Nos. 22-277, 22-555

In the Supreme Court of the United States

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

Petitioners,

— v.—

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,

Respondents.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,

Petitioners,

— v.—

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH AND ELEVENTH CIRCUITS

BRIEF OF INTERNATIONAL CENTER FOR LAW & ECONOMICS AS AMICUS CURIAE IN FAVOR OF PETITIONERS IN 22-555 AND RESPONDENTS IN 22-277

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INTEREST OF *AMICUS*[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center that builds intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies and economic learning to inform policy debates and has longstanding expertise evaluating law and policy.

ICLE has an interest in ensuring that First Amendment law promotes the public interest by remaining grounded in sensible rules informed by sound economic analysis. ICLE scholars have written extensively on issues related to social media regulation and free speech. *See, e.g.*, Geoffrey A. Manne, Ben Sperry, & Kristian Stout, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, 49 RUTGERS COMPUTER & TECH. L. J. 26 (2022); Ben Sperry, *Knowledge and Decisions in the Information Age: The Law & Economics of Regulating Misinformation on Social-Media Platforms*, 59 GONZAGA L. REV., forthcoming (2023); Br. of Internet Law Scholars, Gonzalez v. Google; Jamie Whyte, *Polluting Words: Is There a Coasean Case to Regulate Offensive Speech?*, ICLE White Paper (Sep. 2021); Ben Sperry, *An L&E Defense of the First Amendment's Protection of Private Ordering*, TRUTH ON THE MARKET (Apr. 23, 2021); Liability for User-Generated Content Online: Principles for Lawmakers (Jul. 11, 2019).

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[1] Amicus curiae affirms that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief.

STATEMENT

The pair of *NetChoice* cases before the Court presents the opportunity to bolster the Court's longstanding jurisprudence on state action and editorial discretion by affirming that the First Amendment applies to Internet speech without disfavor. *See Reno* v. *ACLU,* 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet).

The First Amendment protects social media companies' rights to exercise their own content moderation policies free from government interference. Social media companies are private actors with the same right to editorial discretion over disseminating third-party speech as offline equivalents like newspapers and cable operators. *See Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019); *Mia. Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622 (1994).

Consistent with that jurisprudence, the Court should conclude that social media companies are private actors fully capable of taking part in the marketplace of ideas through their exercise of editorial discretion, free from government interference.

SUMMARY OF ARGUMENT

"The most basic of all decisions is *who* shall decide." Thomas Sowell, Knowledge and Decisions 40 (2d ed. 1996). Under the First Amendment, the general rule is that private actors get to decide what speech is acceptable. It is not the government's place to censor speech *or* to require private actors to open their property to unwanted speech. The market process determines speech rules on social media platforms[2] just as it does in the offline world.

The animating principle of the First Amendment is to protect this "marketplace of ideas." "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States* v. *Alvarez*, 567 U.S. 709, 728 (2012) (quoting *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). To facilitate that competition, the Constitution staunchly protects the liberty of private actors to determine what speech is acceptable, largely free from government regulation of this marketplace. *See Halleck*, 139 S. Ct. at 1926 ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors….").

Importantly, one way private actors participate in the marketplace of ideas is through private ordering—by setting speech policies for their own

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[2] Throughout this brief, the term "platform" as applied to the property of social media companies is used in the economic sense, as these companies are all what economists call multisided platforms. *See* David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, at 6 (Coase-Sandor Inst. for L. & Econ. Working Paper No. 753, Mar. 2016).

private property, enforceable by common law remedies under contract and property law. *See id.* at 1930 (a "private entity may thus exercise editorial discretion over the speech and speakers in the forum").

Protecting private ordering is particularly important with social media. While the challenged laws concern *producers* of social media content, producers are only a sliver of social media users. The vast majority of social media users are content *consumers*, and it is for their benefit that social media companies moderate content. Speech, even when lawful and otherwise protected by the First Amendment, can still be harmful, at least from the point of view of listeners. Social media companies must balance users' demand for speech with the fact that not everyone wants to consume every possible type of speech.

The issue is how best to optimize the benefits of speech while minimizing negative speech externalities. Speech produced on social media platforms causes negative externalities when some consumers are exposed to speech they find offensive, disconcerting, or otherwise harmful. Those consumers may stop using the platform as a result. On the other hand, if limits on speech production are too extreme, speech producers and consumers may seek other speech platforms.

To optimize the value of their platforms, social media companies must consider how best to keep users—both producers and consumers of speech—engaged. Major social media platforms mainly generate revenue through advertisements. This means a loss in user engagement could reduce the

value to advertisers, and thus result in less advertising revenue. In particular, a loss in engagement by high-value users could result in less advertising, and that in turn, diminishes incentives to invest in the platform. Optimizing a platform requires satisfying users who are valuable to advertisers.

Major social media platforms have developed moderation policies in response to market demand to protect their users from speech those users consider harmful. This editorial control is protected First Amendment activity.

On the other hand, the common carriage justifications Texas and Florida offer for their restrictions on social media platforms' control over their own property do not save the States' impermissible intervention into the marketplace of ideas. Two of the most prominent legal justifications for common carriage regulation—holding one's property open to all-comers and market power—do *not* apply to social media companies. Major social media companies require all users to accept terms of service, which limit what speech is allowed. And assuming market power can justify common carriage, neither Florida nor Texas even attempted to make such a finding, making at best mere assertions.

The States' intervention is more like treating social media platforms as company towns—an outdated approach that this Court should reject as inconsistent with First Amendment doctrine and utterly unsuitable to the Internet Age.

ARGUMENT

I. Social Media Platforms Are Best Positioned to Optimize Their Platforms To Serve Their Users' Speech Preferences.

The First Amendment promotes a marketplace of ideas. To have a marketplace of any kind, there must be strong private property rights and enforceable contracts that enable entrepreneurs to discover the best ways to serve consumers. *See generally* Hernando de Soto, The Mystery of Capital (2000). As full participants in the marketplace of ideas, social media platforms must be free to exercise their own editorial policies and have choice over which ideas they allow on their platforms. Otherwise, there is no marketplace of ideas at all, but either a government-mandated free-for-all where voices struggle to be heard or an overly restricted forum where the government censors disfavored ideas.

The marketplace analogy is apt when considering First Amendment principles because, like virtually any other human activity, speech has both benefits and costs. Like other profit-driven market endeavors, it is ultimately the subjective, individual preferences of consumers that determine how to manage those tradeoffs. The nature of what is deemed offensive is obviously context- and listener-dependent, but the parties best suited to set and enforce appropriate speech rules are the property owners subject to the constraints of the marketplace.

When it comes to speech, an individual's desire for an audience must be balanced with a prospective audience's willingness to listen. Formal economic institutions acting in the marketplace must strike the

proper balance between these desires and have an incentive to get it right or they could lose consumers. Asking government to make categorical decisions for all of society is substituting centralized evaluation of the costs and benefits of access to communications for the individual decisions of many actors, including property owners who open their property to third party speech. As the economist Thomas Sowell put it, "that different costs and benefits must be balanced does not in itself imply *who* must balance them—or even that there must be a single balance for all, or a unitary viewpoint (one 'we') from which the issue is categorically resolved." Thomas Sowell, Knowledge and Decisions 240 (2d ed. 1996).

Rather than incremental decisions on how and under what terms individuals may relate to one another on a particular platform—which can evolve over time in response to changes in what individuals find acceptable—governments can only hand down categorical guidelines through precedential decisions: "you must allow a, b, and c speech" or "you must not allow x, y, and z speech."

This freedom to experiment and evolve is vital in the social-media sphere, where norms about speech are in constant flux. Social media users often impose negative externalities on other users through their speech. Thus, social media companies must resolve social-cost problems among their users by balancing their speech interests.

In his famous work "The Problem of Social Cost," the economist Ronald Coase argued that the traditional approach to regulating externalities was misguided because it overlooked the reciprocal nature of harms. Ronald H. Coase, *The Problem of Social*

Cost, 3 J. L. & Econ. 1, 2 (1960). For example, the noise from a factory is a potential cost to the doctor next door who consequently cannot use his office to conduct certain testing, *and simultaneously* the doctor moving his office next door is a potential cost to the factory's ability to use its equipment. In a world of well-defined property rights and low transaction costs, the initial allocation of a right would not matter, because the parties could bargain to overcome the harm in a beneficial manner—*i.e.*, the factory could pay the doctor for lost income or to set up sound-proof walls, or the doctor could pay the factory to reduce the sound of its machines. But in the real world, where there are often significant transaction costs, who has the initial right matters because it is unlikely that the right will get to the highest valued use.

Similarly, on social media, speech that some users find offensive or false may be inoffensive or even patently true to other users. Protecting one group from offensive speech necessarily imposes costs on the group that favors the same speech. There is a reciprocal nature to the harms of speech, much as with other forms of nuisance. Due to transaction costs, it is unlikely that users will be able to effectively bargain to a solution on speech harms. There is a significant difference, though. Unlike the situation of the factory owner and the doctor, social media users are all using the property of social media companies. And those companies are best positioned to—and must be allowed to—balance these varied interests in real-time to optimize their platform's value in response to consumer demand.

Social media companies are what economists call "multi-sided" platforms. *See generally* David S. Evans

& Richard Shmalensee, Matchmakers: The New Economics of Multisided Platforms (2016). They are for-profit businesses, and the way they generate profits is by acting as intermediaries between users and advertisers. If they fail to serve their users well, those users will abandon the platform. Without users, advertisers would have no interest in buying ads. And without advertisers, there is no profit to be made.

As in any other community, "[i]nteractions on multi-sided platforms can involve behavior that some users find offensive." David S. Evans, *Governing Bad Behavior by Users of Multi-Sided Platforms*, 27 Berkeley Tech. L.J. 1201, 1215 (2012). As a result, "[p]eople may incur costs [from] unwanted exposure to hate speech, pornography, violent images, and other offensive content." *Id.* And "[e]ven if they are not exposed to this content, they may dislike being part of a community in which such behavior takes place." *Id.*

These cases challenge laws that cater to one set of social media users—producers of speech on social media platforms. But social media platforms must be at least as sensitive to their speech consumers. Indeed, the one-percent rule—"a vast majority of user-generated content in any specific community comes from the top 1% of active users"[3]—teaches that

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[3] Valtteri Vuorio & Zachary Horne, *A Lurking Bias: Representativeness of Users Across Social Media and Its Implications for Sampling Bias In Cognitive Science*, PsyArXiv Preprint at 1 (Feb. 2, 2023); *see also, e.g.*, *Alessia Antelmi*, et al., *Characterizing the Behavioral Evolution of Twitter Users and The Truth Behind the 90-9-1 Rule*, *in* WWW '19: COMPANION PROCEEDINGS OF THE 2019 WORLD WIDE WEB CONFERENCE 1035 (May 2019).

speech-consuming users may be even more important because they far outnumber producers. In turn, less intense users are usually the first to leave a platform, and their exit may cascade into total platform collapse. *See, e.g.*, János Török & János Kertész, *Cascading Collapse of Online Social Networks*, 7 Sci. Rep., art. 16743 (2017).

Social media companies thus need to optimize the value of their platform by setting rules that keep users—mostly speech consumers—sufficiently engaged that there are advertisers who will pay to reach them. Even more, social media platforms must encourage engagement by the *right* users. To attract advertisers, platforms must ensure individuals likely to engage with advertisements remain active on the platform.[4] Platforms ensure this optimization by setting and enforcing community rules.

In addition, like users, advertisers themselves have preferences social media platforms must take into account. Advertisers may threaten to pull ads if they do not like the platform's speech-governance decisions. For instance, after Elon Musk restored the accounts of Twitter users who had been banned by the company's prior leadership, major advertisers left the platform. *See* Kate Conger, Tiffany Hsu, & Ryan Mac, *Elon Musk's Twitter Faces Exodus of Advertisers and*

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[4] "For decades, the 18-to-34 age group has been considered especially valuable to advertisers. It's the biggest cohort, overtaking the baby boomers in 2015, and 18 to 34s are thought to have money to burn on toys and clothes and products, rather than the more staid investments of middle age." Ryan Kailath, *Is 18 to 34 still the most coveted demographic?*, MARKETPLACE.COM Dec. 8, 2017), https://www.marketplace.org/2017/12/08/coveted-18-34-year-old-demographic/.

Executives, N.Y. Times (Nov. 1, 2022); Ryan Mac & Tiffany Hsu, *Twitter's US Ad Sales Plunge 59% as Woes Continue*, N.Y. Times (Jun. 5, 2013).

Thus, it is no surprise that in the cases of major social media companies, the platforms have set content-moderation standards that restrict many kinds of speech. *See generally* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

The bottom line is that the market process leaves the platforms themselves best positioned to make these incremental editorial decisions about their users' preferences on speech, in response to the feedback loop between consumer, producer, and advertiser demand. It should go without saying that social media users do not necessarily want more opportunities to say and hear certain speech. Forcing social media companies to favor one set of users—a fraction of speech producers—by forbidding "viewpoint discrimination" favored by other users is unwarranted and unlawful interference in those companies' editorial discretion. That interference threatens rather than promotes the marketplace of ideas.

II. The First Amendment Protects Private Ordering of Speech, Including Social Media Platform Moderation Polices.

The First Amendment protects the right of social media platforms to serve the speech preferences of their users through their moderation policies.

The "text and original meaning [of the First and Fourteenth Amendments], as well as this Court's

longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928. The First Amendment's reach does not grow when private property owners open their property for speech. If such property owners were "subject to First Amendment constraints" and thus "lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum" they would "face the unappetizing choice of allowing all comers or closing the platform altogether." *Id.* at 1930. That is, the First Amendment respects—indeed protects—private ordering.

So, while the First Amendment protects the right of individuals to speak (and receive speech) without fear of legal repercussions in most instances, it does not make speech consequence-free, nor does it mandate the carrying of all speech in private spaces.

"Bad" speech has, in fact, long been kept in check via informal means, or what one might call "private ordering." In this sense, property rights and contract law have long played a crucial role in determining the speech rules of any given space.

For instance, a man would be well within his legal rights to eject a guest from his home for using racial epithets. As a property owner, he would not only have the right to ask that person to leave but could exercise his right to eject that person as a trespasser—if necessary, calling the police to assist him. Similarly, one could not expect to go to a restaurant and yell at the top of her lungs about political issues and expect the venue to abide. A bar hosting an "open mic night" and thus opening itself up to speech is still within its

rights to end a performance so offensive it could lead to a loss of patrons. Subject to narrow exceptions, property owners determine acceptable speech on their property and may enforce those rules by excluding those who refuse to comply.

A. Social media platforms are not state actors.

One exception to this strong distinction between state and private action is when a "private entity performs a traditional, exclusive public function." *See Halleck*, 139 S. Ct. at 1928. In those cases, there may be a right to free speech that operates against a private actor. *See Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Proceeding from *Marsh*, many litigants seize upon this Court's recent analogizing social media to the "modern public square." *Packingham* v. *N. Carolina*, 137 S. Ct. 1730, 1737 (2017). They argue social media companies are like a company town or town square and so lack the discretion to restrict speech protected by the First Amendment. But cases since *Marsh* make clear that the state-actor exception is exceptionally narrow.

In *Marsh*, this Court found that a company town, while private, was a state actor for purposes of the First Amendment. At issue was whether the company town could prevent a Jehovah's Witness from passing out literature on the town's sidewalks. The Court noted that "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh*, 326 U.S. at 506.

The Court proceeded to balance private property rights with First Amendment rights, determining that, in company towns, the First Amendment's protections should be in the "preferred position." *See id.* at 509.

The Court later extended this finding to shopping centers, finding they were the "functional equivalent" to the business district in *Marsh*, and thus finding that a shopping center could not restrict peaceful picketing of a grocery story by a local food-workers union. *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 318, 325 (1968).

But the Court began retreating from both *Logan Valley* and *Marsh* just a few years later in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), which concerned hand-billing in a shopping mall. Noting the "economic anomaly" that was company towns, the Court said *Marsh* "simply held that where private interests were *substituting for and performing the customary functions of government*, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets." *Id.* at 562 (emphasis added).

Building on *Tanner*, the Court went a step further in *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), reversing *Logan Valley* and more severely cabining *Marsh*. *Hudgens* involved picketing on private property, and the Court concluded bluntly that, "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this[.]" *Id.* at 521. *Marsh* is now a narrow exception, the Court explained, limited to situations where private property has taken on *all* attributes of a town. *See id.* at 516. And following *Hudgens*, the Court further

limited the public-function test to "the exercise by a private entity of powers traditionally exclusively reserved to the State." *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

Today it is well-established that "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens*, 424 U.S. at 513. Purely private actors—even those who open their property to the public—are not subject to First-Amendment limits on how they use their property.

The Court reaffirmed that rule recently in *Halleck*, which considered whether a public-access channel operated by a cable provider was a state actor. Summarizing the case law, the Court said the test required more than just a finding that the government at some point exercised the same function or that the function serves the public good. Instead, the government must have "traditionally *and* exclusively performed the function." *Halleck*, 139 S. Ct. at 1929 (emphasis in original).

The Court then found that merely operating as a public forum for speech is *not* a function traditionally and exclusively performed by the government. And because "[it] is not an activity that only governmental entities have traditionally performed," a private actor providing a forum for speech retains "editorial discretion over the speech and speakers in the forum." *Id.* at 1930.

Following this Court's state-actor jurisprudence, federal courts have consistently found social media companies are *not* equivalent to company towns and thus not subject to First Amendment constraints.

Unlike the company town, where those within their geographical confines have little choice but to deal with them as if they are the government themselves, social media users can simply use alternative means to convey speech or receive it. The Ninth Circuit, for instance, squarely rejected the argument that social media companies fulfill a traditional, public function. *See Prager Univ.* v. *Google, LLC*, 951 F.3d 991, 996-99 (9th Cir. 2020). Every federal court to consider whether social media companies are state actors under this theory has found the same. *See, e.g.*, *Freedom Watch, Inc.* v. *Google Inc.*, 816 F. App'x 497, 499 (D.C. Cir. 2020); *Brock* v. *Zuckerberg*, 2021 WL 2650070, at *3 (S.D.N.Y. Jun. 25, 2021); *Zimmerman* v. *Facebook, Inc.*, 2020 WL 5877863 at *2 (N.D. Cal. Oct. 2, 2020); *Ebeid* v. *Facebook, Inc.*, 2019 WL 2059662 at *6 (N.D. Cal. May 9, 2019); *Green* v. *YouTube, LLC*, 2019 WL 1428890, at *4 (D.N.H. Mar. 13, 2019); *Nyabwa* v. *Facebook*, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018); *Shulman* v. *Facebook.com*, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017).

B. Social media companies have a right to editorial discretion.

Private actors have the right to editorial discretion that cannot generally be overcome by state action compelling the dissemination of speech. *See Mia. Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622 (1994). This is particularly important for private actors whose business is disseminating speech, like newspapers, cable operators, *and* social media companies.

In *Tornillo*, the Court struck a right-to-reply statute for political candidates because it "compel[s] editors or publishers to publish that which 'reason tells them should not be published.'" 418 U.S. at 256. The Court established a general rule that the limits on media companies' editorial discretion were not defined by government edict but by "the acceptance of a sufficient number of readers—and hence advertisers —to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Id.* at 255 (citing *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U. S. 94, 117 (1973)). In other words, the limits on how private entities exercise their editorial discretion comes from the marketplace of ideas itself—the preferences of speech consumers, advertisers, and the property owners—not the government.

The size and influence of social media companies does not shrink *Tornillo*'s effect. No matter how large the editor or the forum, the government still may not coerce private entities to disseminate speech. *See id.* at 254 ("However much validity may be found in these arguments [about monopoly power], at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism . . . If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment."). Alleged market power is insufficient to justify compelling the dissemination of speech by social media companies.

Turner confirms that market power is irrelevant. There the Court began with "an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the

protection of the speech and press provisions of the First Amendment." 512 U.S. at 636. While the Court nonetheless applied intermediate scrutiny, it did so based on technological differences in transmission by newspapers and cable television, and the fact that the law was content-neutral. The level of scrutiny thus turns on "the special characteristics" of transmission, *not* "the economic characteristics" of the market. *Id.* at 640.

Returning to *Tornillo*, the Court reasoned that the law violated the First Amendment by intruding upon the company's editorial discretion. *See* 418 U.S. at 258. Like newspapers, social media platforms are "more than a passive receptable for news, comment, and advertising," as their "choice of material," their "decisions made as to the limitations on the size and content of the paper" and their "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* Indeed, that exercise of editorial control and judgment is central to a platform's retention of speech consumers and attraction of advertisers targeting those users, and thus the platform's continued survival. *See supra*, pp. ___.

Accordingly, federal courts rightly have called government actions into question when they violate the right of social media platforms to exercise editorial discretion. *See NetChoice, LLC* v. *Bonta*, 2023 WL 6135551, at *15 (N.D. Cal. Sept. 18, 2023); *O'Handley* v. *Padilla*, 579 F. Supp. 3d 1163, 1186-88 (N.D. Cal. Jan. 10, 2022); *see also Murthy* v. *Missouri*, No. 23-411, 2023 WL 6935337, at *2 (U.S. Oct. 20, 2023) (Alito, J., dissenting) ("The injunction applies only when the Government crosses the line and

begins to coerce or control others' [i.e. the social media companies'] exercise of their free-speech [i.e. editorial discretion] rights.").

Thus, the Fifth Circuit's claim in *Paxton* that "the Supreme Court's cases do not carve out 'editorial discretion' as a special category of First-Amendment-protected expression," 49 F.4th at 463, is demonstrably wrong. The Court *has* established that private actors have a right to exercise editorial discretion concerning speech on their property. *See Halleck* (using the phrase "editorial discretion" 11 times). Social media platforms have the same right.

C. Strict scrutiny applies.

As social media companies have a right to editorial discretion, the next question is the level of scrutiny the challenged statutes must satisfy. Strict scrutiny is proper, because social media platforms are much more like the newspapers in *Tornillo* than the cable companies in *Turner*.

In *Turner*, the Court found:

> [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 . . . . [U]nlike speaker in other media, [cable operators] can thus silence the voice of competing speakers with a mere flick of the switch.

512 U.S. at 656. Social media platforms have no physical control of the connection to the home, and thus no practical ability to exclude competing voices

or platforms. The internet architecture simply does not allow them to stop users from using other sites to find speech or speak. Strict scrutiny should apply to SB 7072 and HB 20.

Likewise, compelling social media companies to allow speech contrary to their terms of service is fundamentally different than mandating access for military recruiters in law schools or requiring shopping malls to allow the peaceful exercise of speech in areas held open to the public. *Contra Paxton*, 49 F.4th at 462-63. In those instances, there was no identification of the venue with the message. *See Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 86-88 (1980).

Here, the moderation decisions of social media companies *do* have implications for advertisers who do not want their brand associated with certain content. *See* Jonathan Vanian, *Apple, Disney, other media companies pause advertising on X after Elon Musk boosted antisemitic tweet*, CNBC (Nov. 17, 2023);[5] Caleb Ecarma, *Twitter Can't Seem to Buck Its Advertisers-Don't-Want-to-Be-Seen-Next-to-Nazis Problem*, Vanity Fair (Aug. 17, 2023);[6] Ryan Mac & Tiffany Hsu, *Twitter's US Ad Sales Plunge 59% as Woes Continue*, N.Y. Times (Jun. 5, 2023).[7] Similarly, users will exit if they don't enjoy the experience of the

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[5] https://www.cnbc.com/2023/11/17/apple-has-paused-advertising-on-x-after-musk-promoted-antisemitic-tweet.html.

[6] https://www.vanityfair.com/news/2023/08/twitter-advertisers-dont-want-nazi-problem.

[7] https://www.nytimes.com/2023/06/05/technology/twitter-ad-sales-musk.html.

platform. *See* Steven Vaughan-Nichols, *Twitter seeing 'record user engagement'? The data tells a different story*, ZDNet (Jun. 30, 2023).[8] Speech by social media companies disavowing what is said by some users of their platforms does not prevent advertisers and much of the public from identifying user speech with the platform.

Moreover, both the Florida and Texas laws are discriminate based upon content, as a reviewing court would have to consider what speech is at issue to determine whether a social media company can moderate it. This makes the laws different than those at issue in *Turner*, and offer an alternative reason they should be subject to strict scrutiny.

Section 230 of the Communications Act does not change this analysis. *Contra Paxton*, 49 F.4th at 465-66. Section 230 supplements the First Amendment's protection of editorial discretion by granting "providers and users of an interactive computer service" immunity from (most) lawsuits for speech generated by other "information content providers" on their platforms. *See* 47 U.S.C. §230(c). The animating reason for Section 230 was to provide "protection for private blocking and screening" by preventing lawsuits over third party content that was left up, *see* Section 230(c)(1), or over third-party content that was taken down, *see* Section 230(c)(2). *See also* Geoffrey A. Manne, Ben Sperry, & Kristian Stout, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, 49 RUTGERS COMPUTER &

[8] https://www.zdnet.com/article/twitter-seeing-record-user-engagement-the-data-tells-a-different-story/.

TECH. L. J. 26, 39-41 (2022). Section 230 encourages social media companies to use their underlying First Amendment rights to editorial discretion. There is no basis for citing it as a basis for restricting such rights.

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The challenged Florida and Texas laws treat social media platforms essentially as company towns. But social media platforms simply do not demonstrate the requisite characteristics sufficient to treat them as company towns whose moderation decisions are subject to court review for viewpoint discrimination. Instead, consistent with their economic function, they are private actors with their own rights to editorial discretion protected from government interference.

III. The Justifications for Common Carriage Regulation Do Not Apply to Social Media Companies.

The law and economics principles described above establish a general rule of the First Amendment that private property owners like social media companies have the right, responsibility, and need in the marketplace to moderate speech on their platforms. It makes no more sense to apply common carriage regulation to social media platforms than it does to treat them as company towns subject to the First Amendment.

Both Florida's SB 7072 and Texas's HB 20 are designed to restrict the ability of social media companies to exercise editorial discretion on their platforms. Each State justified its law by comparing social media companies to common carriers. Florida's legislative findings included the statement that social media platforms should be "treated similarly to

common carriers." Act of May 24, 2021, ch. 2021-32, § 1(6), 2021 Fla. Laws 503, 505. Texas' legislature found that "social media platforms function as common carriers" and "social media platforms with the largest number of users are common carriers by virtue of their market dominance." Act of Sept. 9, 2021, ch. 3, § (3)–(4), 2021 Tex. Gen. Laws 3904, 3904.

But simply "[l]abeling" a social media platform "a common carrier . . . has no real First Amendment consequences." *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). And nothing about social media platforms justifies the label in any event: Social media platforms do not hold themselves out to the public as common carriers, and social media platforms lack monopoly power.

A. Social media platforms do not hold themselves out to all comers.

Both the Eleventh Circuit in *Moody* and the Fifth Circuit in *Paxton* recognized that one characteristic common carriers share is that they hold themselves out as serving all members of the public without individualized bargaining. *See Moody*, 34 F.4th 1196, 1220 (11th Cir. 2022); *Paxton*, 49 F.4th at 469.

Major social media companies, however, do *not* hold themselves out to the public indiscriminately either for users or the type of speech allowed. Unlike a telephone company or the postal service, both of which carry all private communications regardless of the underlying message, social media companies require all users to accept terms of service dealing specifically with speech in order to use the platform. They also maintain the discretion to enforce their

rules as they see fit, both curating and editing speech before presenting it to the world.. As the Eleventh Circuit put it in *Moody*, social media users "are *not* freely able to transmit messages 'of their own design and choosing' because platforms make—and have always made—'individualized' content- and viewpoint-based decisions about whether to publish particular messages or users." *Moody,* 34 F.4th at 1220 (quoting *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 (1979)).

Moreover, the very service that online platforms offer to users, and that users accept, is the moderation of speech in one form or another. Instagram allows users to curate feeds of specialized images, and Twitter does the same for specialized microblogs. Without this core moderation service, the services would be essentially useless to users. By contrast, common carriers do *not* have as a core part of their service the moderation of speech: any moderation of speech is incidental to operation of the service (e.g. removing unruly passengers).

Judge Srinivasan's concurring opinion in *United States Telecom Association* v. *FCC*, 855 F.3d 381 (D.C. Cir. 2017) (denying rehearing en banc), is instructive on this point. The panel there had denied a petition for review of the FCC's net neutrality order, which applied common carriage regulation to internet service providers. At the rehearing stage, then-Judge Kavanaugh feared the panel's opinion would allow the government to "impose forced-carriage or equal-access obligations on YouTube and Twitter." *Id.* at 433 (Kavanaugh, J., dissenting). Judge Srinivasan sought to allay that fear by explaining: Social media platforms "are *not* considered common carriers that

hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering[.]". *Id.* at 392 (Srinivasan, J., concurring) (emphasis added). Indeed, even the Internet service providers deemed common carriers there could escape such designation if they acted like social media platforms and exercised editorial discretion and advertised themselves as doing so. *See id.* at 389-90 (Srinivasan, J., concurring).

Unlike the telegraph, telephone, the postal service, or even email, major social media companies do not hold themselves out to the public as open to all legal speech—they expressly retain their editorial discretion. They have publicly available terms of service that users must agree to before creating profiles that detail what is and is not allowed on their platforms. While common carriers like airlines may be able to eject passengers based upon conduct even where there is a speech element, social media companies retain the right to restrict pure expression that is inconsistent with their community standards. These rules include limitations on otherwise legal speech and disclose that violators may be restricted from use, including expulsion. Br. for Pet'rs, https://netchoice.org/wp-content/uploads/2023/11/No.-22-555_NetChoice-and-CCIAs-Brief-Paxton.pdf, at 4-7.

The Fifth Circuit was wrong to minimize social media platforms' editorial discretion by comparing their efforts to newspapers curating articles and columns. *See Paxton*, 49 F.4th at 459-60, 492 (noting that more than 99% of content is not reviewed by a human). *Miami Herald* did not establish a floor on how much a private actor must exercise editorial

discretion in order to be protected by the First Amendment. Nor did it specify that a human must review content rather than a company investing in algorithms to help them moderate content. The Fifth Circuit's reasoning is essentially a "use it or lose it" theory of the First Amendment, which says if social media companies do not aggressively use their editorial discretion rights, then they can lose them. "That is not how constitutional rights work," however; the "'use it or lose it' theory is wholly foreign to the First Amendment." *U.S. Telecom*, 855 F.3d at 429 (Kavanaugh, J., dissenting).

Since social media companies do not hold themselves out to the public as open to all speech, they are not common carriers that can somehow be required to carry third party speech contrary to their terms of service.

B. Social media companies lack gatekeeper monopoly power.

Another reason offered for treating social media platforms like common carriers is that some social media companies are alleged to have "dominant market share," *see Biden* v. *Knight*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring), or in the words of *Turner,* "gatekeeper" or "bottleneck" market power. *See Turner,* 512 U.S. at 656.

As shown above, however, *Turner* is *not* really about market power but about the unique *physical* connection that gave cable providers the power to restrict access to content by the flick of a switch. In any case, there is no basis for concluding that social media companies are all monopolists.

A number of major social media companies covered by the Florida and Texas laws are not in any sense holders of substantial market power as measured by share of visits.[9] Neither are companies like reddit, LinkedIn, Tumblr, or Pinterest, who all have even fewer visits. Nonetheless, the challenged laws would apply to such entities based on monthly users at the national level or gross revenue. *See* Fla. Stat. §501.2041(1)(g)(4) (covered providers must have at least 100 million monthly users or $100 million in gross annual revenue); Tex. Bus. & Com. Code §§ 120.001(1), .002(b) (covered social media platforms have 50 million monthly active users). But raw revenue or user numbers do not show market power. It is, at the very least, market *share* (*i.e.*, *concentration*) that could plausibly be instructive—and even then, market power entails a much more complex determination. *See, e.g.,* Brian Albrecht, *Competition Increases Concentration*, TRUTH ON THE MARKET (Aug. 16, 2023), https://truthonthemarket.com/2023/08/16/competition-increases-concentration/. As economist Chad Syverson puts it, "concentration is worse than just a noisy barometer of market power. Instead, we cannot even generally know which way the barometer is oriented." Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSP. 23, 26 (2019).

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[9] *See* https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/ (Facebook at 49.9%, Instagram at 15.85%, X/Twitter at 14.69%, YouTube at 2.29%); https://gs.statcounter.com/social-media-stats/all/united-states-of-america (similar numbers).

Second, there is no legislative finding of market power that would justify either law: just a bare assertion by the Texas legislature that "social media platforms with the largest number of users are common carriers by virtue of their market dominance." HB 20 § 1(4). That "finding" by the Texas legislature fails to even define a relevant market, let alone establish market shares, or identify any indicia of market power of any players in that market. In then-Judge Kavanaugh's words, both Florida and Texas failed to "even tr[y] to make a market power showing." *U.S. Telecom*, 855 F.3d at 418 (Kavanaugh, J., dissenting); *see also FTC* v. *Facebook*, 560 F. Supp. 3d 1, 18 (D.D.C. Jun. 28, 2021) ("[T]he FTC's bare assertions would be too conclusory to plausibly establish market power").

The Texas legislature's bare assertion is considerably weaker than the "unusually detailed statutory findings" the Court relied on in *Turner*, 512 U.S. at 646,[10] and is woefully insufficient to permit reliance on this justification for common-carrier-like treatment under the First Amendment.

CONCLUSION

The First Amendment protects the marketplace of ideas by protecting private ordering of speech rules. For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit in *Paxton* and affirm the decision of the Eleventh Circuit in *Moody*.

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[10] *See also* Pub. L. 102-385 § 2(a)(1) (detailing price increases of cable television since rate deregulation, which is inferential evidence of market power); *id.* § 2(a)(2) (explaining that local franchising regulations and the cost of building out cable networks leave most consumers with only one available option).

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