No. 22-277

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.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR DONALD J. TRUMP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus Donald J. Trump, 45th President of the United States, is the lead plaintiff in class action lawsuits filed against Twitter, Inc.,[2] Meta Platforms, Inc.,[3] and YouTube, LLC.[4] Among the causes of action[5] alleged in these cases are violations of the censorship-disclosure requirements of Fla. Stat. § 501.2041(2)(a) ("Section (2)(a)" or "(2)(a)")[6] and the consistent-application requirements of Fla. Stat. § 501.2041(2)(b) ("Section (2)(b)" or "(2)(b)").[7] Sections (2)(a) and (2)(b) were

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[1] Notice of intent to file this *Amicus* brief was provided to the Petitioner and Respondent on October 10, 2022. Counsel for Petitioner consented to the brief and counsel for the Respondent provided blanket consent. No parties other than the *Amicus* and his counsel have provided funds for this brief and no counsel for any party to this action have authored any portion of this brief.

[2] *Trump et al. v. Twitter, Inc., et al.*, 21-cv-8378 (N.D. Cal.) (dismissed without prejudice on standing grounds in an order predating *NetChoice* and currently before the Ninth Circuit Court of Appeals, *Donald Trump, et al. v. Twitter Inc., et al.*, Case No. 22-15961).

[3] *Trump et al. v. Meta Platforms, Inc.*, *et al.*, 21-cv-9044 (N.D. Cal.).

[4] *Trump et al. v. YouTube, LLC*, *et al.*, 21-cv-9008 (N.D. Cal.).

[5] In addition to the S.B. 7072 causes of action, there are claims under the First Amendment, the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*, and an action to determine the constitutionality of Section 230.

[6] Section (2)(a) requires Platforms, among other provisions, to, "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." Fla. Stat. § 501.2041(2)(a) (2022).

[7] Section (2)(b) requires Platforms to, "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." Fla. Stat. § 501.2041(2)(b) (2022).

enacted by the Florida Legislature as part of Senate Bill 7072 ("S.B. 7072").[8] The decision of the Eleventh Circuit in *NetChoice, LLC v. AG, Florida*, 34 F.4th 1196 (11th Cir. 2022) ("*NetChoice*") directly affects both Sections (2)(a) and (2)(b). *NetChoice* reviewed a district court's order enjoining governmental enforcement of S.B. 7072. The Eleventh Circuit vacated the district court's injunction as to Section (2)(a)'s disclosure requirements but affirmed the injunction as to Section (2)(b)'s consistency requirement. *Amicus* Trump has a direct interest in upholding these statutes and submits this brief to apprise the Court that Sections (2)(a) and (2)(b) are supported by long-standing common-law principles prohibiting unfair discrimination by common carriers.

SUMMARY OF THE ARGUMENT

Recent experience has fostered a widespread and growing concern that behemoth social media platforms ("Platforms") have "seriously leverage[d their] economic power into a means of affecting the community's political life." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 391 (2021). This concern is heightened because Platforms often shroud decisions to exclude certain users and viewpoints in secrecy, giving no meaningful explanation as to why certain users are excluded while others posting equivalent content are tolerated. In

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[8] Fla. Stat. § 501.2041 *et seq.* (2022).

today's world, where the Internet, and particularly social media, have supplanted traditional means of mass communication, "denying a group a vastly important means of public communication is a serious burden." *Id.* at 391. In an effort to ameliorate what it perceived as a dangerous distortion of the public's political discourse, Florida enacted S.B. 7072. Sections (2)(a) and (2)(b)—the focus of this *amicus* brief—seek the limited goal of forcing Platforms to make their censorship decisions transparent and consistent. These Sections do not compel Platforms to carry or ban *any* messages; they impose no rules as to what is and is not permissible. They merely ensure that whatever rules the Platforms adopt are fully disclosed and consistently applied.

The Eleventh Circuit upheld Section (2)(a) because it complies with the consumer-protection principles of *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626 (1985). However, it mistakenly affirmed the injunction as to Section (2)(b)'s consistency requirement by overlooking another consumer-protection principle enshrined in a long line of cases from this Court and others holding that common carriers may not unfairly discriminate among users. *See*, *e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 33 (1911); *York Co. v. Cent. R.R.*, 70 U.S. 107, 111-12 (1865) ("[t]he law prescribes the duties and responsibilities of the common carrier . . . he can make no discrimination between persons, or vary his charges from their condition or character."). NetChoice's inconsistent rulings on S.B. 7072's disclosure and consistency requirements

exemplify Justice Thomas' admonition that "applying old doctrines to new digital platforms is rarely straightforward," *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring). He correctly predicted that the Court "will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms." *Id.* at 1221. Common-carrier and consumer-protection doctrines are central to *NetChoice*, and the urgency of the issue is amplified by the direct conflict created by the Fifth Circuit's recent decision in *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) ("*Paxton*").

The conflict between *NetChoice* and *Paxton* hinges on their different approaches to the primary function of social media platforms. In *NetChoice*, the Eleventh Circuit erroneously concluded that "social-media platforms aren't 'dumb pipes': They're not just servers and hard drives storing information or hosting blogs that anyone can access . . . when a user visits Facebook or Twitter, for instance, she sees a curated and edited compilation of content." *NetChoice*, 34 F.4th at 1204. Conversely, *Paxton* correctly recognized that Platforms are in many ways just that, "dumb pipes," because they "permit any user who agrees to their boilerplate terms of service to communicate on any topic, at any time, and for any reason." *Paxton*, 49 F.4th at 461.[9] While

[9] Many platforms allow posts to be viewed by any user, even those without accounts. *Oracle Am. Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1105-06 (N.D. Cal. 2016) (noting that posts on Twitter are generally visible to users with or without accounts

they perform other functions that may be subject to different rules, when it comes to activities protected by the special privileges of Section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230 ("Section 230")), they are common carriers.

Entities that do not make individualized determinations as to who may use their services are generally considered common carriers. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 741-42 (D.C. Cir. 2016). Platforms with hundreds of millions of daily users, who hold themselves out as admitting all comers, easily meet this standard.[10] And entities that enjoy special privileges bestowed by a government have long been deemed common carriers. *See*, *e.g.*, *Messenger v. Pennsylvania R.R.*, 36 N.J.L. 407, 413 (N.J. 1873); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 58 (2d Cir. 2006). As Section 230 is precisely such a special privilege, Platforms are common carriers under this standard as well.

Industry leaders have acknowledged that "Section 230 made it possible for every major internet service to be built."[11] *See also* Volokh, *supra*, at 391 ("47 U.S.C. § 230(c)(1) immunity from libel and similar lawsuits has allowed platforms to amass and deploy financial

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while Facebook and LinkedIn vary the visibility of posts to users without accounts.

[10] Social media platforms such as Facebook, Twitter, YouTube and Tik Tok have billions of users. *NetChoice*, 34 F.4th at 1204.

[11] Statement of Mark Zuckerberg, CEO of Facebook, Inc., *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020).

resources on a scale that can be matched by few people and even by few corporations."). By enacting Section 230, Congress wanted "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). This immunity is unique to the publishing industry; newspapers and television stations get no such protection and are plagued by costly and burdensome lawsuits. *See*, *e.g.*, *Palin v. N.Y. Times Co.*, 2022 WL 599271 (S.D.N.Y. 2022) (defamation lawsuit by Sarah Palin against the *New York Times*); *Sandmann v. WP Company, LLC*, 401 F. Supp. 3d 781 (E.D. Ky. 2019) (defamation lawsuit brought by Covington Catholic High School student Nicholas Sandmann against the *Washington Post*).

The indispensable role of Section 230 in the creation of the industry is not lost on its leading actors. Judge Oldham observed in *Paxton* that "[b]y their own admission, the Platforms are just as dependent on § 230's liability shield as the old railroad companies were on the ability to traverse land acquired via eminent domain." *Paxton*, 49 F.4th at 477. The similarities between the railroads and social media extend beyond their mutual indebtedness to special privileges; it also includes the noxious practice of unfairly discriminating against users.

Despite holding themselves out to everyone and enjoying special privileges from the government, certain railroads of the Gilded Age—like some Platforms today—abused this public trust, giving preferential treatment to favored customers. Courts brought these practices to heel by holding that, as the recipients of

generous special privileges from the government, the railroads were common carriers, prohibited from engaging in unfair discrimination. *See*, *e.g.*, *Johnson v. Pensacola and Perdido R.R.*, 16 Fla. 623 (Fla. 1878); *Dinsmore v. The Louisville, Cincinnati & Lexington Ry.*, 2 F. 465 (Cir. Ct., D. Ky. 1880).

Sections (2)(a) and (2)(b) represent an effort of the Florida Legislature to ensure that, like any common carrier, Platforms do not unfairly discriminate against users. These Sections do not compel Platforms to allow or endorse speech with which they disagree; they only require Platforms to disclose what standards they are applying and apply those standards consistently. Any incidental effect such inclusivity requirements may have on speech is de minimis, and challenging them "trivializes the freedom" protected by this Court's First Amendment cases. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

This Court has recognized that social media is the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Social media could not have assumed this role in American society without the immunities extended by Congress through Section 230. By ignoring the industry's indebtedness to this special privilege, *NetChoice* failed to recognize that Section (2)(b) simply codifies common-carrier principles against unfair discrimination. The ancient lineage of these principles is no bar to their applicability to social media platforms; the common law remains to this day a key part of telecommunications law. *See*, *e.g.*, *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 858-61 (9th

Cir. 2018). A review of *NetChoice* will give the Court an opportunity to clarify whether states retain their common-law authority to protect users from being unfairly excluded from the "modern public square."

ARGUMENT

I. Platforms are Common Carriers that may be Prohibited from Unfairly Discriminating Among Users

Unfair discrimination by common carriers has been prohibited since at least the 1670s. *Munn v. Illinois*, 94 U.S. 113, 126 (1877). In *Munn* this Court explained that "[c]ommon carriers exercise a sort of public office, and have duties to perform in which the public is interested." *Id.* at 130. By accepting all users and enjoying Section 230's special privileges, Platforms "exercise a sort of public office" and are, therefore, common carriers. *See*, *e.g.*, Volokh, *supra*, at 407 (" . . . social media platforms, in their hosting function (rather than their recommendation function), are more like phone companies . . . than like newspapers or broadcasters"). Sections (2)(a) and (2)(b) simply codify the principles that common carriers must disclose their terms and apply them consistently. This is no different from the requirement that air carriers and railroads sell a ticket to everyone who qualifies under their publicly disclosed terms of service.

a. The Special Privileges of Section 230

It is unjust for any beneficiary of governmental privileges to abuse them in a manner detrimental to the public. *Messenger*, 36 N.J.L. at 413. By ignoring Section 230's vital role in creating and maintaining the industry, *NetChoice* failed to recognize that Sections (2)(a) and (2)(b) are simply designed to apply long-standing common-carrier principles to today's digital Platforms.

i. Section 230 Conveys a Special Privilege to Platforms

Congress enacted Section 230 "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). To further this goal, Congress granted Platforms immunity from defamation and other claims. 47 U.S.C. § 230(c)(1). Liability for defamation has been a part of the Western tradition since at least 450 B.C.[12] and the common law since at least the 1500s;[13] it has been applicable to publishers for over two centuries.[14] Section 230's massive power is demonstrated by this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). While *Sullivan* made it more difficult to sue news-reporting organizations, the risk of liability

[12] The Roman Laws of the Twelve Tables stated that "[i]f anyone sings or composes an incantation that can cause dishonor or disgrace to another . . . he shall suffer a capital penalty." Yale Law School, *The Avalon Project* (last visited October 12, 2022): https://avalon.law.yale.edu/ancient/twelve_tables.asp.

[13] *Palmer v. Thorpe*, 4 Coke's Reporter 20a.

[14] 4 William Blackstone, Commentaries *150-53.

remains for defamation and a multitude of other claims. But, with the stroke of a pen, Congress exempted digital Platforms from a defamation standard dating back several millennia and all the other tort claims applied to publishers since.

The net result of this extraordinary special privilege is best captured by Michael Beckerman, the former president of the industry trade group the Internet Association, who stated that Section 230 is "the one line of federal code that has created more economic value in this country than any other."[15] Section 230 is so crucial that Twitter,[16] Alphabet (parent company of YouTube),[17] and Meta (parent company of Facebook)[18] disclose in filings with the Securities and Exchange

[15] *Section 230: A Key Legal Shield for Facebook, Google is About to Change*, National Public Radio (March 21, 2018).

[16] Twitter, Inc., Annual Report (Form 10-K) (Feb. 16, 2022) ("various Executive and Congressional efforts to restrict the scope of the protection from legal liability . . . under Section 230 . . . [could] result[ ] in increased liability for content moderation decisions and third-party content posted on our platform and higher litigation costs.").

[17] Alphabet Inc., Annual Report (Form 10-K) (Feb. 16, 2022) ("[w]e rely on statutory harbors, as set forth in . . . Section 230 . . . against liability for various linking, caching, and *hosting* activities. Any legislation or court rulings affecting these safe harbors may adversely affect us.") (emphasis added).

[18] Meta Platforms, Inc., Annual Report (Form 10-K) (Feb. 2, 2022) ("[i]n the United States, changes to Section 230 . . . may increase our costs or require significant changes to our product, business practices or operations, which could adversely affect user growth and engagement.").

Commission that changes to Section 230 would have serious and negative effects on their businesses.

ii. The Indispensable Role of Section 230

NetChoice ignored Section 230's pivotal role in creating the industry. The Eleventh Circuit rejected Justice Thomas' suggestion in *Biden* that businesses can rise from purely private to public concerns, stating that a company's legal obligations do not change "because it succeeds in the marketplace and hits it big." *Id.* at 1221-22, quoting *Knight*, 141 S. Ct. at 1223 (wherein Justice Thomas suggests that common-carrier regulations "may be justified, even for industries not historically recognized as common carriers, when a business . . . rises from private to be a public concern."). Where Platforms "succeeded in the marketplace" and "hit it big," that success was not purely through entrepreneurial skill. They "hit it big" in large part because Congress immunized them from the risks traditional publishers face. "Immunity from tort liability is what also helped the major platforms become so big, powerful, and capable of influencing public debate—thus helping create the problems to which common carrier status might be a solution." Volokh, *supra*, at 457. The rise of social media is no simple free market success story: The print industry enjoys no such immunity and has withered in competition with online giants who are

free to profit from the publication of defamatory and otherwise questionable content.[19]

Addressing public harm arising from the exploitation of special privileges is not new ground for the judiciary. In the late 1800s, courts held that special privileges such as the grant of eminent domain powers and gifts of public land converted railroads from purely private concerns to common carriers. These special privileges were first bestowed in the early 1860s, and by easing access to land they played an essential role in the completion of the transcontinental railroad in 1869.[20] By comparison to one-time gifts and eminent domain powers, the immunities of Section 230 are far more valuable. While it would have taken time, the private sector could have provided the funds needed for the construction of the railroads; contrariwise, only Congress could bestow immunity for defamation and other torts. Furthermore, rather than a one-time gift, Section 230 is, in effect, an annuity. A 2017 Internet Association study placed the value of Section 230 and

[19] For example, between 2008 and 2020 digital native newsroom employment rose from 7 thousand to 18 thousand, while employment in print journalism cratered from roughly 71 thousand to 31 thousand. Mason Walker, *U.S. Newsroom Employment has Fallen 26% since 2008*, Pew Research Center (July 13, 2021).

[20] Between 1862 and 1872 Congress granted the railroads 131 million acres; states contributed an additional 44 million acres. Richard White, *The Republic for Which It Stands*, Oxford (2019), at 117-19. Between 1868 and 1873 the railroads used funds raised from selling these lands to construct 30,000 miles of track. *Id*. at 217.

the Digital Millennium Copyright Act at $40 billion annually.[21]

Fast on the heels of railroad special privileges came their abuse by private-sector beneficiaries. For example, John D. Rockefeller worked around the railroads' published freight rates by securing "rebates" for bulk orders of cargo capacity. Ida M. Tarbell, *The History of the Standard Oil Company*, New York (1904), Vol. II, p. 290. Rockefeller made every effort to defeat bills that sought to prohibit preferential treatment, from their first introduction in 1876 until the passage of the Interstate Commerce Act ("ICA") in 1887. *Id.* at 291. But even before passage of the ICA, courts had begun to apply common-carrier principles to prohibit unfair discrimination.

As early as 1872, a state court held that common-law common-carrier principles applied to the railroads as result of the special privileges bestowed on the industry. *Kansas Pac. Ry. v. Nichols, Kennedy & Co.*, 9 Kan. 235, 250 (KS 1872) ("It is believed that no railroad has yet been built in Kansas that has not been aided both by the exercise of eminent domain and by other public aid, such as lands and county or municipal bonds."). And in 1878, the Supreme Court of Florida applied this Court's *Munn* decision to hold that preferential pricing by a railroad violated the common-law prohibition against unfair discrimination. *Johnson*, 16 Fla. 623 at 663 ("It cannot be questioned that the

[21] *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA (June 5, 2017).

reason why a common carrier is restricted to reasonable rates is the same that causes the limitation at common law upon the rates to be charged by a wharfinger licensed under a statute."). In the years before the enactment of the ICA this special-privileges analysis was widely adopted by courts applying common-carrier principles to the railroads.[22]

Beyond the role of special privileges in their development, railroads and social media platforms have striking similarities. The time period from the first land grants in 1862 to the passage of the Interstate Commerce (1887) and Sherman Antitrust Acts (1890) is roughly the same as between the passage of Section 230 and the present. For both industries, that quarter century of congressional favor saw their leading businesses shoot from nothing into the highest ranks of the nation's largest and wealthiest enterprises. And, fulfilling Congress' purpose in granting special privileges

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[22] *See*, *e.g.*, *Dinsmore*, 2 F. at 468 (Cir. Ct., D. Ky. 1880) ("Railroads are quasi-public institutions" and "their construction has been encouraged by liberal grants of power, and aided by private and public contributions"); *Taylor v. Philadelphia & Reading R.R.*, 7 F. 386 (Cir. Ct., E.D. Pa. 1881) ("quasi public corporations, such as railroads . . . are invested with important public and governmental functions") ; *Southern Express Co. v. Memphis, Etc., R.R.*, 8 F. 799 (Cir. Ct., E.D. Ark. 1881) ("a railroad is a quasi public corporation, and bound by the law regulating the powers and duties of common carriers"); *McCory v. Cincinnati, Indianapolis, St. Louis & Chicago R.R.*, 13 F. 3 (Cir. Ct., S.D. Ohio 1882) ("railroad corporations are quasi public corporations dedicated to public use . . . [i]t is upon this idea that they have been invested with the power of eminent domain").

to these industries, both revolutionized America's communication networks and the country itself.

iii. Common-Law Common-Carrier Principles Apply to Section 230

The application of common-law principles to social media companies is perfectly consistent with Section 230's framework. The standards set out in *Munn* and the cases addressing unfair discrimination by railroads formed the basis of the ICA. Applicable at first only to railroads, it was expanded to cover telephone companies in 1910; telephones were transferred to the Federal Communications Commission in 1934, and remain there to this day. *Verity Int'l, Ltd.* 443 F.3d at 57. The essential fact is that the regulatory regime governing today's telecommunications industry traces straight back to the pre-ICA common-law principles that courts applied to the railroads. These principles not only inform but *govern* the statutes and rules applicable to modern telecommunications. Specifically, under 47 U.S.C. § 414 ("Section 414"), nothing within Chapter 5 of the Telecommunications Act (which contains Section 230) "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Unless Section 230 contains a specific provision permitting Platforms to engage in unfair discrimination, Section 414 applies, and Platforms are bound by this common-law prohibition.

Section 230 contains no such exemption.

It should be noted that simply because Platforms are common carriers under the common law, it does not necessarily follow that they are also common carriers for the purpose of all the regulatory burdens of the Telecommunications Act. The issue is discrete: Has Congress enacted any provision that allows Platforms to discriminate against their users unfairly?

Congress has taken no such step.

NetChoice interpreted 47 U.S.C. § 223(e)(6) ("Section 223") as exempting the industry from common-law common-carrier obligations. However, Section 223 addresses obscene or harassing telephone calls and does not relate to the special privileges of Section 230. Had Congress intended to exempt Platforms from the common law, it would have done so expressly in Section 230 rather than by implication in Section 223; moreover, it said the exact opposite in Section 414.

NetChoice also cites a provision of Section 230 for the proposition that Congress did not intend to treat Platforms as common carriers, but it ignored material statutory language from its analysis. *NetChoice* stated that:

> [Section 230] goes on to provide protections for internet companies that are inconsistent with the traditional common-carrier obligation of indiscriminate service. In particular, it explicitly protects internet companies' ability to restrict access to a plethora of material that they might consider "objectionable."

NetChoice, 34 F.4th at 1221. As a preliminary matter, this overlooks the basic principle that common carriers may have rules as to how they provide services, *e.g*., only those who pay for a ticket and behave decently, but must apply those rules to all customers in a consistent fashion. For example, telegraph companies remain common carriers even though they retain the authority to refuse obscene content. *See*, *e.g.*, *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 542 (1st Cir. 1940); *Restatement (Second) of Torts* §§ 581, 612 (1977).

More importantly, Section 230 does not give Platforms free rein to exclude all content they "might consider" objectionable. Rather, Congress strictly limited what this "objectionable" conduct could be:

> **(2)** Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) 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. . . .

47 U.S.C. § 230(c)(2)(A) (emphasis added). Thus, Congress has limited a Platform's immunity to "good faith" efforts, and courts have applied this "good faith" standard to support claims alleging anti-competitive behavior. *See*, *e.g.*, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL

2210029 *3 (M.D. Fla. 2017). Moreover, the list of factors that a Platform is free to consider in censoring content is limited by the statutory language. Inclusion of the catch-all category "otherwise objectionable" does not mean it can censor content based on anything *it* claims to consider "objectionable." Construing the term broadly enough "to include any or all information or content," would render the statutory list meaningless and superfluous. *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014).[23]

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[23] *Amicus* acknowledges that the Ninth Circuit in *Malwarebytes* rejected the *ejusdem generis* argument, which had been accepted by district courts in that circuit and elsewhere, *see*, *e.g.*, *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883-84 (N.D. Cal. 2015) (rejecting "reading 'otherwise objectionable' to mean anything to which a content provider objects regardless of why it is objectionable" and instead applying *ejusdem generis* to cabin "otherwise objectionable" by "the list preceding" it of "obscene, lewd, lascivious, filthy, excessively violent, [and] harassing" material); *Nat'l Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl19GJK, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008) (rejecting the argument "that Congress intended the general term 'objectionable' to [immunize restricting access to] an auction of potentially-counterfeit coins" because "the word ['objectionable'] is preceded by seven other words that describe pornography, graphic violence, obscenity, and harassment"); *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (adopting the reasoning of National Numismatic Certification on this point). *Amicus* believes that *Malwarebytes* erred on this point but it was not the issue presented in the cert petition in that case and was raised only descriptively in a footnote in the Brief in Opposition. Petition for Writ of Certiorari in *Malwarebytes v. Enigma Software Group USA*, No. 19-1284 (May 11, 2020), at i; *id.* Brief in Opposition at 27-28 (Jul. 20, 2020). This Court therefore has not, but should, resolve this important issue.

Nor does Section 230 protect discrimination based on any other basis unrelated to *content*—such as point of view, political influence, skin color, marital status, or friendship with the Platforms' operators. This is what Congress meant when it limited the exercise of this authority to *good faith* efforts, and this is in harmony with both the common law's prohibition on unfair discrimination and, importantly, Section (2)(b)'s consistency requirement. Simply put, Section 414 holds that the common law is fully applicable to social media Platforms. The issue is whether Congress, when it enacted Section 230, authorized Platforms to discriminate against their users *unfairly*; there is no plausible reading of Section 230 supporting such a conclusion.

b. Platforms Accept All Users

The most basic definition of a common carrier is an entity that does not engage in any individualized determination as to whether and on what terms to deal with a consumer. *U.S. Telecom Ass'n*, 825 F.3d at 741-42. By erroneously focusing on the Platforms' curation of posts, the Eleventh Circuit missed the target: When determining if an entity is a common carrier, the proper inquiry is whether the entity offers its services to all comers, not the rules it applies in discriminating among users. Were it otherwise, railroads could have exempted themselves from common carrier status by adopting a rule that allowed Rockefeller to buy passage at lower rates than his competitors. To be sure, the rules a common carrier adopts must be fair and non-discriminatory, but they have nothing to do with

whether the entity in question is a common carrier. The Eleventh Circuit came to the wrong answer because it looked through the wrong end of the telescope.

NetChoice's error is illustrated through a recent example involving Delta Air Lines' carriage policy for big-game trophies. *Conservation Force v. Delta Air Lines, Inc.*, 190 F. Supp. 3d 606 (N.D. Tex. 2016), *aff'd*, 682 Fed. Appx. 310 (5th Cir. 2017) (mem.). A passenger claimed that Delta unfairly discriminated against him by refusing to transport his big-game trophy, but the District Court rejected the argument, noting that common carriers were free to set their carriage policies provided they applied them equally to anyone using the service. *Id.* at 610 (quoting *York Co.*, 70 U.S. at 112). Applying federal common-law principles, the *Conservation Force* court properly drew the distinction between common-carrier status (which Delta clearly had, by virtue of its "all comers" policy) and the terms of service by which Delta operated its airline (which had to be fair and uniform). The terms passed muster because Delta applied its trophy policy uniformly to all users.

When hosting third-party content, Platforms' terms of service are no different from Delta's cargo shipping policy. Like any common carrier, Platforms may set reasonable criteria for what they will carry and on what terms, but what makes them common carriers is that Platforms—like commercial airlines—are open to any qualified user. It is immaterial that Platforms carry speech rather than big game trophies; common-carrier principles apply whatever type of third-party content is being conveyed by the carrier. *U.S. Telecom*

Ass'n, 825 F.3d at 741-42. Furthermore, entities carrying speech have long enjoyed the ability to refuse specific messages without, in the process, eliminating their status as common carriers. 1 Bruce Wyman, *The Special Law Governing Public Service Corporations, and All Others Engaged in Public Employment* § 633 (1911) ("Telegraph companies likewise need not accept obscene, blasphemous, profane, or indecent messages, although there is a case which holds that the telegraph company refuses an equivocal message at its peril.").

Lastly, it bears noting that hosting content but then "hiding it" would not constitute "consistent" treatment under Section (2)(b). Consistent with common-carrier principles, a user's post must be as easily accessible as any other third-party content that can be found on the Platform. *See*, *e.g.*, Volokh, *supra*, at 445 ("A common-carrier mandate might require Twitter to provide this finding tool for all feeds, including ones that Twitter would rather hide.").

II. Sections (2)(a) and (2)(b) Regulate Platforms as Common Carriers and Raise No First Amendment Concerns

Sections (2)(a) and (2)(b) do not implicate the First Amendment. They impose no burden on the Platforms to engage in or refrain from any type of speech. Sections (2)(a) and (2)(b) fall within this Court's holding in *Zauderer* that consumer protection laws that call for the disclosure of "purely factual and uncontroversial information about the terms under which [a

business's] services will be available" do not violate the First Amendment. *Zauderer*, 471 U.S. at 650-51. The Eleventh Circuit appropriately applied *Zauderer* to Section (2)(a). However, it incorrectly applied the higher standards of *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994), and *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), to Section (2)(b)'s consistency requirement.

In *Turner*, the Court was presented with a challenge to a law mandating that cable companies must carry certain channels. *Turner*, 512 U.S. 622. While holding the selection of content to be protected by the First Amendment, the Court upheld the must-carry requirement because it was content neutral. *Id*. at 662. In *Hurley*, the Court reviewed the application of a state public accommodation law to a parade. *Hurley*, 515 U.S. at 564. The Court held that the parade was a form of protected speech and application of the public-accommodation law required the organizers to disseminate views with which they might disagree. *Id.* at 586. *Turner* and *Hurley* have no bearing on Sections (2)(a) and (2)(b). As they do not require Platforms to carry messages they disagree with they do not implicate the First Amendment.

These disclosure and consistency requirements do not apply to individual messages and do not require Platforms to carry *any* messages. Rather, they ensure transparency and fairness in application of the rules the Platforms themselves choose to operate. As such, they resemble the matter before the Court in *Rumsfeld.* Upholding the Solomon Amendment, which compelled

law schools to grant access to military recruiters on an equal basis with other employers, the Court held that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." 547 U.S. at 62. Likewise, S.B. 7072's disclosure and consistency requirements contain no mandate that the Platforms endorse or even allow any third-party content.[24] The statute ensures that whatever rules the Platforms choose to adopt are applied openly, fairly, and consistently.

Importantly, while some portions of S.B. 7072 do impose must-carry provisions, those sections operate independently of Sections (2)(a) and (2)(b). Sections (2)(a) and (2)(b) merely require that, if Platforms do censor, they must disclose their standards and apply them consistently. Whether and how a Platform censors content is completely up to the Platform itself. Section 6 of S.B. 7072 contains a severability provision; accordingly, any infirmities suffered by other sections of S.B. 7072 do not impact the viability of either (2)(a) or (2)(b).

As noted in *Paxton*, "a speech host must make one of two showings to mount a First Amendment challenge . . . [the] law either (a) compels the host to speak or (b) restricts the host's own speech." *Paxton*, 49 F.4th at 459. Sections (2)(a) and (2)(b) do neither: These

[24] Furthermore, Platforms are free to disclaim any association with third party content. *See*, *e.g.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980); *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020); *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909 (N.D. Cal. June 29, 2021).

Sections simply require the consistent application of censorship policies that are controlled by the Platforms themselves. Accordingly, there are no *Turner* or *Hurley* First Amendment concerns. Much as the law schools in *Rumsfeld* were required to open their facilities to the military on a par with other employers, Sections (2)(a) and (2)(b) require Platforms to treat all users fairly.

CONCLUSION

Florida's law is an attempt to ensure that Platforms state their censorship policies and apply them consistently. Sections (2)(a) and (2)(b) are in perfect harmony with long-standing common-law prohibitions against unfair discrimination by common carriers. A review of *NetChoice* will provide urgent clarity to legislatures across the nation as to how they can ensure their residents have access to the "modern public square."

Respectfully submitted,

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