Nos. 22-277 and 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.,
RESPONDENT.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Petitioners
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND ELEVENTH CIRCUITS

Brief of *Amicus Curiae* Open Markets Institute in Support of Petitioners in No. 22-277 and Respondent in 22-555

TARA PINCOCK
SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
655 15th St NW
Suite 310
Washington, DC 20005

JAY L. HIMES
Counsel of Record
50 East 89th Street,
Apt. 12F
New York, NY 10128
(646) 808-6135
jlhimes@gmail.com

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INTEREST OF THE *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

When the internet was young and the precursors to today's internet platforms[2] were new, there was a lot of hype around all the things this new technology could do.[3] At first a novelty and modest

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[1] In accordance with this Court's Rule 37.2, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Internet platforms host user-generated content and include social media platforms, e-commerce platforms, and ride-sharing platforms. JA 66, 96.

[3] See 47 U.S.C. § 230 (a) (detailing Congress's findings and justifications for the enactment of Section 230 by describing the potential economic effects of the internet); *see also Steve Jobs interview: One-on-one in 1995*, COMPUTERWORLD (Oct. 27, 2011) ("[The internet is] very

distraction, platforms provided a place to share news about life events, play games, and maybe read the news. But as the internet grew up and platforms became essential to our everyday lives, their increasing size and power gave rise to issues and concerns both at home and abroad. These firms—whether they be social media, search, e-commerce, or ride-sharing platforms—now operate as critical intermediaries connecting various buyers and sellers for a multitude of services. *See* Benjamin E. Hermalin & Michael L. Katz, *What's So Special About Two-Sided Markets?*, *in* Toward a Just Society: Joseph Stiglitz and Twenty-First Century Economics 111 (Martin Guzman ed., 2018).

As with many emerging industries or new technologies, problems that need to be addressed through legislation and regulation do not always become "immediate upon [a firm's] existence." *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 416 (1914). More often, they become clear only after the "size, number, and influence of those agencies have so increased and developed as to seem to make it imperative." *Id.*

Today, internet platforms' power to spread and amplify all manner of content is a subject of concern across the political spectrum. It should, therefore, be no surprise that states seek to use their established

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exciting because it is going to destroy vast layers of our economy and make available a presence in the marketplace for very small companies, one that is equal to very large companies."), https://www.computerworld.com/article/2499505/video--steve-jobs-one-on-one--the--95-interview.html?page=13 (archived from an interview in 1995).

police power to charge internet platforms with common carrier responsibility to operate in the public interest.[4] Attentive to local conditions, state experiments led the Progressive movement more than a century ago to enact public policies designed to shield the public from the dominating control and discriminatory treatment of the railroads, telephone, and telegraph corporations. And the states are well-positioned to lead again.

We at the Open Markets Institute write in support of the states' exercise of their police power to regulate internet platforms as common carriers if and when they determine it is appropriate. Upholding this state authority has not historically stripped away First Amendment protections of those regulated and should not today. The analytical framework for a First Amendment analysis depends, however, on the activity regulated and responsibility imposed, necessarily determined on a case-by-case basis and are matters on which we express no position. We also take no position on the wisdom on the two state laws, Texas H.B. 20 (2021 Tex. Gen. Laws 3904, codified at Tex. Civ. Prac. & Rem. Code § 143A.002) or Florida S.B. 7072 (2021 Fla. Sess. Law Serv. Ch. 2021-32

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[4] *See e.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[I]t would be strange indeed ... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.").

(S.B. 7072), codified at Fla. Stat. Ann. § 106.072 (West 2021)), involved here.

Under established precedent, states and the federal government can impose common carrier obligations on certain classes of businesses, including communication firms. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 74-76 (D.C. Cir. 2019). Common carriers historically possessed distinguishing features, such as generally holding themselves out as open to the public or requiring a franchise or other special permission from the state to operate.

States can properly designate certain internet platforms as common carriers because the companies hold themselves out as open to all comers. Importantly, their issuance of terms of service ("TOS"), which may require users' adherence to community standards, does not insulate them from common carriage designation or obligations.

The courts have consistently upheld the legislative power to identify and regulate companies, including telecommunication firms, without running afoul of the First Amendment. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016) (upholding the Federal Communications Commission's 2015 Open Internet Order). Moreover, long-standing precedent recognizes that government regulation of common carriers and First Amendment protections can coexist. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part) ("if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies[.]").

Contrary to the platforms' assertions, they are distinguishable from newspapers. Users are able to

publish messages "of their own design and choosing," and these messages are not individually evaluated by social media platforms to ensure they are suitable for public display ahead of time. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023) ("People from around the world can sign up for the platforms and start posting content on them, free of charge and without much (if any) advance screening by defendants."). And because the volume of user-generated content is so high and content curation itself is assigned a low priority for social media platforms, user posts are typically not evaluated after the fact either. *See* Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, MOTHERBOARD (Aug. 23, 2018), https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works (detailing how billions of posts are published each day on Facebook but the company employs only 7,500 content moderators). By electronically receiving constant user-generated content for indiscriminate, automated display, platforms do not resemble newspapers whose editors exercise human judgment about what to publish or discard.

Rather than compare internet platforms to newspapers, it is more apt to compare them to shopping centers. Platforms use product features to induce "compulsive and extended" use of their products. *See Arizona v. Meta*, No. 4:23-CV-05448, 1 (N.D. Cal. Oct. 24, 2023). Similarly, shopping centers try to draw in customers through attractive displays and seasonal activities. Because the Court ruled that states can impose common carrier-like rules on shopping complexes, states should likewise be able to

impose common carrier-like rules on internet platforms. *Cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (State may authorize access to shopping center for expressive activity beyond that which the First Amendment recognizes).

ARGUMENT

States, Congress, and other nations have expressed many concerns about how the largest internet platforms operate.[5] As a result, different jurisdictions have sought various solutions to rein in these companies.[6] One solution that is growing in popularity in the U.S. is to regulate certain platforms, including social media, search, e-commerce, and ride-sharing platforms, as common carriers. To date, three states—Ohio, Texas, and Florida—have taken this approach.

In June 2021, Ohio asked a state court to enter a declaratory judgment recognizing Google as a common carrier and seeking associated injunctive relief. Complaint for Declaratory Judgment and

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[5] *See* Majority Staff of the Subcomm. on Antitrust, Com. & Admin L. of the H. Comm. on the Judiciary, 116th Cong., *Investigation of Competition In Digital Markets* (2020) (Majority Staff Rep.); Australian Competition & Consumer Comm'n, *Digital Platforms Inquiry Final Report* (2019); *Unlocking Digital Competition: Report Of The Digital Competition Expert Panel* (Jason Furman Chair, Crown, March 2019).

[6] *See, e.g.*, *The Digital Services Act Package*, EUR. COMM'N (Mar. 3, 2021), https://ec.europa.eu/digital-single-market/en/digital-services-act-package; Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Austl.), https://www.legislation.gov.au/C2021A00021/latest/text.

Injunctive Relief, *State of Ohio v. Google, LLC*, No. 21-CV-H-060274 (Ohio Ct. Com. Pl. June 8, 2021). The Ohio court found that the state sufficiently pled its claim that Google is a common carrier, and the case is set for trial later in 2024. *See State v. Google LLC*, 2022 WL 1818648 (May 24, 2022). If Ohio succeeds, relief could require Google to refrain from discriminating *against* competitors in search results, or *in favor* of its own sites, at least in Ohio.

Texas and Florida have taken a different route. Instead of proceeding on a case-by-case basis, the states enacted legislation designating those platforms that achieve certain thresholds as common carriers.

Nothing in the common law or U.S. Constitution prevents a state from enacting statutes to regulate an entity as a common carrier. *See* Charles M. Haar & Daniel Wm. Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality* 115–23 (1986). Accordingly, the Court should recognize Texas and Florida's authority to adopt common carrier legislation, subject to potential First Amendment constraints.

I. States Have the Right to Impose Common Carrier Rules on Platforms

Under longstanding precedent, states, as well as the federal government itself, may impose common carrier obligations on certain businesses, including communications firms.[7] *Mozilla Corp. v. FCC*, 940

[7] Thus, the Communications Act of 1934 bars myriad forms of discrimination by telephone and telegraph network operators. 47 U.S.C. § 202(a). The statute

F.3d 1, 74-76 (D.C. Cir. 2019); *see generally ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022). Historically, common carriers were subject to such duties as non-discrimination in access, reasonable rates, and cabined terms of service that could exclude access or continued service. *See* Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law of Carriers*, __ Duke L. J. __ at 11-18 (forthcoming 2024), ("Tech Platforms"), https://ssrn.com/abstract=4663711.

The history of common carriage obligations has a venerable tradition, dating back several centuries. *See generally* David S. Bogen, *The Innkeeper's Tale: the Legal Development of a Public Calling*, 1996 Utah L. Rev. 51. Although the original common carriers were innkeepers and ferrymen who physically hosted and transported people and goods, courts applied the principle dynamically as new technologies developed. *See German All. Ins. Co.*, 233 U.S. 389, 411 (1914) ("It would be a bold thing to say that the principle [regarding common carriers] is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application."). For example, in 1888, the Supreme Court of Vermont described the lines of the Western Union Telegraph Company as "a common carrier of speech for hire." *Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.*, 17 A. 1071, 1072 (Sup. Ct. Vt. 1889).

"prevent[s] common carriers from discriminating against consumers because of the content of their speech, their identity, or any other irrelevant characteristic[.]" Genevieve Lakier, *The Non-First Amendment Law of Speech*, 134 Harv. L. Rev. 2299, 2317 (2021).

See generally Ganesh Sitaraman, *Deplatforming*, 133 Yale L.J. 497, 508-11 (2023).

The Supreme Court long ago recognized as unobjectionable a state's authority to regulate common carriers transporting goods or communications within the state. *See, e.g., Wabash, St. L. & PR Co. v. Illinois*, 118 U.S. 557, 565 (1886) ("there is a commerce wholly within the State which is not subject to the constitutional [Commerce clause] provision"); *W. Union Tel. Co. v. Texas*, 105 U.S. 460, 466 (1882) ("messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction" are subject to state taxation); *W. Union Tel. Co. v. James*, 162 U.S. 650 (1896) (upholding a state statute imposing a penalty on a telegraph company for non-delivery of a message).

Nevertheless, neither the states nor the federal government have carte blanche to impose common carrier rules on any business whatsoever. Historically, courts recognized common carrier rules for firms that held themselves out as open to the public. *See* Charles K. Burdick, *The Origin of the Peculiar Duties of Public Services Companies. Part I*, 11 Colum. L. Rev. 514, 518 (1911). *See also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1318 (1995) ("Holding oneself out as open to the public, one simply should do what one has undertaken to do, especially when others rely on you to fulfill your role.").

Courts also considered other factors in enacting common carrier rules for certain businesses. They imposed common carrier obligations on firms

that required a government franchise or other special permission to operate. Charles K. Burdick, *The Origin of the Peculiar Duties of Public Services Companies. Part II*, 11 Colum. L. Rev. 616, 620 (1911). Electric and gas utilities, for example, receive a state statutory authority to use public streets for their wires and pipelines and eminent domain power to obtain necessary easements on private property. Denise L. Desautels, *Who Should Regulate the Siting of Electric Transmission Lines Anyway? A Jurisdictional Study*, Elec. J., May 2005, at 12-14. Given these special privileges, courts mandated that they serve all paying customers on non-discriminatory terms. *E.g.*, *Charleston Nat. Gas Co. v. Low*, 44 S.E. 410, 413-14 (Sup Ct. App. W. Va. 1901); *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 212-14 (1907).

Thus, the historical evidence shows that the states have the right to determine that certain firms have risen, "by circumstance and . . . nature," to be a public interest, and as a "consequence" may subject them to "government regulation." *See German All. Ins. Co.*, 233 U.S. at 409.

II. Platforms Here Hold Themselves Out as Open to the Public

Platforms can properly be designated as common carriers because they are open to all comers. An adult user needs only provide a name and an email address to create an account.

Importantly, the platforms' issuance of terms of service ("TOS"), which may require users' adherence to community standards, does not insulate them from common carriage designation or obligations. Even for common carriers, "[a]ccess has

always been qualified." Deplatforming, *supra*, 133 Yale L.J. at 559. They do not have to literally serve all comers. Thus, common carriers "were not required to serve customers under a range of scenarios, including if customers harmed the quality and provision of service or if a customer might harm another user." Tech Platform, *supra*, at 15.

Consider *Huffman v. Marcy Mut. Tel. Co.*, 143 Iowa 590, 121 N.W. 1033 (1909): a telephone company removed the telephone line from a customer's home after he and his family members repeatedly used a shared party line to harass other service area customers. He frequently interrupted their conversations with whistling or comments, and at one point, he called up a "patron[] toward whom he entertained ill feelings, and blatted like a sheep in the telephone." *Id*. at 1033. The Iowa Supreme Court recognized the carrier's right to "adopt reasonable rules and regulations" and to withdraw phone service if, after being duly warned, the customer persisted in breaking the rules. *Id.* at 1034. Similarly, common carriers could decline to serve customers who were disruptive or intoxicated or engaged in illegal activity. Deplatforming, *supra*, 133 Yale L.J. 522.[8]

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[8] *See also Pearson v. Duane*, 71 U.S. 605, 615 (1867) ("Common carriers of passengers . . . are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal."); *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 295 (1905) (Railroad depot owner had a "duty to see to it that passengers were not annoyed, disturbed or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass."); Deplatforming, *supra*, 133 Yale L.J. at 559 (open to the public does not require that a business serve

Common carriers such as railroads and gas pipelines historically included as part of their business practices TOS applicable to their users, as do today's shippers and telecommunications companies.[9] Indeed, social media and other online companies routinely interpose boilerplate TOS as a ubiquitous condition to use of their products. But the existence of TOS cannot protect a business open to the public from government regulation as a common carrier. If it did, virtually no business could be subject to common carrier regulation, as mere issuance of TOS would immunize from unwanted government regulation.

This body of precedent upholds extensive government regulatory authority to designate certain

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"all comers without exception"); *id.* at 509-31 (detailing the ability of common carriers in various industries to deny access or continued service).

[9] Deplatforming, *supra*, 133 Yale L.J. at 559. For example, the United Postal Service website has Terms and Conditions of Service that detail, among other things, the types of packages it handles, as well as restricted items. *See* UPS, *2024 UPS Tariff/Terms & Conditions of Service: United States* (Dec. 26, 2023), https://www.ups.com/assets/resources/webcontent/en_US/terms_service_us.pdf; *see also UPS Terms and Conditions*, UPS, https://www.ups.com/us/en/support/shipping-support/legal-terms-conditions.page (last visited Jan. 16, 2024). Likewise, telecommunications company AT&T requires its customers to agree to its Terms of Service before using its products or services. *See AT&T Consumer Service Agreement*, AT&T, https://www.att.com/legal/terms.consumerServiceAgreement.html (last visited Jan. 16, 2024). As can be seen from these examples, common carriers often establish TOS as a foundational part of doing business.

classes of business as common carriers, based either on their special conduct or characteristics. Applying traditional common carriage principles today, a state legislature can impose common carrier rules on an internet platform that is open to all members of the public.

III. First Amendment Considerations Do Not Preclude Common Carrier Regulation

The courts have consistently upheld legislative power to identify and regulate telecommunications operators without running afoul of the First Amendment. As the D.C. Circuit noted in upholding the Federal Communications Commission's 2015 Open Internet Order, popularly known as "net neutrality": "Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the [FCC] rules without raising any First Amendment question." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016)*; see also* S. Walter Jones, *A Treatise on the Law of Telegraph and Telephone Companies, including Electric Law* § 251-53 (2d ed. 1916) (citing state law cases detailing state regulations imposing nondiscrimination requirements on telegraph and telephone corporations). In upholding the FCC's net neutrality rules, the D.C. Circuit observed that these rules "impose on broadband providers the kind of nondiscrimination and equal access obligations that courts have never considered to raise a First Amendment concern." *U.S. Telecom Ass'n,* 825 F.3d at 741. *See also Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part) ("[I]f Congress may demand that

telephone companies operate as common carriers, it can ask the same of cable companies[.]").

Indeed, going beyond traditional common carriage rules, Congress compelled cable operators to carry certain local broadcast channels in 1992. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, § 5, 106 Stat. 1460 (codified at 47 U. S. C. § 535(b)). In *Turner I*, the Court rejected the application of a First Amendment strict scrutiny analysis to these "must carry" provisions. *Turner I*, 512 U.S. at 653. After further evidentiary proceedings below, the Court upheld the requirements under intermediate First Amendment review. *Id.* at 662; *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 185 (1997).

Moreover, where a business holds itself out as open to the public generally, a state may protect a right of access for expressive activity that extends beyond those rights recognized under the First Amendment. Thus, in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), this Court rejected a shopping center owner's First Amendment objection to the California Supreme Court's decision holding that "the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Robins v. PruneYard Shopping Ctr*, 23 Cal.3d 899, 910 (1979).

This Court upheld the California Supreme Court's decision on two grounds. First, the Court stressed that "the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please." *PruneYard*

Shopping Ctr., 447 U.S. at 87. Because the shopping center was open to all members of the public, any views expressed there by members of the public were unlikely to be attributed to the shopping center's owner. *Id.* at 87. Second, recognizing a member of the public's access for expressive activity did not require the shopping center itself to express any prescribed message. Quite the contrary, the shopping center owner was "free to publicly dissociate themselves from the views of the speakers or handbillers." *Id.* at 88. *See also Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65 (2006) (applying the same principles to a federal law that required law colleges to treat military and nonmilitary recruiters alike). In permitting California to protect free speech beyond that required in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), under the federal constitution, the Court preserved the states' ability to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

These precedents recognize that government regulation of common carriers and First Amendment protections can coexist. In truth, traditional common carrier rules have *not* raised serious First Amendment concerns.

IV. Social Media Platforms' Content Curation Should Not Immunize Platforms from Common Carrier Obligations

A primary attraction of social media is that it enables users to freely "publish their thoughts, photos, or videos to the entire world." Tech Platform,

supra, at 43. Users are able to publish content of their choosing and the social media platforms rarely evaluate the messages individually ahead of time to ensure that they are suitable for public display. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023) ("People from around the world can sign up for the platforms and start posting content on them, free of charge and without much (if any) advance screening by defendants."). Moreover, user posts are typically not reviewed by social media platforms after the fact because content moderation has become a low priority for these companies. Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, MOTHERBOARD (Aug. 23, 2018), https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works (detailing how billions of posts are published each day on Facebook, which employs 7,500 content moderators who are tasked with reviewing 10 million posts a week).

By providing a channel for various parties to transact, connect, and communicate, internet platforms are more like a traditional telecommunications or railroad company than a content creator. *See generally* K. Sabeel Rahman, *Regulating Information Infrastructure: Internet Platforms as the New Public Utilities*, 2 Geo. L. Tech. Rev. 234 (2018). Certainly, these firms perform none of the news reporter interviewing, investigation, and content creation, or editor alteration, associated with traditional journalism and newspaper publication. *Cf. U.S. Telecom*, 825 F.3d at 743 (net neutrality rules did not trigger First Amendment scrutiny because the covered internet service providers (ISPs)

"act as neutral, indiscriminate platforms for transmission of speech of any and all users").

The social media platforms' business model is designed to maximize user engagement on their websites. This is because increased user engagement gives them more user data to collect, which allows them to trumpet their professed ability to target ads, and thus, in turn, to command increased advertiser revenue. *See* Kalev Leetaru, *What Does it Mean For Social Media Platforms to "Sell" Our Data?*, FORBES (Dec. 15, 2018), https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data ("Social media platforms often generate the majority of their revenue through selling hyper targeted advertising based on algorithmically mining every second of their unwilling and unwitting users' lives."); *see also* Franklin Foer, *World Without Mind: The Existential Threat of Big Tech* 183–87, 211–13 (2017).

These objectives drive social media platforms' content curation. Algorithms are created and implemented to push posts, videos, articles, and other content into users' feeds so as to maximize the likelihood of keeping users on their websites—not to express any "message" the social media platform seeks to impart. The firms' objective is to make money; enriching minds or furthering the public discourse is incidental. *Cf. Texas v. Johnson*, 491 U.S. 397, 404 (1989) (First Amendment scrutiny presupposes "an intent to convey a particularized message" and a "likelihood . . . that the message would be understood by those who viewed it.") (cleaned up).

Through this lens, social media platforms do not resemble newspaper editors making considered decisions based on human judgment—sometimes individual and sometimes collective—about what content to include or exclude in a publication. Instead, they are more like shopping center owners anxious to connect shoppers with retailers.

Like social media platforms, shopping centers strive to generate engagement by bringing in potential shoppers. Increased engagement leads to increased sales from center stores, which means, in turn, increased revenue for the stores—the analog to the social media platforms' advertisers. Shopping center owners seek to keep tenants happy and increase their tenant-stores' revenue because this allows owners to charge more rent. As a result, to generate shopper engagement, shopping center owners frequently employ marketing activities, both independently and with individual or collective store participation.

For example, during holiday seasons, a shopping center may hire an actor to play Santa Claus or the Easter Bunny and bring in a professional photographer to take their pictures with children. At other times, the owner might host contests, art fairs, car shows, and concerts, offering prizes that tenant-stores might supply. This sort of marketing brings in shoppers and family members, who, it is hoped, will leave carrying bags filled with new purchases.

Social media platforms' content curation for users is pretty much the same—just old wine in new wineskins. Accordingly, professed content curation

should not shield them from common carrier obligations.

CONCLUSION

The states have the authority to regulate platforms as common carriers. If a platform believes that a common carrier law is harmful to or otherwise undesirable for their business, their remedy can be found in the relevant state legislature. The Court should reject their demand to strip states of their time-honored regulatory authority.

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Respectfully submitted,

JAY L. HIMES
Counsel of Record
50 East 89th Street Apt. 12F
New York, NY 10128
(646) 808-6135
jlhimes@gmail.com

TARA PINCOCK
SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
655 15th Street, NW, Suite 310
Washington, DC 20005