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March 13, 2023

Representative Clark Boyd
425 Rep. John Lewis Way N.
Suite 528 Cordell Hull Bldg.
Nashville, TN 37243

Re: House Bill 682

Dear Chair Boyd:

TechFreedom is a nonpartisan, nonprofit organization devoted to technology law and policy, the protection of civil liberties in the digital age, and the preservation of innovation that drives technological advancement to the benefit of society.

We write to submit testimony in advance of the House Commerce Committee, Business & Utilities Subcommittee's March 14, 2023 hearing regarding HB 682. This bill attempts to do precisely what the U.S. Court of Appeals for the Eleventh Circuit ruled that Florida cannot do: violate social media platforms' First Amendment right to determine what content to publish under the guise of common carrier regulation. Like Florida's law, HB 682 will ultimately fail—leaving Tennessee taxpayers to foot the bill for expensive and time-consuming litigation over an unconstitutional law.

As explained in the attached materials, TechFreedom has been a leading voice in explaining why social media platforms cannot be regulated as common carriers. Common carriage is not a mere legal category to be applied when legislators find it convenient. The essence of a common carrier is that it offers the transportation of people or commodities to the public, on indiscriminate terms. While the telegraph and telephone may be said to merely transport (usually private) conversations, the same cannot be said for social media.

The core aspect of a social media platform's business is *not* transportation, and social media platforms are not simply passive conduits traversing the digital road. Rather, platforms offer a differentiated array of forms of public-facing communication, including microblogs, photo sharing services, video-sharing platforms, and audio chatrooms. Thus, social media platforms are in fact modes of expression, for both the speaker *and* the platform, that enable the *broadcasting* of ideas and viewpoints—implicating a broader range of First Amendment concerns. Virtually by definition, such public communication is *not* common carriage.

Indeed, Congress considered, and rejected, proposals to make broadcasters common carriers in the Radio Act of 1927. The Communications Act of 1934 makes this explicit.

Nor do social media platforms offer any of their services indiscriminately—an essential feature of a common carrier. If an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing *en banc*). Every platform engages in editorial intervention based on their terms of service and content standards. Indeed, they are expected to do just that—by users, advertisers, media, and civil rights groups. Tennessee may not substitute its judgment about what a social media platform's rules *should* be in place of the terms of use that the platform has established.

This bill would do just that, forcing platforms to publish content that they wish not to publish, infringing on their First Amendment rights on the justification that social media platforms are "important" and have purported outsized market power—despite the bill applying to *all* platforms regardless of size or market share. But even Justice Thomas—perhaps the common carrier theory's most prominent champion—has conceded that a "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'" *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

Nor can allegations of market power suffice to justify a legislature's intrusion on the First Amendment rights of platforms. In *Miami Herald v. Tornillo*, 418 U.S. 241 (1971), the Supreme Court accepted that the newspaper held near-monopoly control over local news. Yet it still held unconstitutional a Florida law requiring newspapers to publish political candidates' replies to unfavorable coverage. And in any event, allegations of social media platform "control" over speech are overstated at best, wholly unfounded at worst. The Internet is not "a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Even the largest social media websites are just a piece of that "relatively unlimited" world of "communication."

"The right to speak and the right to refrain from speaking are complimentary components of the broader concept of 'individual freedom of mind,'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, under the First Amendment, "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The First Amendment protects the platform and its users alike from intrusion by the state, and the Tennessee legislature cannot evade its strictures simply by waving a magic wand and uttering the incantation of "common carriage."

For a more detailed discussion of these important constitutional principles please see the attached materials. We would welcome the opportunity to discuss these issues with you further.

Sincerely,

Ari Cohn
Free Speech Counsel
TechFreedom

Attachments

I. Selected Commentary on Social Media and Common Carriage

A. Corbin Barthold, *Social Media and Common Carriage: Lessons from the Florida Litigation Over Florida's SB 7072* (Washington Legal Foundation Legal Backgrounder, September 23, 2021)

B. Berin Szóka and Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation* (Lawfare, April 14, 2021)

C. Berin Szóka and Corbin Barthold, *No, Florida Can't Regulate Online Speech* (Lawfare, March 12, 2021)

D. Berin Szóka and Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment* (Lawfare, February 3, 2021)

II. Amicus Brief of TechFreedom in *NetChoice v. Moody* (U.S. Court of Appeals for the Eleventh Circuit)

III. Amicus Brief of TechFreedom in *NetChoice v. Paxton* (U.S. Court of Appeals for the Fifth Circuit)

Selected Commentary on Social Media and Common Carriage

Legal Backgrounder

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Social Media And Common Carriage: Lessons From The Litigation Over Florida's SB 7072

by Corbin K. Barthold

In April, Justice Clarence Thomas, writing for himself in an otherwise unrelated case, speculated about whether large social media websites should be treated as common carriers.[1] The following month, Florida Governor Ron DeSantis signed into law SB 7072, a sweeping set of restrictions on how the companies that run such websites shall moderate what is said on them.[2] SB 7072 forces the likes of Facebook and Twitter to host various categories of speech against their will. Florida may do this, SB 7072 says, because "social media platforms" may "be treated similarly to common carriers."

SB 7072 was bound to get challenged in court, and that litigation, in turn, was bound to test the common carriage theory put forth by Justice Thomas. So it has come to pass. Two groups of internet companies promptly sued, a judge issued an order preliminarily enjoining most of the law, and Florida appealed. Both the judicial opinion,[3] written by federal District Judge Robert Hinkle, and Florida's opening brief on appeal,[4] filed earlier this month in the U.S. Court of Appeals for the Eleventh Circuit, address whether it makes sense to treat social media as common carriage.

What can be learned from these discussions of the common carrier theory? Judge Hinkle concludes that social media websites are *somewhat* like common carriers, but ultimately more like traditional speakers fully protected against government-compelled speech (hence the preliminary injunction). Florida, naturally, argues the common carrier theory to the hilt, relying heavily on Justice Thomas's work along the way. Neither the judge nor the state depicts common carriage in a way that's at once accurate, useful, and convincing. Identifying the holes in their thinking returns us to a conclusion that would, in a less anxious time, be obvious to all. Websites—even large ones that host the speech of others—are engaged in expressive conduct protected by the First Amendment.

Judge Hinkle's Good (But Flawed) Opinion. Judge Hinkle reached the right conclusion—SB 7072 violates the First Amendment. Moreover, his opinion makes a number of astute, laudable, and impeccably correct points. Here are a few:

- "The State has asserted it is on the side of the First Amendment; the [internet companies] are not. It is perhaps a nice sound bite. But the assertion is wholly at odds with accepted constitutional principles."
- "The internet provides a greater opportunity for individuals to publish their views … than

[1] *See* Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, Lawfare, https://bit.ly/3nVVOUN (Apr. 14, 2021).
[2] *See* Corbin Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*, Lawfare, https://bit.ly/39oE9fY (Mar. 12, 2021).
[3] *NetChoice, LLC v. Moody*, No. 4:21-cv-220, Dkt. 113 (N.D. Fla., June 30, 2021), https://bit.ly/3kqQCWF.
[4] Opening Brief of Appellants, *NetChoice, LLC v. Attorney General, State of Florida*, No. 21-12355 (11th Cir., Sep. 7, 2021), https://bit.ly/3lEBW5O.

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existed before the internet arrived."

- "The [internet companies] assert, … with substantial factual support, that the actual motivation for this legislation was hostility to [the largest social media websites'] perceived liberal viewpoint."
- "Leveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest."
- SB 7072 "comes nowhere close" to passing First Amendment scrutiny.

When it came to common carriage, however, Judge Hinkle hedged. The parties had presented him five Supreme Court decisions to guide his analysis. Three of those decisions came from the internet companies:

1. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), strikes down a Florida law that required a newspaper to print a political candidate's reply to the newspaper's unfavorable coverage.
2. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), holds that a private parade has a First Amendment right to exclude some groups from participating.
3. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), blocks a state from compelling a public utility to include certain disclosures in its billing envelopes.

The upshot of these decisions is that (as *Hurley* puts it) "a speaker has the autonomy," under the First Amendment, "to choose the content of his own message." This is, at bottom, a right (in *Miami Herald*'s words) to "editorial control and judgment" over the speech one hosts.

The two decisions Florida raised are:

4. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), which upholds a law requiring law schools, on pain of losing federal funding, to host military recruiters.
5. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which requires a shopping center, in obedience to the California Constitution, to let students protest on its private property.

These cases show that one speaker can sometimes be required to host another speaker, if (in *Rumsfeld*'s words) doing so does not "interfer[e]" with the host speaker's "desired message."

After comparing, on the one side, *Miami Herald*, *Hurley*, and *PG&E*, and, on the other, *Rumsfeld* and *PruneYard*, Judge Hinkle concluded that social media websites fall "in the middle" between being "like any other speaker" and "like common carriers." In reaching this conclusion, however, Judge Hinkle focused on whether such websites "use editorial judgment" in "the same way" as the entities at issue in those cases. That's not the right question.

Similarity to the precise kind of curation or editing done by the entities addressed in *Miami Herald*, *Hurley*, and *PG&E* does not inform whether social media has a First Amendment right to editorial control. We *already know* that social media has that right. We know it because *Reno v. ACLU*, 521 U.S. 844 (1997), tells us so. "[O]ur cases," *Reno* says, "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to the internet. As far as the First Amendment (and binding Supreme Court precedent) is concerned, edge providers on the internet are, in fact, "like any other speaker."

Judge Hinkle concluded that, because social media websites at least act *more* like the entities in *Miami Herald*, *Hurley*, and *PG&E* than like the entities in *Rumsfeld* and *PruneYard*, SB 7072 is "subject to First Amendment scrutiny." He then proceeded to enjoin most of SB 7072 for being blatantly content- and viewpoint-based and failing to overcome strict scrutiny. Judge Hinkle was right that SB 7072 is egregiously discriminatory, and he was right to enjoin the government from enforcing it. Even so, he missed an entire other avenue by which SB 7072 violates the First Amendment. What *Miami Herald*, *Hurley*, and *PG&E* establish is not simply that a law compelling social media companies to host certain speech is "subject to First Amendment scrutiny," but that such a law presumptively *violates* the First Amendment by forcing those companies to "alter the expressive content" (as

Hurley says) of their websites.

Judge Hinkle thought it important that much of the content on a social media website is supposedly "invisible to the provider." Given that his entire exercise in comparing "editing" by social media with "editing" under *Miami Herald*, etc., was unnecessary, however, it should come as no surprise that his "visibility" distinction, raised as part of that unnecessary exercise, is irrelevant and illusory. Indeed, Judge Hinkle cut from whole cloth the proposition that content "visibility" affects an entity's right to editorial control.

What's more, the proposition is perverse. The more material a website blocks, it suggests, the stronger the site's First Amendment protection becomes. The First Amendment contains no such "use it or lose it" trapdoor. "In spite of excluding some applicants," the parade in *Hurley* was "rather lenient in admitting participants." But it did not "forfeit constitutional protection simply by combining multifarious voices."

Finally, the proposition is simply wrong. A large social media website's first round of editorial control might be wielded via algorithm; the content at issue is no less "visible" to the website (nor the website's editorial choices less deserving of First Amendment protection) for that. And content is certainly not "invisible" after it's been posted. Material that, once published, is reported, and found to be objectionable, is regularly labeled, answered, de-amplified, downgraded, hidden, blocked, or deleted.[5] Judge Hinkle never explained why, under the First Amendment, the timing of these varied displays of editorial control—their being *ex post* as opposed to *ex ante*—should matter. As anyone will understand after listening to a few hours of talk radio—in which the station lightly "screens" calls in advance, yet retains the (much needed) right to cut off callers at will—it does not.

Florida's Bad Brief. If Judge Hinkle's intellectual flirtation with common carriage is a flaw in an otherwise shining opinion, Florida's treatment of the topic is a rotten egg in a nest of fallacies. For example:

- Florida asserts that social media websites must present a "unified speech product" to enjoy First Amendment protection, a claim made in naked defiance of *Hurley* and its "multifarious" parade.
- Florida seems to believe that advertisers, civil rights groups, the (old school) media, and the public at large will stop holding social media websites responsible for the speech they host if the sites simply "speak on their own behalf"—presumably more than they already do—and "make clear their own views." This claim is naïve at best.
- Florida says that "systematic examinations" reveal instances in which websites "apply their content standards differently" to "similarly situated," but politically distinct, users. Note that it's the "examination," rather than the supposed bias, that claims to be "systematic." In any event, one can only marvel at Florida's sangfroid, as it announces that it has surmounted the numberless fine distinctions and shades of context that bedevil even basic content moderation.[6]

This much can be said for Florida: whereas before the trial court, it pressed Judge Hinkle to consider common carriage through a lens of strained analogies—law schools (*FAIR*) and shopping malls (*PruneYard*), after all, are not literally common carriers—on appeal it turns to factors that are (for better or worse) widely considered traditional indicia of common carriage. There is no straightforward and widely accepted definition, in the courts or elsewhere, of what common carriage is. Regardless, tacking the discussion toward these tokens of common carriage brings social media websites no closer to qualifying as common carriers.

Common carriers tend, Florida correctly notes, to hold themselves out as "serv[ing] the public indiscriminately." "The businesses regulated" by SB 7072, the state then adds—now going astray—"hold themselves out as platforms that all the world may join." Although it might indeed be said that the websites welcome "all the world" to *join*, whether one gets to *stay* is contingent on one's complying with the sites' terms of service. Gov. DeSantis has claimed that social media websites "evade accountability" by "claiming they're just

[5] *See* Eric Goldman, *Content Moderation Remedies*, MICH. TECH. L. REV. (forthcoming 2021), https://bit.ly/3zkMvja.

[6] *See* Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, Techdirt, https://bit.ly/3u3Oesc (Nov. 20, 2019).

neutral platforms." Actually, these websites are by no means "neutral" about violence, harassment, and hate speech, all of which are widely banned.[7]

Even if the websites *did* hold themselves out as serving the public indiscriminately (they don't), the "holding out" theory of common carriage is conspicuously hollow. As Professor Christopher Yoo observes, a "holding out" standard is easy to evade.[8] Say SB 7072 went into effect, and the websites responded by tightening their terms of service further, thereby making clear(er) that they do not serve the public at large. What then? Rather than admit how badly its law had backfired in its attempt to force the websites to host unwanted speech, Florida would probably declare that the websites are common carriers because the state has *ordered* them to serve the public at large. Such a declaration would confirm that the "holding out" theory is empty at best, and circular at worst.

Florida suggests that social media websites may be treated as common carriers because they are "clothed" with "a *jus publicum*." Unsurprisingly, it doesn't press the point. The Supreme Court has said that whether a business serves a "public interest" is "an unsatisfactory test of the constitutionality of legislation directed at [the business's] practices or prices."[9] Even Justice Thomas concedes that a "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'"

More heavily does Florida lean on a claim that social media websites can be treated as common carriers because of their (purported) market power and (supposed) ability to control others' speech. The first problem on this front is the brute legal fact that an entity does not forfeit its constitutional rights by succeeding in the market. The Supreme Court accepted that the Miami Herald enjoyed near-monopoly control over local news; yet the newspaper retained its First Amendment right to exercise editorial control and judgment as it saw fit.

This is not to say that media firms, social or otherwise, are above the antitrust laws. A newspaper that uses its market power to inflict *economic* pain on a rival—one that, say, convinces advertisers to boycott, and thereby bankrupt, a local radio station—is inviting antitrust liability for its business practices.[10] It *is* to say, however, that the right to reject speech for *expressive* reasons travels with a company, like a shell on a turtle, wherever the company goes—even if the company, like Yertle, is king of the pond.[11]

If that were all there is to say about social media, monopoly, and free speech, SB 7072's supporters could be forgiven for some griping about the demise of their unconstitutional law (though fall it still would). But the reality is that the social media market is as lively as ever. It continues to offer a wide array of useful, differentiated, and rapidly evolving avenues of expression and communication. If you're convinced that "Big Tech" is "out to get" Republicans, you can do your blogging on Substack, your posting on Parler or Gab, your messaging on Telegram or Discord, and your video watching and sharing on Rumble. And anyone who claims, as Florida does, that network effects will ultimately thwart this competition must grapple with the astonishing rise of TikTok.

As for the major players' alleged "control" over speech, Facebook and Twitter are not, as Florida would have it, "like telegraph and telephone lines of the past." The internet, *Reno v. ACLU* explains, is not "a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." Even the largest social media websites are just a piece of that "relatively unlimited" world of "communication." As a (conservative) commentator, Charles C.W. Cooke, recently put it, social media websites are "equivalent not to the telegraph *line*," but to a few "of the telegraph line's many *customers*."[12] They are just a handful of "website[s] among billions."

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[7] *See*, *e.g.*, Twitter, *The Twitter Rules*, https://bit.ly/3cpc75S (2021); Facebook, *Community Standards*, https://bit.ly/3g2IUzX (2021); Snap Inc., *Community Guidelines*, https://bit.ly/3w5A1Li (2021).

[8] Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. OF FREE SPEECH LAW 463, 475 (2021), https://bit.ly/3nRvues.

[9] *Nebbia v. New York*, 291 U.S. 502, 536 (1934).

[10] *See* Berin Szóka & Ashkhen Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, Global Antitrust Institute Report on the Digital Economy at 1081-82 (2020), https://bit.ly/39nrMAI.

[11] *See* Dr. Seuss, *Yertle the Turtle and Other Stories* (1958).

[12] Charles C.W. Cooke, *No, Big Tech Firms Are Not Common Carriers*, Nat'l Rev. Online, https://bit.ly/3hQMYDQ (Aug. 2, 2021).

The receipt of special privileges from the government can nudge a business toward common carrier status. Florida claims that Section 230 is such a privilege, but it is not. "Section 230 helped clear the path for the development of [social media]," Florida reasons, "as the government did generations ago when it used eminent domain to help establish railroads and telegraphs." True enough, businesses that employed property acquired through eminent domain sometimes had to operate as common carriers. It does not follow that Section 230, which broadly protects *all* websites for hosting speech that originates with others, creates a similar *quid pro quo* obligation. There are several problems with the comparison:

- Section 230 was not a gift to "Big Tech" (or any other select group). It applies to every internet website and service. If Section 230 doesn't turn a blog (or Yelp, or the *Wall Street Journal*'s comments sections, or an individual social media account) into a common carrier, it's unclear why it should turn Twitter or Facebook into one.
- Section 230 simply ensures that the *initial speaker* is the one liable for speech that causes legally actionable harm. It is not a "privilege" akin to when the government hands a business real property for exclusive use as a railroad or a telegraph line.
- Far from being a sign that the government wants social media websites to act as *common carriers*, Section 230 is a sign that it wants them to act as discerning *editors*. Section 230 ensures that a website can curate and edit content without (in most cases) worrying that doing so will trigger liability.

If the *federally* enacted Section 230 is the *quid*, by the way, why should a *state* government get to impose the *quo*? The history of common carriage in the United States, going back to the Interstate Commerce Act of 1887, is one of aiding *interstate* commerce by setting and enforcing *national* standards. Precisely because they were regulated as common carriers, telegraph companies were not subject to regulation by the states.[13] Even if Section 230 could serve as the basis for common carriage rules, it couldn't serve as the basis for common carriage rules imposed *by Florida*.

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So what have we learned? We've seen that various arguments in favor of the common carrier theory don't work. We've seen that the orthodox view, under which social media websites enjoy a First Amendment right of editorial control, remains sturdy and sound.

At the outset of his opinion, Judge Hinkle noted that SB 7072 "compels [social media] providers to host speech that violates their standards—speech they otherwise would not host." We can be confident that this is, and will remain, a violation of the First Amendment.

[13] *See Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919).

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CONTENT MODERATION

Justice Thomas's Misguided Concurrence on Platform Regulation

By **Berin Szóka**, **Corbin Barthold** Wednesday, April 14, 2021, 10:30 AM

After months of delay, on April 5 the Supreme Court finally granted certiorari and ruled in *Biden v. Knight*—the case, renamed after President Biden took office, concerning whether the First Amendment prevented then-President Trump from blocking his critics on Twitter. The justices vacated the ruling by the U.S. Court of Appeals for the Second Circuit and instructed the lower court to dismiss the case as moot.

That could have been that. But Justice Clarence Thomas issued a concurrence in the case that could have implications well beyond the Twitter accounts of politicians. The justice's speculations on the possibilities for regulating social media platforms are already changing the tone of the debate on the political right, where commentators have pointed to unsubstantiated claims of political bias by social media platforms in order to push for greater regulation. Thomas's concurrence is just a nonbinding statement, issued without briefing, in which one of the court's nine justices speculates about what legal theories might justify curtailing social media websites' First Amendment rights—but conservatives are celebrating it as a "roadmap" for "reining in the social media giants."

It is no such thing. Thomas raises three questions about the legal status of social media websites. First, are they de facto state actors subject to First Amendment restrictions? Second, might they be compelled, as common carriers, to carry speech against their will? And third, might they be barred, as public accomodations, from "discriminating" against certain content or viewpoints? In an effort to promote the idea that the sites' right to exclude speech might be permissibly curtailed, Thomas treats these questions as though they are unexplored, unsettled, even wide open. As we will explain, however, the answer to all three questions is no.

"Applying old doctrines to new digital platforms is," Thomas submits, "rarely straightforward." Yet in the case before him, it really was. When the government opens a space to free expression, it creates a "designated public forum" in which it may not discriminate based on content or viewpoint. At issue in the case was whether Trump, by using his Twitter account for government business, leaving the account open to replies, and then blocking certain users, had discriminated among viewpoints in a designated public forum. The Second Circuit reached the conclusion that Trump had done so and that the First Amendment barred him from blocking the individual plaintiffs in the case.

While the government's petition for certiorari was pending, the parties agreed that the case was moot—though they disagreed about why. The government argued that the mootness arose from Trump's ceasing to be president. The respondents contended that it arose when Twitter suspended Trump's account following the Jan. 6 riot.

In Thomas's view, the suspension of Trump's account informs the merits of the case. "It seems rather odd," he proposes, "to say that something is a government forum when a private company has unrestricted authority to do away with it." But it's actually not odd at all. Suppose a mayor regularly offered commentary on his administration at events, open to the general public, held at a large conference room at a local Hilton. The room would constitute a designated public forum, yet Hilton, a "private company," would still retain "unrestricted authority to do away" with that forum. If the mayor used the room to incite a riot, for example, Hilton would have every right to kick him out.

Thomas seems to think that Twitter is not like the Hilton because "digital platforms" are "highly concentrated" and have "enormous control over speech." Both propositions are dubious. On the one hand, a mayor who got himself booted by Hilton, Marriott and Hyatt hotels might find himself quickly running out of large conference rooms in his city. On the other, Trump can easily speak, and attract widespread attention for his speech, from an alternative social media website, a new network of his own, or even his own personal website.

The key question in the case at hand was whether the "interactive space" in Trump's Twitter account—where an unblocked user can respond to his tweets—was a designated public forum. As the Second Circuit explained, the "space" clearly met that standard: it was "intentionally opened for public discussion when [Trump], upon assuming office, repeatedly used [his account] as an official vehicle for governance and made its interactive features accessible to the public without limitation." But Thomas focuses on an entirely distinct question in discussing Twitter and public-forum doctrine: whether the *whole* of Twitter is a public forum. *That* question turns not on any action Trump took in regard to his account, but on the very different issue of whether Twitter itself is a de facto state actor.

Thomas acknowledges that because Twitter had "unbridled control of [Trump's] account," the First Amendment restrictions that restrain the government, in the operation of a public forum, "may not" apply to Twitter. In fact, in *Manhattan Community Access Corp. v. Halleck*—a decision Thomas joined—the Supreme Court confirmed that only the equivalent of a state actor can be deemed to operate a public forum, and that a private entity that "opens its property for speech by others is not transformed by that fact alone into a state actor."

As *Halleck* explains, "a private entity can qualify as a state actor" in only "a few limited circumstances." One is when "the private entity performs a traditional, exclusive public function"—and there is nothing either "traditionally" or "exclusively" governmental about running a social media website. Another circumstance is "when the government compels the private entity to take a particular action." Thomas speculates that "plaintiffs might have colorable claims against a digital platform if it took adverse action against them in response to government threats." He acknowledges, however, that "no threat is alleged here," and that it's "unclear" what sort of government threat could turn the likes of Twitter into a state actor. Thomas cites cases holding that the threat must be so coercive that the private party's action is "not voluntary" and is in effect "that of the State."

The public forum doctrine is the sole topic at issue in the case at hand. The doctrine, however, is not even the primary subject of Thomas's concurrence. Thomas devotes most of his attention to exploring two legal theories that might allow greater government control over content moderation. The first is common carriage. Riffing on a single academic article by Adam Candeub, Thomas suggests that digital media might be like toll bridges, railroads or telephone networks—which must "offer service indiscriminately and on general terms."

By contrast, newspapers actively curate content. "The presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages," the Supreme Court has said, describing its landmark decision in *Miami Herald Publishing Co. v. Tornillo*. Thus, newspapers cannot be compelled to carry speech they find objectionable. Their editorial judgments fall "squarely within the core of First Amendment security," wrote the court. The same goes for social media, which actively exercise editorial judgment in moderating content—and thus deserve the same constitutional protections as newspapers. As Justice Antonin Scalia once declared: "[T]he 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 communications appears."

On multiple levels, social media sites are more like newspapers than any of the examples Thomas cites. Unlike newspapers or social media, railroads and telephone networks hold themselves out as serving everyone equally, without editorial intervention. In 1974, the Federal Communications Commission (FCC) extended traditional common carriage regulation to nascent cellular telephony—but not to wireless "dispatch services such as those operated by police departments, fire departments, and taxicab companies, for their own purposes." The U.S. Court of Appeals for the D.C. Circuit upheld the classification of the latter as private carriage: "What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently....'" Likewise, the FCC's 1985 *Computer II* order created the distinction that still undergirds telecommunications law: Services that offer "pure transmission" are common carriers while those offering "data processing" are private carriers. The key, as Thomas explained in his 2005 *Brand X* decision, is "how the consumer *perceives* the service being offered."

Thomas argues that, even absent such perception, common carrier regulation "may be justified ... when a business, by circumstances and its nature, ... rise[s] from private to be of public concern," quoting a 1914 decision involving insurance regulation. He also cites an 1894 decision in which telegraph network operators demanded limitations on their liability as a benefit of traditional common carriage regulation. Neither case says when communications platform operators are not merely "conduits," but speakers with their own speech rights—like newspapers.

Where courts have upheld imposing common carriage burdens on communications networks under the First Amendment, it has been because consumers reasonably expected them to operate conduits. Not so for social media platforms. To understand why, consider net neutrality.

In 2015, the FCC reissued rules requiring most mass-market internet service providers (ISPs) not to block or throttle lawful internet traffic—and formally classifying them as common carriers. The D.C. Circuit upheld the order, and concurring with the court's denial of a rehearing, the two judges who wrote the panel decision explained that the order did not implicate the First Amendment because it applied only insofar as broadband providers represented to their subscribers that their service would connect to "substantially all Internet endpoints." This merely "requires ISPs to act in accordance with their customers' legitimate expectations." Conversely, the judges wrote, ISPs could easily avoid the burdens of common carriage status, and exercise their First Amendment rights: "[T]he 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.'"

Every social media service provides just that kind of filtered service, spelling out detailed terms of service that expressly reserve the right to remove content that violates those terms. Although subscribers to standard broadband service might legitimately expect to obtain access to all lawful internet content, users of a social media service cannot reasonably expect that they may use the service to say whatever they want.

Thomas cites *Turner Broadcasting v. FCC*, in which the Supreme Court upheld forced carriage under the First Amendment. In that case, the court ruled that cable companies "must carry" local broadcasters' channels for free. *Turner* seems to parallel conservatives' contemporary arguments about Big Tech: "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.... A cable operator, unlike speakers in other media, can ... silence the voice of competing speakers with a mere

flick of the switch."

But the comparison between cable companies and social media platforms doesn't hold water. Prior to the advent of direct broadcast satellite television, cable operators controlled the *only* pathway for bringing multichannel video programming services to consumers. This was thanks, in part, to exclusive local franchises granted by municipalities, which controlled access to rights of way—clear state action. Today, no platform controls the only pathway to expression, and the government confers no monopoly privileges on any particular tech service.

What's more, *Turner* is not, fundamentally, a speech case. Although the law at issue in *Turner* gave some broadcasters a right to cable carriage (and therefore favored their speech over the cable providers'), the majority nonetheless concluded that the law was not content based. The cable providers had not objected to any content or viewpoints expressed in the broadcasters' programming; rather, as the majority noted, cable operators suffered an *economic* loss from not being able to charge for the one-third or so of their channel capacity allotted to broadcasters. The majority therefore applied only *intermediate* scrutiny.

When it comes to the regulation of speech on social media, however, the presumption of content neutrality does not apply. Conservatives present their criticism of content moderation as a desire for "neutrality," but forcing platforms to carry certain content and viewpoints that they would prefer not to carry constitutes a "content preference" that would trigger strict scrutiny.

Under strict scrutiny, any "gatekeeper" power exercised by social media would be just as irrelevant as the monopoly power of local newspapers was in *Miami Herald*. Ironically, Thomas himself wanted to apply strict scrutiny in *Turner* because, as a dissent he joined put it, Congress's "interest" in platforming "diverse and antagonistic sources" was not "content-neutral." Yet a platform mandate for "diverse and antagonistic sources" is essentially what many conservatives are arguing for now. Whether "must carry" for cable was really content neutral in *Turner* was debatable—the majority saw no "subtle means of exercising a content preference"—but the agenda behind "must carry" for social media is unmistakable.

Thomas asserts, in his *Knight* concurrence, that common carriage could be imposed on social media companies "especially where a restriction would not … force the company to endorse the speech." But 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." Noting that the FCC had first instituted some form of must-carry mandate in 1966, 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." Similarly, Thomas alludes to *Pruneyard Shopping Center v. Robins*, which forced a mall to let students protest on its private property. "The views expressed by members of the public" on the mall's property, *Pruneyard* declared, "will not likely be identified with those of the owner."

Although users cannot reasonably expect social media services to operate as pure conduits, they can and *do* associate websites with the content they allow. Like newspapers, and unlike telephone networks, social media sites are increasingly held accountable for the consequences of the speech they carry. They are regularly boycotted by users—and, increasingly, by advertisers, under growing pressure from their own investors—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. 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.

Section 230 of the Communications Decency Act allows platforms to moderate what shows up on their services without fear of liability —whether they choose to leave content up or take it down. Clearly, Congress did not want social media to be forced to function as mere conduits (like telegraph and telephone networks) for the speech of others.

But Thomas makes another argument, too. "Even if digital platforms are not close enough to common carriers," he suggests, "legislatures might still be able to treat digital platforms like places of public accommodation." But in two key cases that Thomas's concurrence does not address, the Supreme Court ruled that anti-discrimination laws could not trump private entities' First Amendment rights to speak, to refrain from speaking, or to decline to associate with others' speech. The same goes for newspapers and social media companies.

In *Masterpiece Cakeshop v. Colo. Civil Rights Commission*, the Supreme Court ruled that the commission violated the First Amendment's Free Exercise Clause though its hostility toward the religious beliefs of a baker whom it sanctioned for refusing to create a custom cake for a same-sex wedding because of those beliefs. "[A]s a general matter," Thomas opined, in a concurrence, "public-accommodations laws do not target speech but instead prohibit the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." Thomas drew this language from a ruling that, in turn, invoked *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, a landmark decision barring the city of Boston from dictating which signs or messages a private organization had to allow at its St. Patrick's Day parade. Notably, Thomas cites neither *Masterpiece Cakeshop* nor *Hurley* in his *Biden v. Knight* concurrence.

Much as activists today press for more detailed social media moderation policies, LGBT rights groups had complained that the parade lacked written procedures for selecting participants, and that what procedures there were were not applied uniformly—resulting in

discrimination against LGBT groups wishing to participate in the St. Patrick's Day parade. Although the state courts accepted these objections, the Supreme Court held that in doing so, they had, in effect, improperly turned the parade sponsors' "speech itself" into a public accommodation. In excluding LGBT signs, the sponsors had decided "not to propound a particular point of view," the Supreme Court concluded, "and that choice"—whatever the sponsors' reason for it—lay "beyond the government's power to control."

After quoting *Miami Herald*'s affirmation of a newspaper's First Amendment right to compile, curate, and edit opinions as it sees fit, *Hurley* rejected the notion that a parade is "merely a conduit for the speech of participants," rather than "itself a speaker." The parade sponsors were "intimately connected with the communication advanced" in the parade. Letting the LGBT groups use the parade to "disseminat[e]" a view "contrary" to the sponsors' "own" would, the Supreme Court ruled, compromise the sponsors' First Amendment "right to autonomy over the[ir] message." Again, the same goes for social media platforms.

So which decision—*Turner* or *Hurley*—applies to social media? Are social media platforms more like cable companies, which can be compelled to carry others' speech, or more like parade sponsors, which cannot? Like the parade sponsors in *Hurley*, social media operators all refuse to carry certain content and viewpoints. The cable operators in *Turner*, by contrast, raised no such objections. They had, the record showed, "an incentive to drop local broadcasters and to favor affiliated programmers." The more "channels over which [they] exercise[d] unfettered control," therefore, the higher their profits. Their complaint turned on their bottom line; they raised no argument about their right to free expression.

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. *Halleck* expressly declined to address the constitutionality of forcing cable operators to carry objectionable content. If cable operators object to carrying, say, QAnon content, the case will be altogether different from, and harder than, *Turner*.

Much as parade organizers decide who may march, under what conditions, and in what order, social media sites algorithmically rank, order, and present a newsfeed "parade" of user-generated content. And just as organizers can exclude some would-be marchers whose views are antithetical to the message of the parade, social media moderators ban certain content, users, and groups whose views are antithetical to the message of the site.

Hurley itself raised another important distinction between parades and cable. "Unlike the programming offered on various channels by a cable network," it said, while discussing *Turner*, "the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience." Although usually composed of distinct units, *Hurley* observed, a parade is expressive of "a common theme."

Do social media sites have such a "common theme"? The platforms themselves clearly think so. Facebook sees itself as "a place for expression," one that "give[s] people a voice." Twitter, for its part, says that it aims to enable people to "participate in the public conversation freely and safely." While these "themes" might make for a dull parade, they are nonetheless the makings of a specific, curated, expressive message—a message that is destroyed if calls for violence, harassment, misinformation and the like are allowed. *Hurley* should therefore protect the right of social media to decide what messages not to associate themselves with.

These are just some of the legal questions and factual details that Thomas does not address. More questions remain, such as what role the Takings Clause might play in any legislation that follows Thomas's proposed model; indeed, the dissent Thomas joined in *Turner* specifically noted that Fifth Amendment issues would have to be addressed before cable networks could be treated as common carriers. Only when the arguments Thomas raises make their way to the Supreme Court—perhaps after a state legislature enacts the kind of law he proposes—will the justices have a complete legal and factual record on which to base sound and impartial analysis.

Correction: An earlier version of this article incorrectly attributed two quotes to the Supreme Court's decision in Miami Herald Publishing Co. v. Tornillo. *The article has been updated to reflect that the quotes were from a later decision's description of* Miami Herald.

Topics: Social Media

Tags: U.S. Supreme Court, Twitter

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FIRST AMENDMENT

No, Florida Can't Regulate Online Speech

By **Corbin Barthold**, **Berin Szóka** Friday, March 12, 2021, 11:42 AM

Republican Governor Ron DeSantis has promised that Florida will soon enact "the most ambitious reforms yet proposed" for "holding 'Big Tech' accountable." The bill would force large "social media platforms"—entities that enable users to access "a computer server, including an Internet platform and/or a social media site"—to apply their content moderation standards in a "consistent manner," to change those standards no more than once a month, and to let users turn off algorithmic promotion or post sorting. It would also block websites from moderating content posted by politicians during an election. "We're going to take aim at those companies," DeSantis says, "and pull back the veil and make sure these guys don't continue to find loopholes and gray areas to live above the law."

Although DeSantis poses as a champion of free speech, his bill would trample on private companies' First Amendment right to exercise editorial discretion. Private actors cannot be compelled either to host certain speakers, or to privilege some forms of speech over others. This is even more true of political speech, which, contrary to DeSantis's claims, the bill is likely to *suppress*. Although DeSantis frames some parts of it as a campaign finance measure, the bill does not even regulate campaign contributions. And although he frames other parts as a consumer protection measure, the bill in fact targets entities precisely because of what they choose to say (or not say). The bill is, in essence, nothing more than an attempt to impose a new Fairness Doctrine on the internet.

This content-based regulation would compel social media platforms to carry government-backed speakers and speech. This is unconstitutional, as can be seen from what happened to another bad Florida law. That one, passed in 1913, gave political candidates a right to reply to critics, free of charge, in the paper that published the criticism. In *Miami Herald Publishing Co. v. Tornillo* (1974), the Supreme Court unanimously struck the law down. "The choice of material to go into a newspaper," the court wrote, "constitute[s] the exercise of editorial control and judgment."

Only once has the Supreme Court upheld a "fairness" or "equal time" mandate on privately owned media. But that was a special case. In 1969, *Red Lion Broadcasting Co. v. FCC* upheld the Federal Communication Commission's Fairness Doctrine only because broadcast frequencies are scarce, they are owned by the public, and the government licenses their use—clear "state action."

The court has repeatedly held that digital media enjoy the same First Amendment protection as traditional media. DeSantis counters that Big Tech companies are monopolistic. The plaintiff in *Miami Herald* made a similar argument—and, indeed, many local markets really did have only a single newspaper. Yet the court ruled that no degree of monopoly power could diminish the First Amendment's protection of newspapers' editorial discretion.

Many critics of Big Tech—not only DeSantis but also politicians in other states, such as Texas, that are considering bills similar to Florida's—have used terms like "town square" and "public forum" in arguing that the First Amendment constrains, rather than protects, the editorial discretion of large websites. But social media platforms, even big ones, do not qualify as "public fora," in the technical legal sense, because they don't do anything traditionally and exclusively done by the government—like running literal town squares. "[M]erely hosting speech by others is not a traditional, exclusive public function," Justice Brett Kavanaugh wrote for the court in 2019, "and does not alone transform private entities into state actors subject to First Amendment constraints." In February 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed that YouTube is not a public forum under this definition.

No one, not even a political candidate, has a First Amendment right to force a private actor that is not a public forum (or some other form of de facto state actor) to provide a platform for speech. On the contrary, tech companies have a First Amendment right to free speech and free association—and may therefore decide whom they will and will not host.

DeSantis's bill would let users opt out of "post prioritization" (the placement of content "ahead of, below, or in a more or less prominent position than others in a newsfeed, feed, view, or search results") and "shadow banning" (measures, including ones "not readily apparent to a user," that "limit or eliminate the exposure" of a user or her content "to other users of the social media platform"). Yet these are matters of editorial discretion, as *Miami Herald* makes clear. Likewise, *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* barred the city of Boston from dictating which signs or messages a private organization had to allow at a St. Patrick's Day parade. The First Amendment rules that protect newspapers and parade organizers also protect digital media. Websites cannot be told whom to host or what to say.

The constitutional limits on compelling political speech are even stricter than those on compelling speech in general. Yet DeSantis wants to give special privileges to political candidates. He proposes to exempt them from social media websites' content moderation policies, and he wants to impose fines on websites that deplatform candidates during an election.

In short, DeSantis wants tech companies to host certain speakers and viewpoints against their will. This is unconstitutional. Consider *Washington Post v. McManus*, a 2019 U.S. Court of Appeals for the Fourth Circuit opinion by J. Harvie Wilkinson III, a prominent Reagan appointee. A Maryland law required large websites to publish and retain lists identifying who bought political ads, and stating how much they paid. A group of news websites sued.

The Maryland law raised several constitutional alarms. It was content based and, therefore, presumptively unconstitutional. Further, the law singled out specific content: political speech. Because the free flow of political ideas is crucial to self-governance, *McManus* notes, content-based regulations of such speech are especially suspect. Finally, the law compelled speech—it "force[d] elements of civil society to speak when they otherwise would have refrained." The court had no trouble finding the law unconstitutional as applied to the plaintiffs.

The constitutional problems are even bigger with DeSantis's proposed bill. The Florida proposal singles out campaign-related speech, it does so precisely because the speech is political, and it compels platforms to speak.

McManus makes two especially important points. First, when the government favors certain topics, the result is likely to be *less* speech. "Faced with th[e] headache" of regulation, wrote Wilkinson, "there is good reason to suspect many platforms would simply conclude: Why bother?" *McManus* came before the court "against a backdrop where platforms are not exactly eager to host political advertising." Twitter, Wilkinson observed, had recently banned political ads—they were just not worth the trouble. The Maryland law would have burdened such speech even further.

Likewise, here, a law that seems to promote speech, by forcing websites to give politicians certain privileges, could easily suppress speech, by convincing those websites to ban politicians altogether.

Second, *McManus* explains that the Maryland law created "a constitutional infirmity distinct from garden-variety campaign finance regulations." Placing speech burdens on intermediaries (for example, newspapers that publish ads) differs from placing them on political actors themselves. Burdening intermediaries is more likely to deter speech. Unlike political actors, "third-party platforms" are likely to "view political ads no differently than any other." "When the onus [of regulation] is placed on platforms," *McManus* concludes, "we hazard giving government the ability to accomplish indirectly via market manipulation what it cannot do through direct regulation—control the available channels for political discussion."

Notably, nothing *McManus* says hinges on an entity's "neutrality"—an important point given the repeated, though dubious, conservative claims that platforms discriminate against users on the political right. Although *McManus* refers to "neutral third-party platforms," this plainly means platforms independent of political actors themselves. "For sure," *McManus* clarifies, "platforms are obviously attentive to what their advertisers are saying; the Boston Red Sox are unlikely to accept ads from a group extolling the virtues of the New York Yankees." Likewise, Fox News is unlikely to accept ads from MSNBC (or Democrats) accusing Fox News of bias.

The point can be inverted: An entity remains "neutral," in the sense used in *McManus*, even though it bans content that affects advertisers. The Red Sox website need not host Yankees trolls whose comments antagonize other users, diminish the site's popularity and alienate sponsors. What sets third-party newspapers and platforms apart from political actors, in short, is not that they have preferences about what content they host, but that they host the content "predominant[ly] … to raise revenue."

True, *McManus* was brought by a group of newspapers, and the court declined to "expound upon the wide world of social media." It's not just the traditional media, however, that enjoys protection from content-based regulations and compelled speech. As the Supreme Court has noted repeatedly, First Amendment protections "do not vary when a new and different medium for communication appears." *McManus* concurs. "Indeed," it says, "when a private entity, *let alone* a newspaper, decides to host political speech, its First Amendment protections are at their apex" (emphasis added).

If it passes, the Florida bill will likely be challenged in court, and then promptly struck down under *Miami Herald*, *Hurley* and *McManus*. But some conservatives have turned to campaign finance law as an alternative route by which to constrain the content moderation decisions of tech platforms. Rep. Matt Gaetz raised this idea in May 2020. He filed a complaint with the Federal Election Commission (FEC), asserting that Twitter had made an "in-kind contribution to President Trump's political opponents" by attaching fact-check labels to Trump's tweets. The GOP later filed a similar complaint against Twitter, alleging that it made a contribution by suppressing a *New York Post* story about Hunter Biden. The FEC has not responded, though this is unsurprising for an agency that usually deadlocks 3-3 because of its unique partisan balance or simply delays such decisions indefinitely.

Federal law regulates the giving of "anything of value"—including "in-kind contributions"—to a candidate, by "any person for the purpose of influencing any election for Federal office." But a contribution isn't simply what a service provides on the same terms to everyone. The FEC was once asked, for instance, whether a nonpartisan politics website contributed to candidates by letting them upload videos about their policy positions. The website gave each candidate an equal opportunity to upload content; it subjected each candidate to the same content restrictions; and it sought commercial gain, rather than electoral influence. Under these conditions, the FEC advised, the website was *not* contributing to candidates by distributing their videos.

Like that politics site, social media sites have uniform terms of service. Twitter, for instance, bars hate speech, harassment, election interference and doxxing—rules Trump violated routinely. Twitter's decision to label Trump's falsehood-ridden election tweets was, if anything, special treatment: Twitter could have justified expelling Trump long before it did so. Likewise, the *New York Post*'s Hunter Biden story—which accused Joe Biden's son of arranging a meeting between Biden and a Ukrainian energy executive—violated general restrictions imposed by social media sites regarding content shared on their platforms: Twitter, for its part, objected that the article contained personal contact information and hacked material. An edge case, concededly, but a violation. Republicans are complaining, at bottom, about the platforms' having terms of use. Even biased enforcement decisions, under those terms, are protected by the First Amendment and by campaign finance law itself. But so long as the platforms seek commercial gain, offer an equal chance to use the service, and subject users to the same restrictions—as all credible evidence suggests they do—campaign finance law never enters the picture.

Even if Gaetz's charges of bias were true, campaign finance law would not apply here. Under federal law, a "news story, commentary, or editorial" distributed through a "broadcasting station, newspaper, magazine, or other periodical publication" is not a contribution under campaign finance law. This "media exemption," the FEC has made clear, applies to entities "that cover or carry news stories, commentary, and editorials on the Internet," as well as to entities that, consistent with "the advent of the Internet," post content "on a frequent, but perhaps not fixed, schedule."

To qualify for the media exemption, an entity need not be neutral. Recall that in *McManus*, the websites' intermediary status strengthened their right to avoid speech regulation. Here, similarly, the only "neutrality" that the media exemption requires is that the media entity not be "owned or controlled by a political party, political committee, or candidate." The FEC has opined, in fact, that an entity "would not lose its eligibility" for the exemption "merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocate[d] the election or defeat of a clearly identified candidate for Federal office."

Were it otherwise, CNN might have to satisfy campaign finance requirements whenever it praised or criticized a candidate. Some Democratic FEC Commissioners have indeed pushed to impose an unconstitutional "objectivity" requirement of this sort, at least for any "debate" that's "staged" between candidates. Gaetz adopts this Democratic talking point in his complaint. But an "objectivity" requirement cannot be squared with a media exemption that encourages "commentary." The exemption rightly ensures that outlets—from MSNBC to talk radio to bloggers—can give their commentary any slant they like. Indeed, a publisher can promote a book by a candidate herself, and yet be covered under the exemption.

In sum, a website that publishes regular commentary, of any bent, written by itself or by others, qualifies for the media exemption. Even a blog that publishes assorted writers, the FEC has held, is subject to the exemption. Twitter is simply a form of blog—called a "micro-blog," because of its character limits. Gaetz objects that placing fact-check labels on tweets is not a "legitimate press function." But this reads a "legitimacy" element into the media exemption that isn't there. Even if you're blogging in your garage—doing none of the due diligence that Twitter does—you're as exempt as the Wall Street Journal.

Ultimately, it's the First Amendment that constrains campaign finance law; the media exemption is merely an incomplete codification of First Amendment principles. Neither the FEC nor the states may use campaign finance law to force websites to grant special privileges to political candidates.

What DeSantis and Gaetz are really demanding is a reboot of the FCC's old Fairness Doctrine—an attempt to mandate some form of "neutrality." But *Buckley v. Valeo* (1976)—still the Court's fundamental statement on campaign finance regulation—rejects a Fairness Doctrine-style argument for "equalizing the relative ability of individuals and groups to influence the outcome of elections." "Legislative restrictions on advocacy of the election or defeat of political candidates," *Buckley* declares, "are wholly at odds with the guarantees of the First Amendment."

Finally, DeSantis's bill would also attempt to regulate platforms' terms of use. DeSantis wants more detailed content moderation standards; greater disclosure of those standards, and of a platform's grounds for moderating a given user; and a ban on "frequent" changes to terms of use.

These may seem, at first blush, not to implicate the First Amendment. But laws that single out entities engaged in First Amendment activities, the Supreme Court has repeatedly said, are subject to First Amendment scrutiny. The Florida bill will have just such a targeted effect on social media websites.

Moreover, the bill directly regulates speech. The Supreme Court has applied a lower level of scrutiny to the regulation of commercial speech—that which "does no more than propose a commercial transaction." To police traditional advertising claims or websites' terms of service, a state need not satisfy strict scrutiny, as it does when it attempts to regulate noncommercial speech. DeSantis compares his platform rules to banking privacy and disclosure requirements, which are indeed commercial speech about business practices subject to government oversight.

But consumer protection law can't be used to regulate noncommercial speech—and that's what a platform's community standards are: an inherently subjective set of limits (about, for example, what counts as "harassment"). Interfering with a website's ability to set its takedown

policies on disinformation and other abhorrent speech means forcing the site to leave such speech up, or to delay in taking it down. It means forcing the website to speak differently—a clear violation of the First Amendment.

Consider YouTube's experience. In 2018 the site decided to modify its algorithms, so that viewers of extremist content would receive recommendations for more mainstream content. Before it could proceed, the site had to make difficult judgments about how to define extremism. The separation between tolerable falsehood and dangerous misinformation is subtle and subjective. Does a video on chemtrails cross the line? A video that argues the Sandy Hook shooting never occurred?

Next, YouTube had to make quick decisions about how to respond as extremist content evolved. In early 2019, seeking to better target and demote conspiracy videos, YouTube made at least 30 incremental changes to its algorithms. And the site has had to continue making changes as new forms of misinformation pop up—the "Plandemic" video, content advocating to "Stop the Steal," and so on.

Although the Florida bill claims to seek consumer protection, it in fact strikes at free expression. To force a website to reveal more about how it moderates content, or to change its policies less often or more slowly, or to require that it be "consistent"—if such a thing is even possible—is to curtail that website's editorial discretion, in violation of the First Amendment.

The underlying point is simple: The government cannot force a speaker to explain how it decides what to say. The government can no more compel Twitter to explain or justify its decision-making about which content to carry than it could compel Fox News to explain why it books some guests and not others. These are forms of noncommercial speech that turn not on facts, but on opinions. The government simply cannot compel such speech.

Topics: Social Media, First Amendment

Tags: Content Moderation, big tech, freedom of speech

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CONTENT MODERATION

The Wall Street Journal Misreads Section 230 and the First Amendment

By **Berin Szóka**, **Ari Cohn** Wednesday, February 3, 2021, 3:43 PM

When private tech companies moderate speech online, is the government ultimately responsible for their choices? This appears to be the latest argument advanced by those criticizing Section 230 of the Telecommunications Act of 1996—sometimes known as Section 230 of the Communications Decency Act. But upon closer scrutiny, this argument breaks down completely.

In a new Wall Street Journal op-ed, Philip Hamburger argues that "the government, in working through private companies, is abridging the freedom of speech." We've long respected Hamburger, a professor at Columbia Law School, as the staunchest critic of overreach by administrative agencies. Just last year, his organization (the New Civil Liberties Alliance) and ours (TechFreedom) filed a joint amicus brief to challenge such abuse. But the path proposed in Hamburger's op-ed would lead to a regime for coercing private companies to carry speech that is hateful or even downright dangerous. The storming of the U.S. Capitol should make clear once and for all why all major tech services ban hate speech, misinformation and talk of violence: Words can have serious consequences—in this case, five deaths, in addition to two subsequent suicides by Capitol police officers.

Hamburger claims that there is "little if any federal appellate precedent upholding censorship by the big tech companies." But multiple courts have applied the First Amendment and Section 230 to protect content moderation, including against claims of unfairness or political bias. Hamburger's fundamental error is claiming that Section 230 gives websites a "license to censor with impunity." Contrary to this popular misunderstanding, it is the First Amendment—not Section 230—which enables content moderation. Since 1998, the Supreme Court has repeatedly held that digital media enjoy the First Amendment rights as newspapers. When a state tried to impose "fairness" mandates on newspapers in 1974, forcing them to carry third-party speech, no degree of alleged consolidation of "the power to inform the American people and shape public opinion" in the newspaper business could persuade the Supreme Court to uphold such mandates. The court has upheld "fairness" mandates only for one medium—broadcasting, in 1969—and only because the government licenses use of publicly owned airwaves, a form of "state action."

Websites have the same constitutional right as newspapers to choose whether or not to carry, publish or withdraw the expression of others. Section 230 did not create or modify that right. The law merely ensures that courts will quickly dismiss lawsuits that would have been dismissed anyway on First Amendment grounds—but with far less hassle, stress and expense. At the scale of the billions of pieces of content posted by users every day, that liability shield is essential to ensure that website owners aren't forced to abandon their right to moderate content by a tsunami of meritless but costly litigation.

Hamburger focuses on Section 230(c)(2)(A), which states: "No provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." But nearly all lawsuits based on content moderation are resolved under Section 230(c)(1), which protects websites and users from being held liable as the "publisher" of information provided by others. In the 1997 *Zeran* decision, the U.S. Court of Appeals for the Fourth Circuit concluded that this provision barred "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" (emphasis added).

The Trump administration argued that these courts all 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 that would apply even in this situation. Hamburger neglects all of this and never grapples with what it means for 230(c)(1) to protect websites from being "treated as the publisher" of information created by others.

Hamburger makes another crucial error: He claims Section 230 "has privatized censorship" because 230(c)(2)(A) "makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them." But in February 2020, 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.

Hamburger insists otherwise, alluding to the Supreme Court's 1946 decision in *Marsh v. Alabama*: "The First Amendment protects Americans even in privately owned public forums, such as company towns." But in 2019, Justice Brett Kavanaugh, writing for all five

conservative justices, noted that in order to be transformed into a state actor, a private entity must be performing a function that is traditionally and exclusively performed by the government: "[M]erely 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." In fact, *Marsh* has been read very narrowly by the Supreme Court, which has declined to extend its holding on multiple occasions and certainly has never applied it to any media company.

Hamburger also claims that Big Tech companies are "akin to common carriers." He's right that "the law ordinarily obliges common carriers to serve all customers on terms that are fair, reasonable and nondiscriminatory." But simply being wildly popular does not transform something into a common carrier service. Common carriage regulation protects consumers by ensuring that services that hold themselves out as serving all comers equally don't turn around and charge higher prices to certain users. Conservatives may claim that's akin to social media services saying they're politically neutral when pressed by lawmakers at hearings, but the analogy doesn't work. Every social media service makes clear up front that access to the service is contingent on complying with community standards, and the website reserves the discretion to decide how to enforce those standards—as the U.S. Court of Appeals for the Eleventh Circuit noted recently in upholding the dismissal of a lawsuit by far-right personality Laura Loomer over her Twitter ban. In other words, social media are inherently edited services.

Consider the Federal Communications Commission's 2015 Open Internet Order, which classified broadband service as a common carrier service insofar as an internet service provider (ISP) promised connectivity to "substantially all Internet endpoints." Kavanaugh, then an appellate judge, objected that this infringed the First Amendment rights of ISPs. Upholding the FCC's net neutrality rules, the U.S. Court of Appeals for the D.C. Circuit explained that the FCC's rules would 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.'" Social media services make that abundantly clear. And while consumers reasonably expect that their broadband service will connect them to all lawful content, they also know that social media sites *won't* let you post everything you want.

Hamburger is on surer footing when commenting on federalism and constitutional originalism: "[W]hen a statute regulating speech rests on the power to regulate commerce, there are constitutional dangers, and ambiguities in the statute should be read narrowly." But by now, his mistake should be obvious: Section 230 doesn't "regulat[e] speech." In fact, it does the opposite: It says the government won't get involved in online speech and won't provide a means to sue websites for their refusal to host content.

Hamburger doubles down by claiming that Section 230 allows the government to "set the censorship agenda." But neither immunity provision imposes any "agenda" at all; both leave it entirely to websites to decide what content to remove. Section 230(c)(1) does this by protecting all decisions made in the capacity of a publisher. Section 230(c)(2)(A) does this by providing an illustrative list of categories ("obscene, lewd, lascivious, filthy, excessively violent, harassing") and then adding the intentionally broad catchall: "or otherwise objectionable." Both are coextensive with the First Amendment's protection of editorial discretion.

Hamburger argues for a "narrow" reading of 230(c)(2)(A), which would exclude moderating content for any reason that does not fall into one of those categories or because of its viewpoint. He claims that this will allow state legislatures to "adopt civil-rights statutes protecting freedom of speech from the tech companies." And he reminds readers about the dangers of the government co-opting private actors to suppress free speech: "Some Southern sheriffs, long ago, used to assure Klansmen that they would face no repercussions for suppressing the speech of civil-rights marchers." This analogy fails for many reasons, especially that those sheriffs flouted laws *requiring* them to prosecute those Klansmen. That is markedly and obviously different from content moderation, which is protected by the First Amendment.

Ironically, Hamburger's proposal would require the government take the side of those spreading hate and falsehoods online. Under his "narrow" interpretation of Section 230, the law would not protect the removal of Holocaust denial, use of racial epithets or the vast expanse of speech that—while constitutionally protected—isn't anything Hamburger, or any decent person, would allow in his own living room. Nor, for example, would it protect removal of hate speech about Christians or any other religious group. Websites would bear the expense and hassle of fighting lawsuits over moderating content that did not fit squarely into the categories mentioned in 230(c)(2)(A).

Perversely, the law would favor certain kinds of content moderation decisions over others, protecting websites from lawsuits over removing pornography or profanity, but not from litigation over moderating false claims about election results or vaccines or conspiracy theories about, say, Jewish space lasers or Satanist pedophile cannibal cults. But if Hamburger's argument is that Section 230 unconstitutionally encourages private actors to do what the government could not, how does favoring moderation of some types of constitutionally protected speech over others address this complaint? This solution makes sense only if the real criticism isn't of the idea of content moderation, or its constitutionality, but rather that social media platforms aren't moderating content according to the critic's preferences.

Hamburger is a constitutional originalist, and he invokes the Framers' understandings of the First Amendment: "Originally, the Constitution's broadest protection for free expression lay in Congress's limited power." But there's nothing remotely originalist about his conclusion. His reading of Section 230 would turn "Congress shall make no law…" into a way for the government to pressure private media to carry the most odious speech imaginable.

Topics: First Amendment

Tags: Section 230, First Amendment, Content Moderation, freedom of speech

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Amicus Brief of TechFreedom in *Netchoice v. Moody*

U.S. Court of Appeals for the Eleventh Circuit

No. 21-12355

In the United States Court of Appeals
for the Eleventh Circuit

NETCHOICE LLC, et al.,

Plaintiffs-Appellees,

vs.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF APPELLEES AND AFFIRMANCE

On Appeal from the United States District Court for the Northern District of Florida, No. 4:21-cv-220

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae TechFreedom certifies under Fed. R. App. P. 26.1, that it has no parent company, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

TechFreedom states, in accord with Circuit Rule 26.1-1, that it believes the Certificates of Interested Persons in the Briefs of Defendants-Appellants and Plaintiffs-Appellees are complete.

/s/ Corbin K. Barthold

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has closely studied recent state laws that attempt to regulate social media. Its experts have written and spoken extensively on those laws' constitutional infirmities, as well as on why those infirmities cannot be fixed by a "common carriage" theory. See, e.g., Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*, Lawfare, https://bit.ly/3iBFk0h (Mar. 12, 2021) (cited in this action's complaint, Dkt 1 at 19 n.26); Corbin K. Barthold, *Social Media and Common Carriage: Lessons From the Litigation Over Florida's SB 7072*, WLF Legal Backgrounder, https://bit.ly/3FmvYzl (Sept. 24, 2021); UCLA School of Law, *A Space for Everyone? Debating Online Platforms and Common Carriage Rules*, YouTube, https://bit.ly/3Dfa3Ir (June 4, 2021) (debate between TechFreedom President Berin Szóka and

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

Professor Eugene Volokh); Berin Szóka & Corbin K. Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, Lawfare, https://bit.ly/2YxGxPo (Apr. 14, 2021); Berin Szóka & Ari Cohn, *It is Not the Government's Job to Promote 'Fairness' Online*, Salt Lake Tribune, https://bit.ly/3FjCjeR (Apr. 9, 2021); Corbin K. Barthold & Berin Szóka, *Florida's History of Challenging the First Amendment Shows DeSantis' 'Tech Transparency' Bill is Doomed*, Miami Herald, http://hrld.us/2ZPzqCf (Mar. 25, 2021).

TechFreedom submits this brief to assist the Court in understanding the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment.

SUMMARY OF ARGUMENT

Promoting SB 7072 on Twitter last May, Governor Ron DeSantis announced that "Florida's Big Tech Bill" will "level the playing field … on social media." Ron DeSantis (@GovRonDeSantis), Twitter (May 24, 2021), 8:45 AM, https://bit.ly/2ZW30qe. A month later, in the decision below, District Judge Hinkle offered the perfect response: "[L]eveling the

playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest." Dkt 13 at 27.

Under the First Amendment, "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This is, at bottom, a right to "editorial control and judgment" over the speech one hosts and disseminates. *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). See Appellees' Response Brief (ARB) 22-25 (discussing *Hurley* and *Miami Herald* in greater detail). With its carriage mandates for political candidates and "journalistic enterprises," its (impossible) "consistency" requirement, its notice and reporting rules, and more, SB 7072 roundly violates this right.

SB 7072 is, in short, a First Amendment train wreck. Hence Florida's attempt to insulate its new law from First Amendment scrutiny under the guise of "common carriage." SB 7072 §1(6); Appellants' Opening Brief (AOB) 34-39. But slapping the label "common carrier" on something doesn't make it so. And even if it did, common carriers retain their First Amendment rights, and they have much broader discretion to refuse service than SB 7072 allows for.

This brief addresses Florida's "common carrier" theory as follows:

I. Social media websites—even large ones—are nothing like common carriers. Common carriage is about (1) *carriage*, i.e., transportation, (2) of uniform *things*, i.e., people, commodities, or parcels of private information, (3) in a manner that is *common*, i.e., indiscriminate. When regulating telecommunications common carriers, the FCC has adhered to these points. Social media, meanwhile, depart from them in all pertinent respects. Social media are (1) a diverse array of differentiated media products (microblogs, videochats, photo streams, and so on), (2) typically shared as a *public*-facing *expressive* activity, (3) that are subject to extensive terms of service.

II. Contrary to Florida's claims, large social media websites display none of the indicia of traditional common carriage:

- Such sites do not serve the public "indiscriminately." Rather, they serve the public *subject* to various rules of conduct—rules that reflect the sites' normative judgments about what expression they wish to foster or are willing to tolerate.
- Even if the sites were "clothed" with a "public interest" (whatever that might mean), the Supreme Court—and at least one of the common carrier theory's most notable proponents—don't think a "public interest" test is useful for determining who can be treated as a common carrier.

- Social media websites do not possess "bottleneck" control over speech. In fact, the social media market remains highly fluid and competitive. And in any event, the concept of market power is not useful. Even an entity with substantial market power retains its First Amendment rights.
- Social media websites have not enjoyed governmental support in any special or unique sense. They certainly have not received anything akin to the public easements that gave railroads and telegraph companies *de facto* geographic monopolies.

III. Three Supreme Court cases—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)—have been cited as support for the common carrier theory. These cases show, at most, that an entity can sometimes be required to host another's speech if doing so does not "interfer[e]" with the host speaker's "desired message." *Rumsfeld*, 547 U.S. at 64. The whole point of SB 7072, by contrast, *is* to "interfere" with social media websites' "desired message." What's more, unlike the entities regulated in *PruneYard*, *Rumsfeld*, and *Turner*, social media websites function as editors, constantly making decisions about whether and how to allow, block, promote, demote,

remove, label, or otherwise respond to content. Curation and editing of expression are antithetical to the concept of common carriage.

IV. Even if social media websites *were* similar to common carriers, most, if not all, of SB 7072 would remain unconstitutional. In addition to the fact that common carriers are not stripped of their First Amendment rights, no common carrier has ever had to serve customers without regard to their behavior. Common carriers have always been entitled to refuse service, or bar entry, to anyone who misbehaves, disrupts the service, harasses other patrons, and so on. Because SB 7072 tries to force websites to serve *even* such people, it is not itself a proper common carriage regulation.

Florida's attempt to treat social media websites like common carriers is a dead end.

ARGUMENT

I. Social Media and Common Carriage Are Irreconcilable Concepts

"A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." *McCoy v. Pac. Spruce Corp.*,

1 F.2d 853, 855 (9th Cir. 1924). As its name suggests, in other words, "common carriage" is about offering, to the *public at large* and on *indiscriminate* terms, to carry generic *stuff* from point A to point B. Social media websites fulfill none of these elements.

A. Social Media Are Not "Carriage": They Are Diverse and Evolving Products

Lumber is lumber. Once it has arrived at a construction site, one two-by-four is generally as good as another. How the wood got to the site is, for purposes of the construction itself, irrelevant. Putting common carriage in its proper historical context begins with this fundamental point. The "business of common carriers" is, at its core, "the transportation of property." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406 (1914); see Interstate Commerce Act, 24 Stat. 379, 379-80 (1887) (prohibiting a "common carrier" in "the transportation of *passengers or property*" from discriminating, by price, among its similarly situated customers) (emphasis added).

True, the "transmission of intelligence" has sometimes been treated as "of cognate character" to traditional common carriage. *German Alliance*, 233 U.S. at 406-07. But that "cognate character" arose in fields, such as telegraphy and telephony, where information was treated as a commodity product to be purveyed through some sort of (typically scarce)

public thoroughfare. See *id.* at 426-27 (Lamar, J., dissenting). The key is that, like traditional common carriage, "they all ha[d] direct relation to the business or facilities of *transportation*" itself. *Id.* at 426 (emphasis added). Although it doubtless contains a message, a telegram is best thought of as a widget of private information conveyed along "public ways," *id.*, by a commodity carrier, see Mann-Elkins Act, 36 Stat. 539, 544-45 (1910) (applying the Interstate Commerce Act to telegraph and telephone companies).

Social media websites are nothing like this. They are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not transportation at all. What the platforms offer is a wide array of differentiated—and rapidly evolving—forms of public-facing communication. Twitter's main product is a microblog. Instagram is primarily a photo-sharing service. TikTok is centered around short videos. Snapchat's main feature is the evanescence of posts. Clubhouse focuses on providing oral chatrooms. Facebook embraces several of these other forms, and also fosters group pages. Far from simply transporting information from point A to point B, moreover, each of these services deploys proprietary algorithms to customize the order in which content appears on any given user's feed. When it comes to social media, Marshall McLuhan was right: the medium is the message.

It is not true, as Florida claims (AOB 36), that SB 7072 fits an established "template" for "legislative designation" of certain "internet companies" as common carriers. To the contrary, the FCC has long confirmed that "data *transport*" is the essence of telecommunications common carrier service, whereas "any offering over the telecommunications network which is more than a basic transmission service" is not. *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11513, ¶ 25 (1998) (emphasis added). Indeed, because the bar for qualifying as "more than a basic transmission service" is low, even some services that, unlike social media, really do closely resemble pure information "transport" are, nonetheless, not common carriers. Although telephony, which connects users without any intervention by the carrier, is common carriage, even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not. See *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd. 12075 (2018).

The social media market is diverse and fast-moving. Social media websites constantly create new forms of content. They compete in a market for differentiated media products. What they do *not* do is passively act as "carriers" of information.

B. Social Media Are Not "Carriage": They Are Fundamentally Expressive

Again, common carriage involves the transportation of people and commodities. Telegraphy and telephony press the boundaries of that core, transportational conception of common carriage. One message, after all, is not interchangeable with another. There is, however, a key sense in which a telegram or a telephone call is indeed just a widget of information: such communications are usually private. And being private, they are usually treated as strictly between the individual sender and recipient. Cf. 18 U.S.C. § 2511 (criminal penalties for intercepting a wire or secretly recording a call). This means that a carrier may transmit a telegram or a call while remaining indifferent to its content.

Once a "telephone company becomes a medium for public rather than private communication," however, "the fit of traditional common carrier law becomes much less snug." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987). While transmitting a private call or message can be thought of as carrying an information widget, transmitting a public-facing call or message is clearly about *broadcasting* ideas and viewpoints. *Id.* It is a mode of expression, not only by the direct speaker, but also by the purveyor of the speech. "Mass-media speech," in short, "implicates a broader range of free

speech values" than does "person-to-person" speech. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010).

This is not to say that all private communications are common carriage. As we saw above, text messaging is not. Nor would an Internet-based messaging service such as WhatsApp be. What is true, though, is that *public* communication is, virtually by definition, not common carriage. Indeed, Congress considered, and rejected, proposals to make broadcasting common carriage in the Radio Act of 1927, and it explicitly declared that broadcasting is *not* common carriage in the Communications Act of 1934. *Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 105 (1973); see 47 U.S.C. § 153(h).

As the appellees explain (ARB 22-25), two of the key precedents governing this case are *Miami Herald*, 418 U.S. 241, and *Hurley*, 515 U.S. 557. *Miami Herald* strikes down a Florida law that required a newspaper to print a political candidate's reply to the newspaper's unfavorable coverage. *Hurley* holds that a private parade may exclude some groups from participating. Like a newspaper (*Miami Herald*) or a parade (*Hurley*), a social media website presents a collection of messages to a wide audience. This public-facing expression is incompatible with—indeed, contradictory to—the concept of common carriage. Calling the

websites "common carriers" anyway doesn't make it so. The Florida legislature could not overturn *Miami Herald* or *Hurley* simply by declaring that newspapers or parades are "common carriers." The same holds true here.

"[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's [First Amendment] right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. That is the overriding principle that SB 7072 flouts. "Common carriage" is not a magic label that can make this First Amendment violation go away.

C. Social Media Are Not "Common": They Are Not Offered Indiscriminately

An edited product is, inherently, not common carriage. Although the FCC has waffled over whether most Internet service providers are common carriers, for instance, what's clear is that if an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing *en banc*). So long as it's up front about what it's doing, a provider that wants to engage in "editorial intervention"—and, thus, not common carriage—is free to do so. *Id.*

All prominent social media websites engage in such intervention. Twitter, for example, has rules that seek to "ensure all people can participate in the public conversation freely and safely." Twitter, *The Twitter Rules*, https://bit.ly/3cpc75S (last accessed Nov. 9, 2021). "Violence, harassment and other similar types of behavior discourage" such conversation, and are therefore barred by Twitter's rules. *Id*. Not surprisingly, bans on things like harassment and hate speech are common among online platforms. See Dkt 12 Ex. A ¶¶ 12-13 & n.27, Ex. C ¶ 11, Ex. D ¶¶ 8-12.

What's more, such bans have always been common. "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." Wayback Machine, *Facebook Terms of Use*, https://bit.ly/3w1gYC5 (Nov. 26, 2005). Indeed, one can go back much farther than that. As early as 1990, Prodigy, one of the first social networks, made its curation function a central part of its marketing strategy. "'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. *Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995). "'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.'" *Id*.

That social media websites engage in curation and editing should come as no surprise, given that curation and editing are a fundamental aspect of the service those platforms exist to provide. Without intermediaries, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries enable users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day." Yoo, *supra*, 78 Geo. Wash. L. Rev. at 701. Indeed, "social media" could not exist if intermediaries did not play this role. It is only because a platform engages in curation and editing that a mass of "social" media becomes navigable by the average user. More than that, such curation and editing is necessary to make social media a pleasant experience worth navigating. "[T]he editorial discretion that intermediaries exercise" enables users to avoid "unwanted speech" and "identify and access desired content." *Id*.

Florida contends (AOB 29-32) that such light editorial intervention doesn't trigger full First Amendment protection; that websites must offer a "unified speech product" to avoid state interference with its editorial discretion. Wrong. Such a rule would be perverse, rewarding websites if they engage in more of the so-called "censorship" that Florida claims to

oppose. In any case, *Hurley* granted full First Amendment protection to a parade that combined "multifarious voices" and conveyed no "particularized" message. 515 U.S. at 569-70.

Not only do platforms refuse to host content indiscriminately; they are widely expected not to do so. Although Florida won't admit it (AOB 25-26), everyone from advertisers to civil rights groups to the media holds the platforms responsible for the content they amplify, or even just host. See, e.g., Tom Maxwell, *Twitch Streamers Demand the Platform 'Do Better' at Moderating Hate Speech*, Input, https://bit.ly/ 37wIbSo (Aug. 10, 2021); Analis Bailey, *Premier League, English Soccer Announce Social Media Boycott in Response to Racist Abuse*, USA Today, https://bit.ly/3xIpfdT (Apr. 24, 2021). An underlying assumption in the current furor over the *Wall Street Journal*'s "Facebook Files" coverage is that Facebook can, and should, intervene, extensively, in its own product to ensure that it is free, so far as possible, of toxic content. See *The Facebook Files*, Wall St. J., https://on.wsj.com/3GPgzYX (last accessed Nov. 2, 2021).

II. Social Media Bear None of the Indicia of Common Carriage

Florida argues that large social media websites meet some criteria widely exhibited by common carriers of the past, such as railroad and

telegraph companies. Even if these criteria had more than limited relevance to the rights of expressive entities (they don't), social media websites meet none of the criteria at hand.

A. "Serve the Public Indiscriminately"

Common carriers, Florida correctly notes, hold themselves out as "serv[ing] the public indiscriminately." AOB 35. "The businesses regulated" by SB 7072, the state then adds—now going astray—"hold themselves out as platforms that all the world may join." *Id*. Although it might indeed be said that the websites welcome "all the world" to *join*, whether one gets to *stay* is contingent on one's complying with the sites' terms of service. Social media websites are not "indiscriminate" about hosting users who promote violence, engage in harassment, or spew hate speech. See Sec. I.C., *supra*.

Even if the websites did hold themselves out as serving the public indiscriminately (they don't), the "holding out" theory of common carriage is conspicuously hollow. A "holding out" standard is easy to evade. See Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. of Free Speech Law 463, 475 (2021). Say SB 7072 went into effect, and the websites responded by tightening their terms of service further, thereby

making even clearer that they do not serve the public at large. What then? Rather than admit how badly its law had backfired in its attempt to force the websites to host unwanted speech, Florida would probably declare that the websites are common carriers because the state has *ordered* them to serve the public at large. Such a declaration would confirm that the "holding out" theory is empty at best, and circular at worst.

B. "Clothed" With a "Public Interest"

Florida suggests that social media websites may be treated as common carriers because they are "clothed" with "a *jus publicum*." AOB 35. Unsurprisingly, it doesn't press the point. The Supreme Court has said that whether a business serves a "public interest" is "an unsatisfactory test of the constitutionality of legislation directed at [the business's] practices or prices." *Nebbia v. New York*, 291 U.S. 502, 536 (1934). Even Justice Thomas—perhaps the common carrier theory's most prominent champion—concedes that a "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'" *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

C. "Market Power"

Florida claims that large social media websites can be treated as common carriers because of their (purported) market power and (supposed) ability to control others' speech. AOB 36-38. The first problem on this front is the brute legal fact that an entity does not forfeit its constitutional rights by succeeding in the market. The Supreme Court accepted that *The Miami Herald* enjoyed near-monopoly control over local news; yet the newspaper retained its First Amendment right to exercise editorial control and judgment as it saw fit. 418 U.S. at 250-52, 256-58.

This is not to say that media firms, social or otherwise, are above the antitrust laws. A newspaper that uses its market power to inflict *economic* pain on a rival—one that, say, convinces advertisers to boycott, and thereby bankrupt, a local radio station—is inviting antitrust liability for its business practices. See *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). It *is* to say, however, that the right to reject speech for *expressive* reasons travels with a company, like a shell on a turtle, wherever the company goes—even if the company, like Yertle, is king of the pond. Cf. Dr. Seuss, *Yertle the Turtle and Other Stories* (1958).

In reality, however, the social media market is as lively as ever. It continues to offer many avenues of expression and communication. If

you're convinced (as Gov. DeSantis and SB 7072's other supporters explicitly are) that "Big Tech" is "out to get" Republicans, you can blog on Substack, post on Parler, Gettr, or Gab, message on Telegram or Discord, and watch and share videos on Rumble. And anyone who claims that network effects will ultimately thwart this competition must grapple with the astonishing rise of TikTok.

As for the major players' alleged "control" over speech, Facebook and Twitter are not, as Florida would have it, "like telegraph and telephone lines of the past." AOB 37. The Internet is not "a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Even the largest social media websites are just a piece of that "relatively unlimited" world of "communication." As one (conservative) commentator recently put it, social media websites are "equivalent not to the telegraph line," but to a few "of the telegraph line's many customers." Charles C.W. Cooke, *No, Big Tech Firms Are Not Common Carriers*, National Review Online, https://bit.ly/3hQMYDQ (Aug. 2, 2021). They are just a handful of "website[s] among billions." *Id*.

Consider an ongoing antitrust case against Facebook. Dismissing the FTC's complaint, Judge Boasberg refused "to simply nod to the conventional wisdom that Facebook is a monopolist." *FTC v. Facebook*,

1:20-cv-3590, Dkt 73 at 31 (D.D.C., June 28, 2021). The agency, the judge observed, had presented "almost nothing concrete on the key question of how much market power Facebook actually had, and still has, in a properly defined antitrust product market." *Id*. In an amended pleading, moreover, the FTC now stands its case on an utterly implausible claim that Facebook's only real competitor is Snapchat. *Id*. Dkt 82. The litigation is ongoing, and its outcome cannot be predicted. But if the FTC struggles to define a proper social-networking market (never mind show Facebook's power within that market), all the greater is the task before anyone who, like Florida, makes the even bolder claim that large social media websites wield bottleneck control over online speech.

D. "Recipients" of a "Publicly Conferred Benefit"

"Section 230 helped clear the path for the development of [social media]," Florida claims, "as the government did generations ago when it used eminent domain to help establish railroads and telegraphs." AOB 38. True enough, businesses that employ property acquired through eminent domain have sometimes had to operate as common carriers. It does not follow that Section 230, which broadly protects *all* websites for hosting speech that originates with others, creates a similar *quid pro quo* obligation. There are several problems with the comparison:

- Section 230 was not a gift to a few large social media websites (none of which existed when Section 230 was passed). It applies to every Internet website and service. See 47 U.S.C. §§ 230(c)(1), (c)(2). If Section 230 doesn't turn a blog, or Yelp, or a newspaper's comments sections, or an individual social media account, into a common carrier, it's unclear why it should turn Facebook, YouTube, or TikTok into one.
- Section 230 simply ensures that the *initial speaker* is the one liable for speech that causes legally actionable harm. See *id.* § 230(c)(1). It is not a "privilege" akin to when the government hands real property to one firm, to the exclusion of all potential competitors, for use as a railroad or a telegraph line.
- Far from being a sign that the government wants social media websites to act as common carriers, Section 230 is a sign that it wants them to act as discerning editors. Section 230 ensures that a website can "exercise" a "publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content"—without (in most cases) worrying that doing so will trigger liability. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230 does not curtail websites' First Amendment rights; it *endorses* them.

And if the *federally* enacted Section 230 is the *quid*, why should a *state* government get to impose the *quo*? The history of common carriage in the United States, going back to the Interstate Commerce Act of 1887, is one of aiding *interstate* commerce by setting and enforcing *national* standards. Precisely because they were regulated as common carriers, telegraph companies were not subject to regulation by the states. *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919). Even if Section 230 could serve as the basis for common carriage rules, it couldn't serve as the basis for common carriage rules imposed *by Florida*.

III. Supreme Court Case Law Does Not Save Florida's Common Carrier Theory

Three Supreme Court cases are sometimes cited as support for the notion that social media websites are "analogous" to common carriers. None of the three is pertinent.

A. *PruneYard Shopping Center v. Robins*

At issue in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), was whether a shopping mall could be forced, under the California Constitution, to let students protest on its private property. Yes, *PruneYard* says, it could. In so saying, however, *PruneYard* distinguishes *Miami Herald*. That case involved "an intrusion into the function of

editors," *PruneYard* notes—a "concern" that "obviously" was "not present" for the mall. *Id*. at 88. Here, by contrast, that concern obviously *is* present, as explained above. "Intru[ding]" into social media websites' "function" as "editors" is what SB 7072 is all about.

What's more, *PruneYard* announces that "the views expressed by members of the public" on the mall's property would "not likely be identified with that of the owner." *Id*. at 87. Even if that evidence-free declaration was true, at the time, of the mall (we have our doubts), it is certainly not true today of social media websites. Florida's claims to the contrary (AOB 27-29) notwithstanding, those sites *are* "identified" with the speech they host. A platform that hosts a certain speaker is widely considered to have deemed that speaker "worthy of presentation," and "quite possibly of support as well." *Hurley*, 515 U.S. at 575.

The mall also challenged the speech-hosting obligation under the Takings Clause. On its way to rejecting that challenge, *PruneYard* makes further findings pertinent to this case. The students, *PruneYard* notes, "were orderly," and the mall remained free to impose "time, place, and manner regulations" on others' speech that would "minimize any interference with its commercial functions." 447 U.S. at 83-84. This makes *PruneYard* nothing like the case here, in which Florida seeks to make websites host hostile, abusive, highly disruptive speech. In effect,

SB 7072 requires the websites to host *disorderly* conduct, and it *bars* them from imposing reasonable time, place, and manner regulations.

B. *Rumsfeld v. FAIR*

In protest of the military's "Don't ask, don't tell" policy, various law schools stopped allowing military recruiters on their campuses. Let the recruiters in, Congress responded, in a law known as the Solomon Amendment, or lose government funding. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), rejects an association's contention that the Solomon Amendment violates the First Amendment.

Distinguishing *Miami Herald* and *Hurley*, *FAIR* concludes that "accommodating the military's message d[id] not affect the law schools' speech." *Id*. at 63-64. Unlike "a parade, a newsletter, or the editorial page of a newspaper," *FAIR* explains, "a law school's decision to allow recruiters on campus is not inherently expressive." *Id*. at 64. The pertinent distinction between job-recruitment meetings, on the one hand, and parades, newsletters, and newspapers, on the other, is—even though Florida, when discussing *FAIR*, ignores it (AOB 22-23)—not hard to divine. One-on-one recruitment meetings are akin to telegraphic or telephonic communication—the passage of private information widgets—

and not at all like the public-facing expression of views undertaken by a parade, a publication, or a website.

SB 7072 requires social media to platform various speakers, and to spread and amplify, far and wide, almost anything those speakers wish to say. It thus looks nothing like the law at issue in *FAIR*, a case about direct communication between a recruiter willing to talk and a law student willing to listen. For *FAIR* to resemble this case, Congress would have had to pass a law altogether different from the Solomon Amendment. Picture a law requiring law schools to let neo-Nazis maraud their halls toting signs and bullhorns. *That* is the equivalent of what SB 7072 requires of select social media websites.

C. *Turner Broadcasting System v. FCC*

In the 1992 Cable Act, Congress imposed "so-called must-carry provisions" that "require[d] cable operators to carry the signals of a specified number of local broadcast television stations." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 630 (1994). While concluding that cable operators engage in speech protected by the First Amendment, *id.* at 636, *Turner* subjects the must-carry provisions merely to intermediate, rather than to strict, scrutiny. *Turner* is brimming, however, with distinctions that render it inapplicable to social media websites.

First, like traditional common carriers, see *German Alliance*, 233 U.S. at 426-27 (Lamar, J., dissenting), cable systems use "physical infrastructure"—"cable or optical fibers"—that require "public rights-of-way and easements." *Id.* at 627-28. This setup "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." *Id.* at 656. This means that "a cable operator, *unlike speakers in other media*," can "silence the voice of competing speakers with a mere flick of the switch." *Id.* (emphasis added). On precisely this ground, *Turner* distinguishes *Miami Herald*, notwithstanding the fact that a "daily newspaper" may "enjoy monopoly status in a given locale." *Id.* "A daily newspaper," after all, "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications." *Id.* Just the same can be said of social media websites. Whatever the level of their market control—it's not much, in our view, as we have explained—they do not, when "assert[ing] exclusive control over [their] own … copy," thereby "prevent other[s]" from "distribut[ing]" competing products "to willing recipients." *Id.*

Second, "cable personnel" generally "do not review any of the material provided by cable networks," and "cable systems have no conscious control over program services provided by others." *Id.* at 629

(quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988)). Cable operators are thus, "in essence," simply "conduit[s] for the speech of others." *Id.* They generally transmit speech "on a continuous and unedited basis to subscribers." *Id.* This makes sense, given that most broadcast television content is comparatively sanitized and, certainly when compared to the worst online speech, uncontroversial. *Turner* concludes, therefore—again while distinguishing *Miami Herald*—that "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,' and by so doing diminish the free flow of information and ideas." *Id.* at 656 (quoting *Miami Herald*, 418 U.S. at 257). This is the precise opposite of the situation with social media websites. The websites are not simply "conduits"; they are provided on a curated and edited basis, and they do sometimes take "the safe course" and "avoid controversy." Witness, for instance, Twitter's decision to stop hosting political advertisements. See *Wash. Post v. McManus*, 944 F.3d 506, 517 n.4 (4th Cir. 2019).

Third, and relatedly, *Turner* declares—again while distinguishing *Miami Herald* (and it could have added *Hurley* to boot)—that there was "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." *Id*. at 655. This, again, because of the cable operators' "long history of serving" merely "as a conduit for broadcast signals." *Id*. The cable operators did not even contest this point; they did "not suggest" that "must-carry" would "force" them "to alter their own messages to respond to the broadcast programming they [we]re required to carry." *Id*. As we've explained, the "long history" behind social media could not be more different. Naturally, given that history, the platforms vigorously contend that they would have to "respond" to certain messages they might be required "to carry."

Fourth, the central issue in *Turner* was whether the must-carry provisions were content neutral. "Broadcasters, which transmit over the airwaves, are favored," *Turner* acknowledges, "while cable programmers, which do not, are disfavored." *Id*. at 645. But this distinction, *Turner* concludes, did not make the must-carry provisions a content-based law subject to strict scrutiny. According to *Turner*, "Congress' overriding objective … was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free [broadcast] television programming." *Id*. at 646. In other words, the law was purely about "economic incentive[s]." *Id*. at 646. The cable operators, for their part, did little to argue otherwise, raising only "speculati[ve]" "hypothes[es]" about "a content-based purpose" for the law. *Id*. at 652.

Here, by contrast, SB 7072 "is riddled with [content-based] distinctions." Eric Goldman, *Florida Hits a New Censorial Low in Internet Regulation (Comments on SB 7072)*, Technology & Marketing Law Blog, https://bit.ly/2T8R5BC (June 3, 2021) (analyzing SB 7072's "many discriminatory classifications").

IV. The Burdens Imposed by SB 7072 Go Far Beyond Common Carriage

Florida's law effectively compels large social media services to host all users, however obnoxious their behavior. This is not what common carriage meant at common law. "An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons[.]" *Lombard v. Louisiana*, 373 U.S. 267, 280 (1963) (Douglas, J., concurring) (citing Bruce Wyman, *Public Service Corporations* (1911), available at https://bit.ly/3wb5c84). "It is not the mere intoxication that disables the person from requiring service; it is the fact that he may be obnoxious to the others." Wyman, *supra*, § 632. "Telegraph companies likewise need not accept obscene, blasphemous, profane or indecent messages." *Id.* § 633.

In short, common carriers enjoyed broad discretion to "restrain" and "prevent" "profaneness, indecency, [and] other breaches of decorum in speech or behavior." *Id.* § 644. They 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*.

True, there were limits. A telegraph company that refused to carry an "equivocal message"—one whose offensiveness was debatable—did so "at its peril." *Id*. § 632. Although a telephone service 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*. And regulators could (and in some areas still can) assess whether certain of a common carrier's rules and prohibitions are "just and reasonable." See, e.g., 47 U.S.C. §§ 201(b), 202(a). But in general, the "principle of nondiscrimination does not preclude distinctions based on reasonable business classifications." *Carlin*, 827 F.2d at 1293. 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*.

Florida's tactic of "labeling" SB 7072 a "common carrier scheme" has "no real First Amendment consequences." ARB 42 (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part)). But although a common carrier's First Amendment rights exist apart

from its common-law powers over patrons' behavior, it still bears noting that, under those common-law rules, SB 7072 cannot qualify as a proper common-carriage law. Above all, a valid common-carriage regulation would not bar social media from setting reasonable rules governing "indecent messages." Wyman, *supra*, § 633.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

November 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,342 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, in 14-point font, using Microsoft Office 365.

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Eleventh Circuit through the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Corbin K. Barthold

Amicus Brief of TechFreedom in *Netchoice v. Paxton*

U.S. Court of Appeals for the Fifth Circuit

No. 21-51178

In the United States Court of Appeals
for the Fifth Circuit

NETCHOICE, L.L.C., A 501(C)(6) DISTRICT OF COLUMBIA ORGANIZATION DOING BUSINESS AS NETCHOICE; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, A 501(C)(6) NON-STOCK VIRGINIA CORPORATION DOING BUSINESS AS CCIA,

Plaintiffs-Appellees,

vs.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF APPELLEES AND AFFIRMANCE

On Appeal from the United States District Court for the Western District of Texas, No. 1:21-cv-840

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiffs-Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification.

Amicus Curiae:

TechFreedom

Counsel for Amicus Curiae:

Corbin K. Barthold

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Ari Cohn

TechFreedom has no parent corporation. No publicly held company has any ownership interest in TechFreedom.

/s/ Corbin K. Barthold

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has closely studied recent state laws that attempt to regulate social media. Its experts have written and spoken extensively on those laws' constitutional infirmities, as well as on why those infirmities cannot be fixed by a "common carriage" theory. See, e.g., Corbin K. Barthold, *Social Media and Common Carriage: Lessons From the Litigation Over Florida's SB 7072*, WLF Legal Backgrounder, https://bit.ly/3FmvYzl (Sept. 24, 2021); UCLA School of Law, *A Space for Everyone? Debating Online Platforms and Common Carriage Rules*, YouTube, https://bit.ly/3Dfa3Ir (June 4, 2021) (debate between TechFreedom President Berin Szóka and Professor Eugene Volokh); Berin Szóka & Corbin K. Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, Lawfare, https://bit.ly/2YxGxPo

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

(Apr. 14, 2021); Corbin K. Barthold & Berin Szóka, *Florida's History of Challenging the First Amendment Shows DeSantis' 'Tech Transparency' Bill is Doomed*, Miami Herald, http://hrld.us/2ZPzqCf (Mar. 25, 2021).

TechFreedom submits this brief to assist the Court in understanding the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment.

SUMMARY OF ARGUMENT

Announcing his support for the social media speech code that would become HB20, Texas Governor Greg Abbott tweeted: "Too many social media sites silence conservative speech and ideas and trample free speech. It's un-American, Un-Texan, & soon to be illegal." Greg Abbott (@GreggAbbott_TX), Twitter (Mar. 4, 2021), 11:52 PM, https://bit.ly/3jqSwWP. A few months later, in an order blocking enforcement of a similar law passed by Florida, District Judge Hinkle offered the perfect response: "[L]eveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest." *NetChoice LLC v. Moody*, 546 F. Supp. 3d 1082, 1095 (N.D. Fla. 2021).

Under the First Amendment, "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This is a right to "editorial control and judgment" over the speech one publishes and disseminates. *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). See Appellees' Response Brief (ARB) 17-19 (discussing *Hurley* and *Miami Herald* in greater detail). With its onerous reporting and process requirements, and its unprecedented (and impossible) demand for viewpoint neutrality, HB20 roundly violates this right.

Under a conventional First Amendment analysis, HB20 is doomed. Hence the Texas legislature's attempt to insulate its new law from such analysis under the guise of "common carriage." HB20 §§ 1(3), (4). But slapping the label "common carrier" on something doesn't make it so. And even if it did, common carriers retain their First Amendment rights, and they have much broader discretion to refuse service than HB20 allows for.

We address Texas's "common carrier" theory as follows:

I. Social media websites—even large ones—are nothing like common carriers. Common carriage is about (1) *carriage*, i.e., pure transportation or transmission, (2) of uniform *things*, i.e., people, commodities, or parcels of private information, (3) in a manner that is

common, i.e., indiscriminate. When determining which communications services are telecommunications common carriers, the Federal Communications Commission (FCC) has adhered to these points. Social media, meanwhile, depart from them in all pertinent respects. Social media are (1) a diverse array of data-*processing* products (microblogs, videochats, photo streams, and so on), (2) typically shared as a public-facing *expressive* activity, (3) that are offered *subject to the condition* of a user's compliance with extensive terms of service.

II. Contrary to HB20's naked assertions—and to arguments made on appeal by Texas and its *amici*—large social media websites display none of the indicia of traditional common carriage:

- Even if the sites were "affected with a public interest" (whatever that might mean), see § 1(3), the Supreme Court—and at least one of the common carrier theory's most notable proponents—don't think a "public interest" test is useful for determining who can be treated as a common carrier.
- Social media websites have not "enjoyed governmental support," see § 1(3), in any special or unique sense. They certainly have not received anything akin to the exclusive public easements that governments granted to railroads and telegraph companies.

- Social media websites do not possess "bottleneck" control over speech. In fact, social media markets remain highly fluid and competitive. In any event, the concept of "market dominance," see § 1(4), is not useful. Even an entity with substantial market power retains its First Amendment rights.
- Such sites do not "hold" themselves "out" as willing to serve the public indiscriminately. Rather, they serve the public *subject* to various rules of conduct—rules that reflect the sites' normative judgments about what expression they wish to foster or are willing to tolerate.

III. Texas and its *amici*'s main authorities—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)—show, at most, that an entity can sometimes be required to host another's speech if doing so does not "interfer[e]" with the host speaker's "desired message," *Rumsfeld*, 547 U.S. at 64. The whole point of HB20, by contrast, *is* to "interfere" with social media websites' "desired message." What's more, unlike the entities regulated in *PruneYard*, *Rumsfeld*, and *Turner*, social media websites function as editors, constantly making decisions about whether and how to allow, block, promote, demote, remove, label, or otherwise respond to content.

Curation and editing of expression are antithetical to the concept of common carriage.

IV. Even if social media websites *were* similar to common carriers, most, if not all, of HB20 would remain unconstitutional. In addition to the fact that common carriers are not stripped of their First Amendment rights (see ARB 36-37), no common carrier has ever had to serve customers without regard to their behavior. Common carriers have always been entitled to refuse service to anyone who misbehaves, disrupts the service, harasses other patrons, and so on. Because HB20 tries to force websites to serve *even* such people, it is not itself a proper common carriage regulation.

ARGUMENT

I. Social Media and Common Carriage Are Irreconcilable Concepts

"A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." *McCoy v. Pac. Spruce Corp.*, 1 F.2d 853, 855 (9th Cir. 1924). As its name suggests, in other words, "common carriage" is about offering, to the *public at large* and on

indiscriminate terms, to carry generic *stuff* from point A to point B. Social media websites fulfill none of these elements.

A. Social Media Are Not "Carriage": They Are Diverse and Evolving Data-Processing Products

Lumber is lumber. Once it has arrived at a construction site, one two-by-four is generally as good as another. How the wood got to the site is, for purposes of the construction itself, irrelevant. Putting common carriage in its proper historical context begins with this fundamental point. The "business of common carriers" is, at its core, "the transportation of property." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406 (1914); see Interstate Commerce Act, 24 Stat. 379, 379-80 (1887) (prohibiting a "common carrier" in "the *transportation* of *passengers or property*" from discriminating, by price, among its similarly situated customers) (emphasis added).

True, the "transmission of intelligence" has sometimes been treated as "of cognate character" to traditional common carriage. *German Alliance*, 233 U.S. at 406-07. But that "cognate character" arose in fields, such as telegraphy and telephony, where information was treated as a commodity product to be purveyed through some sort of (typically scarce) public thoroughfare. See *id.* at 426-27 (Lamar, J., dissenting). The key is that, like traditional common carriage, "they all ha[d] direct relation to

the business or facilities of *transportation*" itself. *Id.* at 426 (emphasis added). Although it doubtless contains a message, a telegram is best thought of as a widget of private information conveyed along "public ways," *id.*, by a commodity carrier, see Mann-Elkins Act, 36 Stat. 539, 544-45 (1910) (applying the Interstate Commerce Act to telegraph and telephone companies).

Social media websites are nothing like this. They are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not *transportation* at all. The FCC has long distinguished between "basic" services, which simply *carry* data along, and "enhanced" services, which *process* data in some way. 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). Any service that offers more than "pure transmission capability" is an "enhanced" service. *Id.* Social media websites clearly offer "enhanced" services, extensively manipulating data to enable, structure, and shape microblogs, photo-sharing, video-streaming, group chats, newsfeeds, and more. "Enhanced services" are, by definition, not common carriers. See *Verizon v. FCC*, 740 F.3d 623, 629-30, 650 (D.C. Cir. 2014).

It is not true, as Texas and its *amici* claim, that social media services are simply "conduits" of information, akin to the telegraph or the

telephone. See, e.g., Appellant's Opening Brief (AOB) 22, Claremont Brief 11, 14, 17-18, Hamburger Brief 4, 7, 10, 11-13, 17, 20. Again, a service that offers *anything* more than "basic transmission" is an "enhanced" service, and, thus, not a common carrier. Indeed, because the bar for qualifying as "more than a basic transmission service" is low, even some services that, unlike social media, involve an element of pure information "transport" are, nonetheless, not common carriers. Although telephony, which connects users without any intervention by the carrier, is common carriage, even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not. See *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd. 12075 (2018).

Social media websites constantly process information in new ways. What they do *not* do is passively act as "carriers" of information.

B. Social Media Are Not "Carriage": They Are Fundamentally Expressive

Common carriage, to repeat, involves the transportation of people and commodities. Telegraphy and telephony press the boundaries of that core, transportational conception of common carriage. One message, after all, is not interchangeable with another. There is, however, a key sense in which a telegram or a telephone call is indeed just a widget of

information: such communications are usually private. And being private, they are usually treated as strictly between the individual sender and recipient. Cf. 18 U.S.C. § 2511 (criminal penalties for intercepting a wire or secretly recording a call). This means that a carrier may transmit a telegram or a call while remaining indifferent to its content.

Once a "telephone company becomes a medium for public rather than private communication," however, "the fit of traditional common carrier law becomes much less snug." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987). While transmitting a private call or message can be thought of as carrying an information widget, transmitting a public-facing call or message is clearly about *broadcasting* ideas and viewpoints. *Id*. It is a mode of expression, not only by the direct speaker, but also by the purveyor of the speech. "Mass-media speech," in short, "implicates a broader range of free speech values" than does "person-to-person" speech. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010).

This is not to say that all private communications are common carriage. As we saw above, text messaging is not. Nor would an Internet-based messaging service such as WhatsApp be. What is true, though, is

that *public* communication is, virtually by definition, not common carriage. Indeed, Congress considered, and rejected, proposals to make broadcasting common carriage in the Radio Act of 1927, and it explicitly declared that broadcasting is *not* common carriage in the Communications Act of 1934. *Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 105 (1973); see 47 U.S.C. § 153(h).

As the appellees explain (ARB 17-19), two of the key precedents governing this case are *Miami Herald*, 418 U.S. 241, and *Hurley*, 515 U.S. 557. *Miami Herald* strikes down a Florida law that required a newspaper to print a political candidate's reply to the newspaper's unfavorable coverage. *Hurley* holds that a private parade may exclude some groups from participating. Like a newspaper (*Miami Herald*) or a parade (*Hurley*), a social media website presents a collection of messages to a wide audience. This public-facing expression is incompatible with—indeed, contradictory to—the concept of common carriage. Calling the websites "common carriers" anyway doesn't make it so. The Texas legislature could not overturn *Miami Herald* or *Hurley* simply by declaring that newspapers or parades are "common carriers." The same holds true here.

Forcing upon a speaker "the dissemination of a view contrary to one's own" curtails the speaker's "right to autonomy over [its] message,"

in violation of the First Amendment. *Hurley*, 515 U.S. at 576. That is the overriding principle that HB20 flouts. "Common carriage" is not a magic label that can make this First Amendment violation go away.

C. Social Media Are Not "Common": They Are Not Offered Indiscriminately

An edited product is, inherently, not common carriage. Although the FCC has waffled over whether most Internet service providers are common carriers, for instance, what's clear is that if an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing *en banc*); contra Hamburger Brief 15 (questioning this standard, yet offering no reason why a common-carriage test that applies to ISPs should not also apply, *a fortiori*, to social media). So long as it's up front about what it's doing, a provider that wants to engage in "editorial intervention"—and, thus, not common carriage—is free to do so. 855 F.3d at 389.

All prominent social media websites engage in such intervention. Twitter, for example, has rules that seek to "ensure all people can participate in the public conversation freely and safely." Twitter, *The Twitter Rules*, https://bit.ly/3cpc75S (last accessed Apr. 4, 2022).

"Violence, harassment and other similar types of behavior discourage" such conversation, and are therefore barred by Twitter's rules. *Id*. Not surprisingly, bans on things like harassment and hate speech are common among online platforms. See ARB 5 (citing ROA.359, ROA.383, ROA.1664-1721).

What's more, such bans have always been common. "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." Wayback Machine, *Facebook Terms of Use*, https://bit.ly/3w1gYC5 (Nov. 26, 2005). Indeed, one can go back much farther 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. *Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995). "'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.'" *Id*.

That social media websites engage in curation and editing should come as no surprise, given that curation and editing are a fundamental

aspect of the service those websites exist to provide. Without intermediaries, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries enable users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day." Yoo, *supra*, 78 Geo. Wash. L. Rev. at 701. Indeed, "social media" could not exist if intermediaries did not play this role. It is only because a website engages in curation and editing that a mass of "social" media becomes navigable by the average user. More than that, such curation and editing is necessary to make social media a pleasant experience worth navigating. "[T]he editorial discretion that intermediaries exercise" enables users to avoid "unwanted speech" and "identify and access desired content." *Id*.

Texas and its *amici* contend that, to enjoy a First Amendment right to editorial discretion, social media services must "pre-screen" posts. AOB 23, Claremont Brief 17, Hamburger Brief 13-14. Such a rule would be perverse, rewarding websites for engaging in more of the so-called "censorship" that Texas claims to oppose. In any case, there is no reason why, under the First Amendment, the time at which editorial control is exercised should matter. Consider talk radio, in which a station lightly "screens" calls in advance, yet retains the (much needed) right to cut off callers at will.

Not only do social media refuse to publish content indiscriminately; they are widely expected not to do so. No matter how many times Texas and its *amici* assert otherwise (see, e.g., AOB 23, States' Brief 10-11, Claremont Brief 13, 22-23), everyone from advertisers to civil rights groups to the media holds online platforms responsible for the content they spread. See, e.g., Tom Maxwell, *Twitch Streamers Demand the Platform 'Do Better' at Moderating Hate Speech*, Input, https://bit.ly/37wIbSo (Aug. 10, 2021); Analis Bailey, *Premier League, English Soccer Announce Social Media Boycott in Response to Racist Abuse*, USA Today, https://bit.ly/3xIpfdT (Apr. 24, 2021). An underlying assumption in the recent furor over the *Wall Street Journal*'s "Facebook Files" coverage was that Facebook can, and should, intervene, extensively, in its own products to ensure that they are free, so far as possible, of toxic content. See *The Facebook Files*, Wall St. J., https://on.wsj.com/3GPgzYX (last accessed Apr. 4, 2022).

II. Social Media Bear None of the Indicia of Common Carriage

HB20, Texas, and Texas's *amici* declare that large social media websites meet some of the criteria exhibited by common carriers of the past, such as railroad and telegraph companies. Even if these criteria had

more than limited relevance to the rights of expressive entities (they don't), social media websites meet none of the criteria at hand.

A. "Affected With a Public Interest"

HB20 claims that social media websites are "affected with a public interest." § 1(3). Texas and some of its *amici* mention this claim (AOB 26, Claremont Brief 28, Hamburger Brief 8), but, not surprisingly, they don't press the point. As the Supreme Court has said, whether a business serves a "public interest" is "an unsatisfactory test of the constitutionality of legislation directed at [the business's] practices or prices." *Nebbia v. New York*, 291 U.S. 502, 536 (1934). Even Justice Thomas—perhaps the most prominent champion of the idea that social media are common carriers—concedes that a "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'" *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

B. "Have Enjoyed Governmental Support"

HB20 says that social media websites have "enjoyed governmental support in the United States." § 1(3); see also Hamburger Brief 8-9. This presumably refers to Section 230 of the Telecommunications Act of 1996. 47 U.S.C. § 230; see ARB 32-34 (discussing Section 230).

True enough, businesses that employ property acquired through eminent domain have sometimes had to operate as common carriers. It does not follow that Section 230, which broadly protects *all* websites for publishing speech that originates with others, creates a similar *quid pro quo* obligation. There are several problems with the comparison:

- Section 230 was not a gift to a few large social media websites (none of which existed when Section 230 was passed). It applies to every Internet website and service. See 47 U.S.C. §§ 230(c)(1), (c)(2), (f)(2), (f)(3); contra Hamburger Brief 18-19 (wrongly stating that Section 230 "privileges social media"). If Section 230 doesn't turn a blog, or Yelp, or a newspaper's comments sections, or an individual social media account, into a common carrier, it's unclear why it should turn Facebook, YouTube, or TikTok into one.

- Section 230 simply ensures that the *initial speaker* is the one liable for speech that causes legally actionable harm. See *id.* §§ 230(c)(1), (f)(3). It is not a "privilege" akin to the government handing real property to one firm, to the exclusion of potential competitors, for use as a railroad or a telegraph line.

- Far from being a sign that the government wants social media websites to act as "conduits" or common carriers, Section 230 is

> a sign that it recognizes they are editors, and wants them to act as discerning ones. Section 230 ensures that a website can "exercise" a "publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content"—without (in most cases) worrying that doing so will trigger liability. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997); contra Hamburger Brief 6-7 (wrongly stating that Section 230 "recognizes" social media services as common carriers). Section 230 does not curtail websites' First Amendment rights; it *endorses* them.

And if the *federally* enacted Section 230 is the *quid*, why should a *state* government get to impose the *quo*? The history of common carriage in the United States, going back to the Interstate Commerce Act of 1887, is one of aiding *interstate* commerce by setting and enforcing *national* standards. Precisely because they were regulated federally as common carriers, telegraph companies were not subject to state regulation. *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919). Even if Section 230 could serve as the basis for common carriage rules, it couldn't serve as the basis for common carriage rules imposed *by Texas*.

C. "Market Dominance"

HB20 claims that large social media websites "are common carriers by virtue of their market dominance." § 1(4); but see generally AOB (appearing to abandon this argument). The first problem on this front is the brute legal fact that an entity does not forfeit its constitutional rights by succeeding in the market. The Supreme Court accepted that the *Miami Herald* enjoyed near-monopoly control over local news; yet the newspaper retained its First Amendment right to exercise editorial control and judgment as it saw fit. 418 U.S. at 250-52, 256-58.

This is not to say that media firms, social or otherwise, are above the antitrust laws. A newspaper that uses its market power to inflict *economic* pain on a rival—one that, say, strongarms advertisers into boycotting, and thereby bankrupting, a local radio station—is inviting antitrust liability for its business practices. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). It *is* to say, however, that the right to reject speech for *expressive* reasons travels with a company, like a shell on a turtle, wherever the company goes—even if the company, like Yertle, is king of the pond. Cf. Dr. Seuss, *Yertle the Turtle and Other Stories* (1958).

In any event, the social media market is as lively as ever. It continues to offer many avenues of expression and communication. If you're convinced (as Gov. Abbott and HB20's other supporters explicitly

are) that "Big Tech" is "out to get" Republicans, you can blog on Substack, post on Parler, Gettr, or Gab, message on Signal or Discord, and watch and share videos on Rumble. And anyone who claims that network effects will ultimately thwart this competition must grapple with the rapid rise of TikTok.

Contrary to Texas's claim, the "old telegraph and telephone companies" are not the "technological ancestors" of social media services. AOB 3. The Internet is not "a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Even the largest social media websites are just a piece of that "relatively unlimited" world of "communication." As one (conservative) commentator has put it, social media websites are "equivalent not to the telegraph line," but to a few "of the telegraph line's many customers." Charles C.W. Cooke, *No, Big Tech Firms Are Not Common Carriers*, National Review Online, https://bit.ly/3hQMYDQ (Aug. 2, 2021). They are just a handful of "website[s] among billions." *Id*.

D. "Holding" Oneself "Out" as "Willing to Deal"

Common carriers, Texas correctly notes, "hold" themselves "out" as "willing to deal with all comers." AOB 27. Texas is mistaken, however, in

assuming that social media services meet this definition. Although it might indeed be said that the websites welcome "all the world" to *join*, whether one gets to *stay* is contingent on one's complying with the sites' terms of service. Social media websites are not "willing to deal" with users who promote violence, engage in harassment, or spew hate speech. See Sec. I.C., *supra*.

Even if the websites did hold themselves out as serving the public indiscriminately (they don't), the "holding out" theory of common carriage is "conspicuously empty." Thomas B. Nachbar, *The Public Network*, 17 CommLaw Conspectus 67, 93 (2008). A "holding out" standard is easy to evade. See Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. of Free Speech Law 463, 475 (2021). Suppose HB20 went into effect, and the websites responded by tightening their terms of service further, thereby making even clearer that they do not serve the public at large. What then? Rather than admit how badly its attempt to force the websites to publish unwanted speech had backfired, Texas would probably declare that the websites are common carriers because the state has *ordered* them to serve the public at large. Such a declaration would confirm that the "holding out" theory is empty at best, and circular at worst.

Texas agrees that the "holding out" rule is "circular" if a company can *avoid* common carrier status by *not* "holding" itself "out" to the public. AOB 27. It then tries to save the test, however, by claiming that a state can *impose* common carrier status simply by baldly declaring that a company *should* "hold" itself "out" to the public. *Id*. That won't do. The test remains circular under Texas's formulation; it's just that the location of the circularity has moved. (At least Texas does not confidently announce that the "holding out" rule applies to any business that "offer[s] [its] services to the public, even if not all the public"—a standard that would make virtually every business, from an airline to a local bakery, a "common carrier." Hamburger Brief 15-16. But cf. *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018).)

III. Supreme Court Case Law Does Not Save HB20's Common Carrier Theory

Texas and its *amici* cite three Supreme Court cases—*PruneYard*, *FAIR*, and *Turner*—as support for the notion that social media websites are analogous to common carriers. See, e.g., AOB 18-19 (*PruneYard*), 19-20, 23 (*FAIR*), 28-29 (*Turner*); States' Brief 5 (*PruneYard*), 6-8 (*FAIR*); Claremont Brief 19 (*PruneYard*), 12-16, 19-20 (*FAIR*), 11-12, 18-19, 24-27 (*Turner*); Hamburger Brief 12 (*Turner*). None of the three helps their cause.

A. *PruneYard Shopping Center v. Robins*

At issue in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), was whether a shopping mall could be forced, under the California Constitution, to let students protest on its private property. Yes, *PruneYard* says, it could. In so saying, however, *PruneYard* distinguishes *Miami Herald*. That case involved "an intrusion into the function of editors," *PruneYard* notes—a "concern" that "obviously" was "not present" for the mall. *Id*. at 88. Here, by contrast, that concern obviously *is* present, as explained above. "Intru[ding]" into social media websites' "function" as "editors" is what HB20 is all about.

What's more, *PruneYard* announces that "the views expressed by members of the public" on the mall's property would "not likely be identified with that of the owner." *Id*. at 87. Even if that evidence-free declaration was true, at the time, of the mall (we have our doubts), it is certainly not true today of social media websites. As we've discussed—and Texas and its *amici*'s repeated claims to the contrary notwithstanding—those sites *are* "identified" with the speech they spread. A social media service that publishes a certain speaker is widely considered to have deemed that speaker "worthy of presentation," and "quite possibly of support as well." *Hurley*, 515 U.S. at 575.

The mall also challenged the speech-hosting obligation under the Takings Clause. On its way to rejecting that challenge, *PruneYard* makes further findings pertinent to this case. The students, *PruneYard* notes, "were orderly," and the mall remained free to impose "time, place, and manner regulations" on others' speech that would "minimize any interference with its commercial functions." 447 U.S. at 83-84. This makes *PruneYard* nothing like the case here, in which Texas seeks to make websites publish hostile, abusive, highly disruptive speech. In effect, HB20 requires the websites to allow *disorderly* conduct, and it *bars* them from imposing reasonable time, place, and manner regulations.

B. *Rumsfeld v. FAIR*

In protest of the military's "Don't ask, don't tell" policy, various law schools stopped allowing military recruiters on their campuses. Let the recruiters in, Congress responded, in a law known as the Solomon Amendment, or lose government funding. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), rejects an association's contention that the Solomon Amendment violates the First Amendment.

Distinguishing *Miami Herald* and *Hurley*, *FAIR* concludes that "accommodating the military's message d[id] not affect the law schools' speech." *Id*. at 63-64. Unlike "a parade, a newsletter, or the editorial page

of a newspaper," *FAIR* explains, "a law school's decision to allow recruiters on campus is not inherently expressive." *Id*. at 64. The pertinent distinction between job-recruitment meetings, on the one hand, and parades, newsletters, and newspapers, on the other, is not hard to divine. One-on-one recruitment meetings are akin to telegraphic or telephonic communication—the passage of private information widgets—and not at all like the public-facing expression of views undertaken by a parade, a publication, or a website.

HB20 requires social media to platform various speakers, and to spread and amplify, far and wide, almost anything those speakers wish to say. It thus looks nothing like the law at issue in *FAIR*, a case about direct communication between a recruiter willing to talk and a law student willing to listen. For *FAIR* to resemble this case, Congress would have had to pass a law altogether different from the Solomon Amendment. Picture a law requiring law schools to let neo-Nazis maraud their halls toting signs and bullhorns. *That* is the equivalent of what HB20 requires of select social media websites.

C. *Turner Broadcasting System v. FCC*

In the 1992 Cable Act, Congress imposed "so-called must-carry provisions" that "require[d] cable operators to carry the signals of a

specified number of local broadcast television stations." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 630 (1994). While concluding that cable operators engage in speech protected by the First Amendment, *id*. at 636, *Turner* subjects the must-carry provisions merely to intermediate, rather than to strict, scrutiny. *Turner* is brimming, however, with distinctions that render it inapplicable to social media websites.

First, like traditional common carriers, see *German Alliance*, 233 U.S. at 426-27 (Lamar, J., dissenting), cable systems use "physical infrastructure"—"cable or optical fibers"—that require "public rights-of-way and easements," 512 U.S. at 627-28. This setup "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." *Id*. at 656. This means that "a cable operator, *unlike speakers in other media*," can "silence the voice of competing speakers with a mere flick of the switch." *Id*. at 656-57 (emphasis added). On precisely this ground, *Turner* distinguishes *Miami Herald*, notwithstanding the fact that a "daily newspaper" may "enjoy monopoly status in a given locale." *Id*. at 656. "A daily newspaper," after all, "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications." *Id*. Just the same can be said of social media websites. Whatever the level of their market control—it's not much, in

our view, as we have explained—they do not, when "assert[ing] exclusive control over [their] own … copy," thereby "prevent other[s]" from "distribut[ing]" competing products "to willing recipients." *Id*.

Second, "cable personnel" generally "do not review any of the material provided by cable networks," and "cable systems have no conscious control over program services provided by others." *Id.* at 629 (quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988)). Cable operators are thus, "in essence," simply "conduit[s] for the speech of others." *Id*. They generally transmit speech "on a continuous and unedited basis to subscribers." *Id*. This makes sense, given that most broadcast television content is comparatively sanitized and, certainly when compared to the worst online speech, uncontroversial. *Turner* concludes, therefore—again while distinguishing *Miami Herald*—that "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,' and by so doing diminish the free flow of information and ideas." *Id*. at 656 (quoting *Miami Herald*, 418 U.S. at 257). This is the precise opposite of the situation with social media websites. The websites, to repeat, are not simply "conduits"; they are provided on a curated and edited basis, and they do sometimes take "the safe course" and "avoid controversy." Witness, for instance, Twitter's

decision to stop publishing political advertisements. See *Wash. Post v. McManus*, 944 F.3d 506, 517 n.4 (4th Cir. 2019).

Third, and relatedly, *Turner* declares—again while distinguishing *Miami Herald* (and it could have added *Hurley* to boot)—that there was "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." *Id.* at 655. This, again, because of the cable operators' "long history of serving" merely "as a conduit for broadcast signals." *Id.* The cable operators did not even contest this point; they did "not suggest" that "must-carry" would "force" them "to alter their own messages to respond to the broadcast programming they [we]re required to carry." *Id.* As we've explained, the "long history" behind social media could not be more different. Naturally, given that history, social media services vigorously contend that they would have to "respond" to certain messages they might be required "to carry."

Fourth, the central issue in *Turner* was whether the must-carry provisions were content-neutral. "Broadcasters, which transmit over the airwaves, are favored," *Turner* acknowledges, "while cable programmers, which do not, are disfavored." *Id.* at 645. But this distinction, *Turner* concludes, did not make the must-carry provisions a content-based law subject to strict scrutiny. According to *Turner*, "Congress' overriding

objective … was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free [broadcast] television programming." *Id*. at 646. In other words, the law was purely about "economic incentive[s]." *Id*. The cable operators, for their part, did little to argue otherwise, raising only "speculati[ve]" "hypothes[es]" about "a content-based purpose" for the law. *Id*. at 652. Here, by contrast, HB20 compels the carrying of speech based on its viewpoint. § 6; see *Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015) (viewpoint discrimination is simply "a more blatant and egregious form of content discrimination").

IV. The Burdens Imposed by HB20 Go Far Beyond Common Carriage

Texas's law effectively compels large social media services to deal with all users, however obnoxious their behavior. This is not what common carriage meant at common law. "An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons[.]" *Lombard v. Louisiana*, 373 U.S. 267, 280 (1963) (Douglas, J., concurring) (citing Bruce Wyman, *Public Service Corporations* (1911), available at https://bit.ly/3xekNXI). "If [a] guest … misconducts himself so as to annoy other guests, he may for that cause be ejected from the inn." Wyman, *supra*, § 630. "Telegraph companies

likewise need not accept obscene, blasphemous, profane or indecent messages." *Id.* § 633.

In short, common carriers enjoyed broad discretion to "restrain" and "prevent" "profaneness, indecency, [and] other breaches of decorum in speech or behavior." *Id.* § 644. They 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.*

True, there were limits. A telegraph company that refused to carry an "equivocal message"—one whose offensiveness was debatable—did so "at its peril." *Id.* § 632. Although a telephone service 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.* And regulators could (and in some areas still can) assess whether certain of a common carrier's rules and prohibitions are "just and reasonable." See, e.g., 47 U.S.C. §§ 201(b), 202(a). But in general, the "principle of nondiscrimination does not preclude distinctions based on reasonable business classifications." *Carlin*, 827 F.2d at 1293. 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.*

Texas's attempt (see AOB 26) simply to "label" HB20 a "common carrier scheme" has "no real First Amendment consequences." ARB 36-37 (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part)). But although a common carrier's First Amendment rights exist apart from its common-law powers over patrons' behavior, it still bears noting that, under those common-law rules, HB20 cannot qualify as a proper common-carriage law. Above all, a valid common-carriage regulation would not bar social media from setting reasonable rules governing "indecent messages" or "disorderly guests." Wyman, *supra*, §§ 630, 633.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,422 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

On April 8, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

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