or similar categories of speech that Congress has previously carved out.”⁶¹ Whether “must carry” for cable was truly content-neutral in *Turner* was debatable, but the majority saw no “subtle means of exercising a content preference.”⁶² The agenda behind “must carry” for social media is unmistakable: Carr wants social media publishers to carry specific kinds of content they do not want to carry while leaving providers free to restrict types of constitutionally protected content that he simply finds less

⁵⁶ See *infra* at 25.

⁵⁷ Brief for Professor Philip Hamburger as Amicus Curiae Supporting Defendant-Appellant, *NetChoice v. Paxton*, No. 21-51178, 9 n.2 (5th Cir. Mar. 6, 2022), <https://digitalcommons.law.scu.edu/historical/2641/>.

⁵⁸ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997).

⁵⁹ *Turner*, 512 U.S. at 658 (“*Buckley* thus stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference”).

⁶⁰ Justice Thomas joined a dissent authored by Justice O’Connor arguing that this discrimination alone justified imposing strict scrutiny.

⁶¹ Carr, *supra* note 1 at 7.

⁶² 512 U.S. at 645.

worthy. He objects to specific editorial judgments that he believes are made for political reasons. It is precisely such picking and choosing among speech that demands strict scrutiny.⁶³

In short, a careful read of *Turner* confirms that the kinds of common carrier regulation Carr proposes for social media will be subject to strict rather than intermediate scrutiny. Under strict scrutiny, the “dominant position” of social media publishers would be just as irrelevant as was that of some local newspaper monopolies in *Tornillo*, and regulation of the editorial judgments of social media publishers will be just as likely to fail as any regulation of the editorial judgments of newspapers.

There is, indeed, another area in which the courts have upheld “certain antidiscrimination obligations”: net neutrality. But as we shall see, the FCC’s Open Internet regulations withstood scrutiny precisely because they did *not* “regulate a corporation’s decision about what speech to carry.” Carr does not mention the non-discrimination aspects of those rules (presumably because he opposed them) but does mention the transparency rule (which he supported):

CARR: At the FCC, we require broadband providers to comply with a transparency rule that can provide a good baseline for Big Tech. Under the FCC’s rule, broadband providers must provide detailed disclosures about practices that would shape Internet traffic—from blocking to prioritizing or discriminating against content. ... Congress could take a similar approach to Big Tech. It could require these digital distribution networks to provide greater specificity regarding their terms of service and it could hold them accountable by prohibiting actions that are inconsistent with those plain and particular terms.⁶⁴

FACT: None of the FCC’s net neutrality rules applied to services that actively exercised editorial judgment, illustrating why Congress could not extend either transparency or non-discrimination concepts from broadband to social media.

⁶³ See *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (“[L]aws 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 . . . must also satisfy strict scrutiny.”) (internal citations and quotation marks omitted).

⁶⁴ Carr, *supra* note 1, at 6.

Carr first drew this analogy in a 2020 op-ed,⁶⁵ equating (a) the kind of “network management practices” that FCC’s transparency rule requires Broadband Internet Access Service (BIAS) providers to disclose⁶⁶ with (b) how tech platforms enforce their terms of service in moderating objectionable content, banning users who violate those terms, et cetera. Constitutionally, these are apples and oranges: the FCC’s transparency rules, like the rest of its Open Internet rules, apply only to business conduct, not the exercise of editorial judgment protected by the First Amendment.⁶⁷ This may sound surprising, given how much those pushing for the 2010 and 2015 Open Internet Orders talked about the need to “protect free speech values,” but rhetoric aside, the FCC carefully crafted those Orders to avoid the kind of First Amendment questions Carr’s proposals raise. The FCC’s broadband transparency rule, which remains in place, has never compelled broadband providers to describe how they exercise their editorial discretion, nor did the FCC’s blocking and throttling rules constrain that editorial discretion, because these rules applied only to those providers that, by definition, hold themselves out as *not* exercising editorial discretion.

The FCC’s 2015 Open Internet Order, like the 2010 Order before it, applied to ISPs only insofar as they “represent that their services allow Internet end users to access all or substantially all content on the Internet, *without alteration, blocking, or editorial intervention.*”⁶⁸ BIAS users, “in turn, expect that they can obtain access to all content available on the Internet, *without the editorial intervention of their broadband provider.*”⁶⁹ Therefore, the panel of three D.C. Circuit judges held, “the net neutrality rule applies only to ‘those broadband providers that hold themselves out as neutral, indiscriminate conduits’ to any internet content of a subscriber’s own choosing.”⁷⁰

⁶⁵ Brendan Carr, *A Conservative Path Forward on Big Tech*, NEWSWEEK (July 27, 2020, 7:30 AM), <https://www.newsweek.com/conservative-path-forward-big-tech-opinion-1520375>.

⁶⁶ 47 C.F.R. § 8.1 (“Any person providing broadband internet access service shall publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.”)

⁶⁷ TechFreedom, Comment Letter on Petition for Rulemaking to Clarify provisions of Section 230 Of the Communications Act of 1934, 65 (Sep. 2, 2020), <https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-%E2%80%93-9.2.2020.pdf>.

⁶⁸ In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5869 ¶ 549 (emphasis added) (“2015 Order”).

⁶⁹ *Id.* (emphasis added).

⁷⁰ U.S. Telecomm. Ass’n v. FCC, 855 F.3d 381, 389 (D.C. Cir. 2017).

It is easy to see the difference between BIAS providers and social media publishers. The mere fact that Twitter, Facebook, and other such sites have lengthy “community standards” proves the point: they exercise editorial judgment. Consider what Twitter says about its service:

Twitter's purpose is to serve the public conversation. Violence, harassment and other similar types of behavior discourage people from expressing themselves, and ultimately diminish the value of global public conversation. Our rules are to ensure all people can participate in the public conversation freely and safely.⁷¹

Twitter elaborates on each category of content that it does not allow, such as defining what constitutes a “violent threat.”⁷² Now consider what Comcast says about its service:

Comcast does not discriminate against lawful Internet content, applications, services, or non-harmful devices ... Comcast does not block or otherwise prevent end user access to lawful content, applications, services, or non-harmful devices. ... Comcast does not degrade or impair access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device.⁷³

In terms of the Open Internet Order, Twitter “discriminates,” “blocks,” and “throttles,” while Comcast does not. If Comcast fundamentally changed the nature of its representations to consumers regarding a particular flavor of Internet access service, that *curated* service would no longer qualify as a “BIAS” and would therefore not be subject to the FCC’s Open Internet rules, including both common carrier classification and the transparency rules. This crucial line-drawing permitted the D.C. Circuit to dispose of First Amendment concerns raised by then-Judge Brett Kavanaugh regarding the FCC’s 2015 Order:

While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP’s exercise of “editorial intervention.” [2015 Order] ¶ 549. For instance, Alamo Broadband, the lone broadband provider that raises a First Amendment challenge to the rule, posits the example of an ISP wishing to provide access solely to “family friendly websites.” Alamo Pet. Reh’g 5. ***Such an ISP, as long as it represents itself as engaging in editorial intervention of that kind, would fall outside the rule. ...***

⁷¹ Twitter, The Twitter Rules, <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

⁷² Twitter, Violent threats policy, <https://help.twitter.com/en/rules-and-policies/violent-threats-glorification>.

⁷³ Xfinity, Xfinity Internet Broadband Disclosures, <https://www.xfinity.com/policies/internet-broadband-disclosures>.

The Order thus specifies that *an ISP remains “free to offer ‘edited’ services” without becoming subject to the rule’s requirements.* [2015] Order ¶ 556.

That would be true of an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content (*e.g.*, family friendly websites). It would also be true of an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP’s commercial interests. *An ISP would need to make adequately clear its intention to provide “edited services” of that kind, id. ¶ 556, so as to avoid giving consumers a mistaken impression that they would enjoy indiscriminate “access to all content available on the Internet, without the editorial intervention of their broadband provider,” id. ¶ 549.* It would not be enough under the Order, for instance, for “consumer permission” to be “buried in a service plan—the threats of consumer deception and confusion are simply too great.” *Id. ¶ 19; see id. ¶ 129.*⁷⁴

In other words, the First Amendment permits the government to compel a company that does *not* exercise editorial discretion to “disclose accurate information regarding the network management practices, performance, and commercial terms of its [unedited] services sufficient for consumers to make informed choices regarding use of such services.”⁷⁵ Such a mandate is essentially similar to standard “truth in labeling laws” because it governs business practices, not editorial judgments. Likewise, the First Amendment permits the government to regulate discriminatory business practices, but not editorial judgments.

⁷⁴ *U.S. Telecomm. Ass’n*, 855 F.3d at 389-90 (emphasis added).

⁷⁵ 47 C.F.R. § 8.3.

CARR: Today, Big Tech offers a black box. After Google manipulates search results, a small business can see its web traffic drop precipitously overnight for no apparent reason, potentially flipping its outlook from black to red. On Twitter, social media posts are left up or taken down, accounts suspended or permanently banned, without any apparent consistency. Out of the blue, YouTube can demonetize someone who risked their capital and invested their labor to build an online business.⁷⁶

FACT: Digital media are inherently curated. Curation, whether done by humans or machines, is fundamentally the expression of opinions. The offering of opinions is protected by the First Amendment, even when it has business consequences.

Carr’s concerns sound like they are about transparency, but they are ultimately about constitutionally protected editorial judgments. This is evidenced by his focus on the impact and results of those judgments—and the improper focus on editorial judgment would not be remedied by any explanation of why these decisions were made.

It is precisely because these decisions are subjective exercises of editorial discretion that the government is forbidden from compelling digital publishers to explain them.⁷⁷ Imagine a law requiring newspapers to explain why they chose to publish or not publish every letter or editorial submitted to them, or why they placed certain columns in certain places. Such a law would be profoundly unconstitutional. Indeed, even lesser disclosure requirements have been held unconstitutional as bringing “the state into an unhealthy entanglement with news outlets.”⁷⁸ Requiring digital publishers to justify every subjective editorial decision that they make would go far beyond the “factual and noncontroversial information” that the government may, consistent with the First Amendment, require entities to disclose.⁷⁹ Moreover, as several courts have now held, transparency requirements for editorial judgments chill digital publishers from making those protected judgments due to the

⁷⁶ Carr, *supra* note 1, at 6.

⁷⁷ See generally Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 *Hastings L.J.* (forthcoming 2022) (arguing that the First Amendment’s protection against compelled transparency of editorial judgments with respect to traditional publishers extends to digital publishers), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4005647.

⁷⁸ *Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019).

⁷⁹ See *NetChoice, LLC v. Paxton*, No. 1:21-cv-00840-RP at 21 (W.D. Tex. Dec. 1, 2021) (citing *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018)), available at <https://www.courtlistener.com/docket/60413417/51/netchoice-llc-v-paxton/>

burdens of compliance and the potential costs of noncompliance.⁸⁰ This may indeed be the aim of many calls for transparency, but either way, the result is the same: the government may not force publishers to explain their subjective editorial judgments any more than it can force someone to explain why they support a particular cause.

When Moody's evaluates the likelihood that a bondholder will faithfully repay its debts on time, it is publishing an opinion.⁸¹ The First Amendment protects that opinion, despite its significant business consequences, just as it protects a search engine's evaluation of the relevance of a particular website.⁸² But if, say, Moody's coerced businesses into paying for better ratings, or discriminated against businesses that were not affiliated with its parent company, these would not be editorial judgments protected by the First Amendment; they would be business practices subject to antitrust suit. The same goes for social media and search engines: as in *Associated Press* and *Lorain Journal*, the government may regulate anti-competitive business practices but not the editorial judgments Carr is complaining about.

CARR: Any violations of those disclosures [required by the FCC's broadband transparency rule] are enforced by the Federal Trade Commission.⁸³

FACT: Consumer protection law cannot be applied to the subjective differences of opinion behind most complaints about content moderation.

The broadband network management practices required to be disclosed by the FCC, like all aspects of the FCC's Open Internet Rules, involve business practices within the constitutional purview of government regulation.⁸⁴ The FTC can police those compliance with those disclosures under its long-standing authority to prohibit deceptive marketing claims principally because those required disclosures involve pure commercial speech, which

⁸⁰ *See id.* at 22 ("The provisions also impose unduly burdensome disclosure requirements on social media platforms "that will chill their protected speech." The consequences of noncompliance also chill the social media platforms' speech and application of their content moderation policies and user agreements.) (internal citation omitted); *see also* *NetChoice LLC v. Moody*, No. 4:21-cv-00220-RH-MAF at 28 (N.D. Fla. Jun. 30, 2021) ("The provisions at issue here do not meet the narrow-tailoring requirement. Indeed, some of the disclosure provisions seem designed not to achieve any governmental interest but impose the maximum available burden on the social media platforms."), available at <https://www.courtlistener.com/docket/59942201/113/netchoice-llc-v-moody/>.

⁸¹ *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 856 (10th Cir. 1999); *see supra* note 24.

⁸² *See* Volokh & Falk, *supra* note 8, at 844.

⁸³ Carr, *supra* note 1, at 6.

⁸⁴ *See supra* at 14 et seq.

“[does] no more than propose a commercial transaction.”⁸⁵ But when speech, even pertaining to commercial topics, contains “expressions of opinions with respect to issues of social policy,” it begins to move outside the boundaries of what the government may regulate as commercial speech.⁸⁶ This is the distinction then-FTC Chairman Joe Simons was referring to when he told lawmakers that the issue of social media censorship is outside the FTC’s remit because “our authority focuses on commercial speech, not political content curation.”⁸⁷

The content policies implemented by social media publishers are editorial judgments imbued with precisely the type of opinions about social policy that the government may not regulate. These policies are statements of opinion about what expression is desirable in those companies’ communities. Content moderation decisions applying those policies are subjective value judgments as to how to apply those policies to complex real-world facts. Consumer protection law cannot regulate perceived disconnects between what speech websites say they will allow and what speech they actually allow any more than it could police the subjective marketing claims about the editorial practices of traditional media.

In 2004, MoveOn.org and Common Cause asked the FTC to proscribe Fox News’s use of the slogan “Fair and Balanced” as a deceptive trade practice.⁸⁸ The Petition acknowledged that Fox News had “no obligation whatsoever, under any law, actually to present a ‘fair’ or ‘balanced’ presentation of the news,”⁸⁹ but argued: “What Fox News is not free to do, however, is to advertise its news programming—a service it offers to consumers in competition with other networks, both broadcast and cable—in a manner that is blatantly and grossly false and misleading.”⁹⁰ FTC Chairman Tim Muris (a Bush appointee) responded pithily: “I am not aware of any instance in which the [FTC] has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content

⁸⁵ *Central Hudson Gas Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 562 (1980).

⁸⁶ *The Constitution of the United States of America, Analysis and Interpretation*, Prepared by the Congressional Research Service, Library of Congress 1248 (June 28, 2020), https://books.google.com/books?id=kAAohNvVik8C&pg=PA1248&lpg=PA1248&dq=%22devoid+of+expressions+of+opinions+with+respect+to+issues+of+social+policy%22&source=bl&ots=Ftv1KrxXrO&sig=ACfU3U0kK1Hj2fil69UlwwZ7Rr6vPNzccQ&hl=en&sa=X&ved=2ahUKEwj_v-WA3cPrAhWej3IE.

⁸⁷ Leah Nylen, *Trump Aides Interviewing Replacement for Embattled FTC Chair*, POLITICO (August 28, 2020, 02:28 PM), <https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479>.

⁸⁸ Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act, MoveOn.org and Common Cause (July 19, 2004), https://web.archive.org/web/20040724155405/http://cdn.moveon.org/content/pdfs/ftc_filing.pdf.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 3.

of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency.”⁹¹

PragerU recently made a similar argument against YouTube, but the Ninth Circuit dismissed the organization’s deceptive marketing claims. Despite having over 2.52 million subscribers and more than a billion views, this controversialist producer⁹² of “5-minute videos on things ranging from history and economics to science and happiness,” sued YouTube for “unlawfully censoring its educational videos and discriminating against its right to freedom of speech.”⁹³ Specifically, Dennis Prager alleged⁹⁴ that roughly a sixth of the site’s videos had been flagged for YouTube’s Restricted Mode,⁹⁵ an opt-in feature that allows parents, schools, and libraries to restrict access to potentially sensitive content (and a feature that fewer than 1.5% of YouTube users enable). After dismissing PragerU’s claim that YouTube was a state actor limited, rather than protected, by the First Amendment, the Ninth Circuit ruled:

YouTube's braggadocio about its commitment to free speech constitutes *opinions* that are not subject to the Lanham Act. Lofty but vague statements like “everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories” or that YouTube believes that “people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities” are classic, non-actionable opinions or puffery. Similarly, YouTube's statements that the platform will “help [one] grow,” “discover what works best,” and “giv[e] [one] tools, insights and best practices” for using YouTube's products are *impervious to being “quantifiable,” and thus are non-actionable “puffery.”* The district court correctly dismissed the Lanham Act claim.⁹⁶

Roughly similar to the FTC’s deception authority, the Lanham Act requires proof that (1) a provider of goods or services made a “false or misleading representation of fact,”⁹⁷ which (2)

⁹¹ Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), <https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris>.

⁹² PragerU, YOUTUBE, <https://www.youtube.com/user/PragerUniversity/about>.

⁹³ *PragerU Takes Legal Action Against Google and YouTube for Discrimination*, PragerU (2020), <https://www.prageru.com/press-release/prageru-takes-legal-action-against-google-and-youtube-for-discrimination/>.

⁹⁴ Dennis Prager, *Don’t Let Google Get Away With Censorship*, THE WALL STREET JOURNAL (Aug. 6, 2019), <https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175>.

⁹⁵ Your content & Restricted Mode. YouTube Help (2020), <https://support.google.com/youtube/answer/7354993?hl=en>.

⁹⁶ *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) (internal citations omitted; emphases added).

⁹⁷ 15 U.S.C. § 1125 (a)(1).

is “likely to cause confusion” or deceive the general public about the product.⁹⁸ Puffery fails both requirements because it “is not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.”⁹⁹ Likewise, The FTC’s bedrock 1983 Deception Policy Statement declares that the “Commission generally will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously.”¹⁰⁰

There is simply no way social media publishers can be successfully sued for “fairness” or “bias” in their content moderation practices, or for their subjective enforcement decisions. At most, consumer protection claims could be based on clear claims involving objectively verifiable aspects of content moderation. For example, if a social media publisher proclaimed that it did not employ Chinese citizens as content moderators when, in fact, it did, this might well constitute deception. The value of the product quality may be subjective, but its truth is objectively verifiable. Thus, for example, the FTC polices claims that goods were “Made in USA” despite the subjectivity of that value, or labels promising that diamonds were “real” despite their physical indistinguishability from laboratory-grown diamonds. Once again, though, it is precisely subjective line-drawing about what constitutes hate speech, abuse, misinformation and the like that Carr is complaining about—all questions of opinion that the First Amendment protects.

CARR: The Supreme Court has written that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”¹⁰¹

FACT: Never before in human history has the ordinary person had greater “access to a multiplicity of information sources.”

⁹⁸ 15 U.S.C. § 1125 (a)(1)(A).

⁹⁹ *Coastal Abstract Service v. First Amer. Title*, 173 F.3d 725, 731 (9th Cir. 1998).

¹⁰⁰ Fed. Trade Comm’n, FTC Policy Statement on Deception, at 4 (Oct. 14, 1983). The Commission added: “Some exaggerated claims, however, may be taken seriously by consumers and are actionable.” But the Commission set an exceptionally high bar for such claims:

For instance, in rejecting a respondent’s argument that use of the words “electronic miracle” to describe a television antenna was puffery, the Commission stated: Although not insensitive to respondent’s concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of “electronic miracle” in the context of respondent’s grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae.

Id.

¹⁰¹ Carr, *supra* note 1, at 7.

As the Supreme Court recognized in *Reno v. ACLU* (1997), the Internet is “a unique and wholly new medium of worldwide human communication.”¹⁰² It offers “vast democratic forums” never before conceivable.¹⁰³ A quarter century later, even though the Internet has changed significantly, what the *Reno* Court said remains true: there is no “single centralized point from which individual Web sites or services can be blocked from the Web.”¹⁰⁴ No tech company can block content from the web. Content unwelcome on one platform can readily find a home on another, or on a content provider’s own website or platform. The explosion of content available online is thanks in no small part to Section 230, which made it feasible to build platforms for publishing user-generated content in the first place.

The language Carr quotes comes from *Turner*, a case that, as explained above, is readily distinguishable from social media publishers in every key respect. The *Turner* Court decided only that Congress had an “important or substantial governmental interest,” the first prong of intermediate scrutiny. Thus, the Court’s lofty language tells us nothing about how the Court would apply strict scrutiny in any future case. Legally, the use of a term like “highest order” is clearly dicta: it is a rhetorical aside unnecessary to the holding of the case, and has no binding effect.¹⁰⁵

The line Carr quotes is inapt for another reason. Immediately after that sentence, the *Turner* Court cites three cases as examples of the government’s interest in “assuring that the public has access to a multiplicity of information sources.”¹⁰⁶ All three cases involved broadcasting, a medium that, unlike cable or digital media, receives exceptionally limited First Amendment protection. As the Supreme Court noted in its 1969 *Red Lion* decision upholding the Fairness Doctrine,¹⁰⁷ “[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards.”¹⁰⁸ *Red Lion* simply does not apply to digital media (or any other medium); the Supreme Court said so explicitly in *Reno v. ACLU* (1997).¹⁰⁹ More recently, the

¹⁰² 521 U.S. 844, 850.

¹⁰³ *Id.* at 868-69.

¹⁰⁴ *Id.* at 853.

¹⁰⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994); Black’s Law Dictionary (10th ed. 2014) (“Dicta” is a “judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)”).

¹⁰⁶ *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding law barring cable operators from “importing” the signals of broadcasters into other markets in order to protect the broadcaster in each market from external competition).

¹⁰⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 370 (1969).

¹⁰⁸ *Id.* at 386.

¹⁰⁹ 521 U.S. at 868..

Court declared in an opinion written by Justice Scalia: “whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”¹¹⁰ Lower courts have consistently held that *Tornillo* protects the “the exercise of editorial control and judgment” by websites.¹¹¹

The *Turner* Court also referenced *Associated Press*, where it declared: “The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”¹¹² Again, *Associated Press* involved purely anti-competitive business practices, not editorial judgments (and thus rational basis review). When the Court said that “[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity,”¹¹³ the key words were “combination” and “restrain trade”: the First Amendment does not protect a local newspaper excluding rivals from a cartel because “[m]ember publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want.”¹¹⁴ There is a valid governmental interest in policing business practices in that market, but that interest in no way justifies interfering with editorial judgments, as *Tornillo* makes abundantly clear. The Court has thus interpreted *Associated Press* not to uphold regulations that level the playing field for speech, but to strike them down.

In *Buckley v. Valeo*, still the Court’s fundamental statement on campaign-finance regulation, the Court struck down limits on election-related expenditures made independently of political candidates. This limit “aimed in part at equalizing the relative ability of all voters to affect electoral outcomes.”¹¹⁵ But, explained the Court, quoting *Associated Press*, “the concept that government may restrict the speech of some elements of our society in order to enhance

¹¹⁰ *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 790 (2011) (striking down a state law restricting the purchase of violent video games).

¹¹¹ *Huber v. Biden*, No. 21-cv-06580-EMC, 2022 U.S. Dist. LEXIS 48660, at *20 (N.D. Cal. Mar. 18, 2022); *O’Handley v. Padilla*, 2022 WL 93625, at *15 (N.D. Cal. Jan. 10, 2022); *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP, 2021 U.S. Dist. LEXIS 233460 (W.D. Tex. Dec. 1, 2021); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437, 440 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).

¹¹² 326 U.S. 1 (1945).

¹¹³ *Id.* at 21.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”¹¹⁶ Citing *Tornillo*, the Court ruled that “legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.”¹¹⁷

II. Section 230

Carr’s testimony reflects a concern that social media publishers are moderating content in ways that he disapproves of, and that the courts’ applications of Section 230 are to blame. In fact, it is the First Amendment that ultimately protects content moderation decisions; Section 230 merely provides a procedural mechanism by which any publisher of user-generated content can avoid voluminous, meritless, and costly litigation based on its decision *not* to publish certain content or speakers.

CARR: When the federal government conferred special benefits on Internet companies in the 1990s...¹¹⁸

FACT: Section 230 provides broad immunity that is not industry- or business model-specific.

Again, Section 230’s protections are not “special”; they apply equally to any business with an online presence, *i.e.*, an interactive computer service (ICS),¹¹⁹ and indeed to Internet users themselves.¹²⁰ Essentially, anyone involved in publishing, retweeting, or providing access to third-party content online is protected by Section 230. President Trump himself relied upon Section 230 to have dismissed a lawsuit against him alleging that he was liable for retweeting defamatory material posted by another Twitter user.¹²¹

¹¹⁶ 424 U.S. at 48-49 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964), quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S., at 484.).

¹¹⁷ *Id.* at 50.

¹¹⁸ Carr, *supra* note 1, at 6.

¹¹⁹ 47 U.S.C. § 230(f)(2).

¹²⁰ 47 U.S.C. § 230(c)(1) (“No provider *or* user of an interactive computer service shall be held liable”) (emphasis added); *see supra* at 12-13.

¹²¹ Cristiano Lima, *Before bashing tech’s legal shield, Trump used it to defend himself in court*, POLITICO (June 4, 2020), <https://www.politico.com/news/2020/06/04/tech-legal-trump-court-301861>.

CARR: ... it did so, as Section 230 states, “to preserve the vibrant and competitive free market that presently exists.”¹²²

FACT: Section 230 fosters free speech by permitting competition *between platforms* with respect to their content policies.

Carr insinuates that Section 230 is not preserving “the vibrant and competitive free market” because tech companies are taking down content and banning users he thinks should stay up. This is precisely the kind of confusion that Rep. Cathy McMorris Rodgers (R-WA) refuted in 2019: “Section 230 is ... largely misunderstood. Congress never intended to provide immunity only to websites who are ‘neutral.’ Congress never wanted platforms to simply be neutral conduits, but in fact wanted platforms to moderate content.”¹²³ Sen. Ron Wyden (D-OR), one of Section 230’s original sponsors, confirmed this understanding: “Section 230 is not about neutrality. Period. Full stop. 230 is all about letting private companies make their own decisions to leave up some content and take other content down.”¹²⁴

Indeed, Section 230’s purpose was not to foster free speech and competition by limiting what rules interactive computer services may set for their own platforms. Instead, Section 230 aimed to allow ICS providers to compete by offering different types of communities with different content moderation practices without fear of potential liability. Section 230 would foster, and has fostered, free speech online by making the publishing of user-generated content feasible in the first place.

¹²² Carr, *supra* note 1, at 6.

¹²³ Remarks of Cathy McMorris Rodgers, House Energy & Commerce Committee, Hearing on “Fostering a Healthier Internet to Protect Consumers,” (Oct. 16, 2019), <https://youtu.be/DaACbUEenZo?t=1430>.

¹²⁴ Emily Stewart, *Ron Wyden Wrote The Law That Built The Internet. He Still Stands By it – And Everything It’s Brought With It*, Vox (May 16, 2019, 9:50 AM), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality>.

CARR: as Justice Thomas has made clear, courts have construed Section 230 broadly to confer sweeping immunity on some of the largest companies in the world that is found nowhere in the text of the statute. They have done so in a way that nullifies the limits Congress placed on the types of actions that Internet companies can take while continuing to benefit from Section 230. Congress should address this by ensuring that Internet companies no longer have carte blanche to censor speech while maintaining their Section 230 protections.¹²⁵

FACT: Section 230 is working precisely as intended, by providing comprehensive protection against lawsuits that would inhibit companies from setting and enforcing their own content policies.

Carr’s testimony belies a mistaken belief that Congress intended Section 230 to limit protection of content moderation. The opposite is true. As discussed above, the fundamental purpose of the law was to remove barriers that might keep providers from establishing content policies and enforcing them for fear of ruinous litigation. Congress chose to do so by offering comprehensive protection to cover as much moderation activity as possible.

Section 230 supplies effectively two kinds of benefits. First, it provides immunity for publishing (purely) third-party content. Paragraph (c)(1) superseded the common law as developed by courts in the early 1990s, under which websites could have been held liable for unlawful content created by third parties either because they attempted to moderate it¹²⁶ or because they should have known that the content was unlawful.¹²⁷ Both of these scenarios created a version of the “Moderator’s Dilemma,” in which websites have a perverse incentive to avoid content moderation, monitoring for unlawful content, or even making it easy for users to flag unlawful content—because doing so would increase their liability.

Second, Section 230 also provides immunity for content moderation. Section 230(c)(2)(A) explicitly covers content moderation, protecting “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable.”¹²⁸ Because 230(c)(1) does not explicitly address restriction of access to content, many commentators across the political spectrum assume that the two functions of the statute map neatly onto these two provisions, with (c)(1) protecting “hosting” (*i.e.*, publishing) and *only* (c)(2)(A) protecting moderation. In fact, (c)(1) has consistently been

¹²⁵ Carr, *supra* note 1, at 6.

¹²⁶ Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

¹²⁷ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

¹²⁸ 47 U.S.C. § 230(c)(2)(A).

interpreted to cover both. In its 1997 *Zeran* decision, the Fourth Circuit became the first appellate court to interpret Section 230(c)(1), concluding that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”¹²⁹ Subsequent courts have consistently held that 230(c)(1) protects content moderation, and nearly all content moderation cases are resolved under 230(c)(1) rather than 230(c)(2)(A). “Of the 516 content moderation decisions reviewed, only 19 of the opinions focused on Section 230(c)(2) ‘good faith’ provision.”¹³⁰

Carr invokes Justice Clarence Thomas’s concurrences in two decisions involving certiorari (whether to grant review of lower court decisions).¹³¹ Both opinions are nonbinding statements in which one of the Court’s nine justices speculates about why the Court should, in some other hypothetical future case, reinterpret Section 230’s protections for content moderation. Since neither case involved those aspects of Section 230, Thomas was improvising without the benefit of briefing as to how Section 230 protects content moderation.¹³² Carr, like Justice Thomas, believes that courts have misread the statute because their interpretation of 230(c)(1) has rendered 230(c)(2)(A) superfluous. But the courts have explained exactly how these two provisions operate differently and complement each other: 230(c)(1) protects websites only if they are not responsible, even “in part,” for the “development” of the content at issue. If, for example, they edit that content in ways that contribute to its illegality (say, deleting “not” in “John is not a murderer”), they lose their 230(c)(1) protection from suit. Because Congress aimed to remove all potential disincentives to moderate content, it included 230(c)(2)(A) as a belt-and-suspenders protection for the service’s decision to remove content even in this situation.

Thus, the two provisions serve different functions: (c)(1) protects ICS providers and users—but only insofar as they are not themselves information content providers (ICPs)—that is, not responsible, even “in part, for the creation or development of information provided

¹²⁹ *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997); *see also* *Barrett v. Rosenthal*, 146 P.3d 510, 515 (Cal. 2006).

¹³⁰ “Of these [19 decisions], the vast majority involved disputes over provider efforts to block spam.” Elizabeth Banker, *Internet Association: A Review of Section 230’s Meaning & Application Based On More Than 500 Cases* at 10, INTERNET ASSOCIATION (July 27, 2020), available at https://techfreedom.org/wp-content/uploads/2022/04/IA_Review-Of-Section-230-3.pdf.

¹³¹ *Jane Doe v. Facebook, Inc.*, 595 U. S. ___, No. 21-459 (Mar. 7, 2022) (Thomas, J., concurring in denial of certiorari) (involving liability for sex trafficking); *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring in grant of certiorari) (involving whether government-run webpages are public fora).

¹³² *See generally* Berin Szóka & Corbin Barthold, *Justice Thomas’s Misguided Concurrence on Platform Regulation*, LAWFARE (April 14, 2021), <https://www.lawfareblog.com/justice-thomass-misguided-concurrence-platform-regulation>.

through the Internet or any other interactive computer service.”¹³³ But (c)(2)(A)’s protections apply even when an ICS provider or user is responsible, at least in part, for developing the content at issue.

The critical point here is that, while Section 230 changed the baseline of common law liability for *publishing* third-party content, it did not change the baseline for *moderating* (i.e., declining to publish or withdrawing from publication) third-party content. Content moderation is governed, ultimately, by the First Amendment’s protections for the exercise of editorial discretion. Section 230 merely offers a civil procedure shortcut for those exercising that First Amendment right to resolve lawsuits about that exercise quickly and cheaply, without the expense and hassle of having to litigate difficult questions of constitutional law. Without Section 230 protections, ICS providers would face what the Ninth Circuit, in its landmark *Roommates* decision, famously called “death by ten thousand duck-bites”¹³⁴: liability at the scale of the billions of pieces of content generated by users of social media sites and other third parties every day. As that court explained, “section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”¹³⁵

In short, Congress did not “place limits” on what interactive computer services may do “while continuing to benefit from Section 230,” as Carr claims. Congress broadly immunized providers for publishing user-generated content,¹³⁶ and for performing content moderation, in order to ensure their ability to set and enforce content policies, or decline to do so, without fear of suffering financial ruin in litigation.

And yet even if Carr’s preferred interpretation of Section 230—that (c)(2)(A) alone governs liability standards for the removal of content—were adopted by the courts, his argument would still fail to produce the results he desires.

First, Section 230(c)(1) and 230(c)(2)(A) are not conditioned on one another. If, for instance, a social media company were not entitled to immunity for the removal of certain content, it would *still* be entitled to immunity against being held liable as the publisher of that content,

¹³³ 47 U.S.C. § 230(f)(3) (“The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”).

¹³⁴ Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008).

¹³⁵ *Id.*

¹³⁶ From civil liability and state criminal prosecution with respect to content they are not “responsible, in whole or in part” for creating or developing, 47 U.S.C. §§ 230(f)(2), (3), but not from federal criminal prosecution for any content, 47 U.S.C. § 230(e)(1).

thus benefitting from Section 230. Thus, even Carr’s proposed reinterpretation of Section 230 would not cause an ICS provider to lose all 230 immunity simply for moderating content.

Second, even if Section 230(c)(2)(A) supplied the sole immunity for content removal, social media platforms would still be immunized for removing content in good faith¹³⁷ that they subjectively believe to be “otherwise objectionable.” This, again, is wholly consistent with the reason for the law’s existence: to allow each service to set their own rules and enforce them according to their own judgment. These rules are inherently subjective editorial judgments. Indeed, the very categories of content prohibited in various terms of service often evade concrete definitions. What constitutes “hate speech,” for example, will vary wildly from person to person, and platform to platform. Just as the government and the courts are not empowered to determine for newspapers what is news- and print-worthy, they cannot dictate to social media platforms how they must define subjective terms and concepts contained in their terms of service, or how they must be enforced.

Thus, even if the courts applied Section 230 in the way Carr believes they ought, social media platforms would still largely retain the immunity for their subjective, editorial judgments that Section 230 was intended to protect. Carr’s argument is not for any return to the “true intent” of Section 230, which is presently working as it was intended to.¹³⁸ Rather, Carr is essentially arguing for a new law fundamentally opposed to the purpose of Section 230: one that would provide the immunity necessary to make publishing user-generated content feasible, but only if platforms publish expression that they wish not to publish or be associated with. Such a regime would not be in line with the intent of Section 230; it would eviscerate the law’s entire purpose. And far from furthering free speech and competition, it would hinder both, and pose significant First Amendment concerns.¹³⁹

¹³⁷ This would exclude anti-competitive business practices hidden behind purely pretextual editorial judgments. See Berin Szóka and Ashkhen Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, The Global Antitrust Institute Report on the Digital Economy, 1082-84 (2020).

¹³⁸ Ron Wyden, *I wrote this law to protect free speech. Now Trump wants to revoke it*, CNN BUSINESS PERSPECTIVES (June 9, 2020), available at <https://www.cnn.com/2020/06/09/perspectives/ron-wyden-section-230/index.html>.

¹³⁹ TechFreedom, Comment Letter on Petition for Rulemaking to Clarify provisions of Section 230 Of the Communications Act of 1934, 36-40 (Sep. 2, 2020) (explaining that compelling platforms to cede their right to editorial discretion to obtain Section 230 protection would impose an unconstitutional condition on their First Amendment rights).

CARR: Section 230 itself codifies “user control” as an express policy goal, and it encourages Internet platforms to provide tools that will “empower” users to engage in their own content moderation. So, as Congress takes up reforms, it should do so mindful of how we can return power to Internet users over their online experiences. One idea on this front is to empower consumers to choose their own content filters.¹⁴⁰

FACT: User control complements editorial judgment; both have a role to play.

Section 230 indeed includes the policy of “encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services. That policy preference is effectuated in Section 230(c)(2)(B), which immunizes against liability for “any action taken to enable or make available to information content providers or others the technical means to restrict access to material[.]” Accordingly, ICS providers are free to implement (and have in fact implemented) a wide variety of parental control tools, and functionality allowing users to block, hide, or report content provided by others—thus giving rather granular control to users over what they wish to see. But such control complements, rather than replaces, the constitutionally protected editorial judgments of ICS providers of what content they will or will not publish on their service.

III. Common Carriage Regulation: What Carr Is Really Talking About

In 2017 Commissioner Carr correctly refuted claims that “Title II is preventing ISPs from selling bundled or curated plans that offer access to only a portion of the Internet”; as he noted, the FCC’s 2015 Order “expressly stated that Title II allows providers to do just that.”¹⁴¹ “This is part of what I call the ‘Great Title II Headfake,’” said Carr on Twitter in 2017, “attributing to Title II things it does not do.”¹⁴² Now it is Carr who is calling for common

¹⁴⁰ Carr, *supra* note 1, at 7.

¹⁴¹ Statement of Commissioner Brendan Carr on the Circulation of a Draft Order on Restoring Internet Freedom, WC Docket No. 17-108 (Nov. 21, 2017), <https://docs.fcc.gov/public/attachments/DOC-348261A5.pdf>

¹⁴² Brendan Carr (@BrendanCarrFCC), TWITTER (May 9, 2020, 12:17 PM) <https://twitter.com/BrendanCarrFCC/status/1259170601585033217>; *see also* Brendan Carr (@BrendanCarrFCC), TWITTER (Dec. 10, 2017, 10:14 AM), <https://twitter.com/brendancarrfcc/status/939890960997154817>.

carriage regulation to be imposed on the Internet, and it is Carr who is attributing to such regulation things it does not—indeed, constitutionally cannot—do.

Common carriage regulation applies to transportation of physical goods or, in communications services, to “transmission.” The FCC has long distinguished between “basic” services, which simply *carry* data along, and “enhanced” services, which *process* data in some way.¹⁴³ Under the FCC’s longstanding *Computer Inquiries*, any service that offers more than “pure transmission capability” was an “enhanced” service.¹⁴⁴ Congress codified this distinction in the 1996 Act’s bifurcation between “telecommunications” (“basic”) common carrier services and “information” (“enhanced”) non-common carrier services.¹⁴⁵ As early as 2004, the FCC recognized that services and applications that use Internet Protocol are information services; rather than providing transmission services to their users, users “‘bring their own broadband’ transmission to interact with the ... server” used to provide such services.¹⁴⁶ Social media clearly meet the statutory definition of information services: micro-blogging, photo-sharing, video-streaming, group chats, newsfeeds, and other social media all extensively “transform” and “process” information supplied by users.¹⁴⁷ Information services are, by definition, not common carriers.¹⁴⁸ Moreover, while mere transformation and processing of information suffice to qualify something as information service, social media publishers do much more than offering such technological transformation of information: they exercise editorial judgment protected by the First Amendment. Such “curation,” as Carr himself noted in the broadband context, is antithetical to common carriage.

Even when it does apply, common carriage regulation does not do what Carr wants. Even common carriers have never been compelled to host all comers. “An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons[.]”¹⁴⁹ “If the guest after being received misconducts himself so as to annoy the other guests, he may for that cause be ejected from the inn,” as a preeminent 1911 treatise on common carriage

¹⁴³ See, e.g., *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 420, ¶ 97 (1980).

¹⁴⁴ *Id.*

¹⁴⁵ 47 U.S.C. §§ 153(24), (53).

¹⁴⁶ Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, ¶ 6 (Feb. 19, 2004), <https://docs.fcc.gov/public/attachments/FCC-04-27A1.pdf>.

¹⁴⁷ 47 U.S.C. § 153(24).

¹⁴⁸ See *Verizon v. FCC*, 740 F.3d 623, 629-30, 650 (D.C. Cir. 2014).

¹⁴⁹ *Lombard v. Louisiana*, 373 U.S. 267, 280 (1963) (Douglas, J., concurring) (citing Bruce Wyman, *Public Service Corporations* (1911), <https://bit.ly/3wb5c84>).

explained.¹⁵⁰ Likewise, “[i]t is not the mere intoxication that disables the person from requiring service, it is the fact that he may be obnoxious to the others.”¹⁵¹ Common carriers, including telegraph companies, enjoyed broad discretion to “restrain” and “prevent” “profaneness, indecency, [and] other breaches of decorum in speech or behavior.”¹⁵² Thus, even if it could be applied to social media, Carr’s proposed non-discrimination regulation would not bar social media from enforcing rules against misbehavior.

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After many years of opposing common carriage regulation for the Internet’s physical infrastructure, Commissioner Carr now proposes to apply such regulations to the Internet’s applications layer. He fundamentally misrepresents how common carriage works. Including no footnotes and citing nothing at all in, his testimony avoids entirely having to grapple with *Tornillo* and *Reno* protect editorial discretion. Call it the “Great Common Carriage Headfake.” Add his many misunderstandings of Section 230 and you have a “Great Section 230 Headfake,” too.

All of this is a distraction from your Subcommittee’s oversight of the FCC, which has no authority to implement any of what Carr proposes. Carr’s complaints about the editorial judgments of private companies are a distraction from the question Congress can actually address without offending the First Amendment: Is existing law adequate to protect consumers and competition from the *business practices* of tech companies? If not, how should existing law be changed to address problems that can be measured in some objectively verifiable way? We stand ready to assist your committee with these important questions.

Sincerely,

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¹⁵⁰ Wyman § 630.

¹⁵¹ *Id.* § 632.

¹⁵² *Id.* § 644. Common carriers were not even “bound to wait until some act of violence, profaneness or other misconduct had been committed” before expelling those whom they suspected to be “evil-disposed persons.” *Id.* In general, the “principle of nondiscrimination does not preclude distinctions based on reasonable business classifications.” *Carlin Commc’ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1293 (9th Cir. 1987). Thus, a telephone company could refuse to carry all price advertising in its yellow pages directory (a common carrier service) even though this was an “explicit content-based restriction.” *Id.* True, there were limits, a telegraph company that refused to carry an “equivocal message”—one whose offensiveness was debatable—did so “at its peril.” Wyman § 632. Although a telephone company could “cut off” a “habitually profane” subscriber, it had to show some tolerance to someone who “desisted from objectionable language upon complaint being made to him.” *Id.* § 632.