Nos. 22-277 & 22-555

IN THE

Supreme Court of the United States

ASHLEY MOODY, ATT'Y GENERAL OF FLORIDA, et al.,
Petitioners,

v.

NETCHOICE, LLC, et al.,
Respondents.

NETCHOICE, LLC, et al.,
Petitioners,

v.

KEN PAXTON, ATT'Y GENERAL OF TEXAS,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Eleventh Circuits

BRIEF OF TECHFREEDOM AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (22-277) & PETITIONERS (22-555)

CORBIN K. BARTHOLD
Counsel of Record
BERIN SZÓKA
ARI COHN
TECHFREEDOM
1500 K Street NW
Washington, DC 20005
(771) 200-4997
cbarthold@techfreedom.org

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INTEREST OF AMICUS CURIAE*

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

TechFreedom has been deeply involved in the debate over Texas's HB20 and Florida's SB7072 since before either law was even enacted. Its experts' work appears in the complaint challenging SB7072, see Compl., No. 4:21-cv-220, at 19 n.26 (N.D. Fla., May 27, 2021) (citing Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*, Lawfare, https://tinyurl.com/mr2u5c34 (Mar. 12, 2021)); in the Eleventh Circuit's decision blocking SB7072, see Pet. App. 40a n.17, No. 22-277; and in the Fifth Circuit's decision upholding HB20, see Pet. App. 73a n.31, 76a, No. 22-555.

Before this Court, TechFreedom has already filed (1) a brief setting forth the catastrophic consequences of letting HB20 (or SB7072) take effect, Amicus Br. of TechFreedom, No. 21A720 (May 17, 2022), and (2) a brief discussing the constitutional flaws in SB7072's (and HB20's) "transparency" provisions, Amicus Br. of TechFreedom, No. 22-393 (Nov. 23, 2022). We encourage anyone interested in these issues to consult those briefs. See also Corbin K. Barthold, *Social Media Transparency Rules,* Zauderer *Standard Head to*

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* No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission.

Supreme Court, Lawfare, https://tinyurl.com/3fy m4tc2 (Sept. 27, 2022); Berin Szóka, *Florida and Texas' 'Free Speech' Social Media Laws Would Require Sites to Host Mass Shooting Videos*, Daily Beast, https://tinyurl.com/ycybyhsc (May 26, 2022).

Texas and Florida want this Court to "giv[e] the Government a green light to use heavy-handed tactics to skew the presentation of views on the medium that," in the eyes of many, "increasingly dominates the dissemination of news." *Murthy v. Missouri*, No. 23A243 (U.S., Oct. 20, 2023) (Alito, J., dissenting from grant of application for stay) (slip op. 5). In this brief, we explain why Texas and Florida cannot achieve that end simply by declaring that social-media websites are common carriers.

SUMMARY OF ARGUMENT

In March 2021, Texas governor Greg Abbott complained that "too many social media sites silence conservative speech[.]" JA 22a, No. 22-555 (Greg Abbott (@GregAbbott_TX), Twitter (Mar. 4, 2021), 11:52 PM, https://bit.ly/3jqSwWP). Texas's HB20 would, Abbott promised, make that alleged editorial bent "illegal." *Id.* Two months later, Florida governor Ron DeSantis announced similarly that SB7072, "Florida's Big Tech Bill," would "level the playing field … on social media." Ron DeSantis (@GovRonDe-Santis), Twitter (May 24, 2021), 8:45 AM, https://bit.ly /2ZW30qe. These statements confirm HB20's and SB7072's unconstitutionality. "As the Supreme Court stated in *Buckley v. Valeo*, in one of the most important sentences in First Amendment history: The 'concept that government may restrict speech of some

elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'" *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 432 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

"The First Amendment protects acts of expressive association." *303 Creative LLC v. Elenis*, No. 21-476, slip op. 8 (U.S., June 30, 2023). It ensures that a speaker cannot be "force[d]" to "include other ideas," in his message, that "he would prefer not to include." *Id.*, slip op. 9. This is a right to "editorial control and judgment" over the speech one disseminates. *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). The speech codes and onerous reporting requirements in HB20 and SB7072 roundly violate this right.

Under a conventional First Amendment analysis, HB20 and SB7072 are doomed. Hence Texas's and Florida's attempt to insulate their new laws from such analysis under the guise of "common carriage." But slapping the label "common carrier" on something doesn't make it so. Moreover, common carriers retain their First Amendment rights, and even when speech is not at issue, they have much broader discretion to refuse service than HB20 or SB7072 allows for.

We address the states' common-carrier theory as follows:

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

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

II. Large social-media websites display none of the indicia of traditional common carriage:

- Even if social media were "affected with a public interest" (whatever that might mean), see HB20 § 1(3), this Court has found the "public interest" test unhelpful for determining who can be treated as a common carrier.
- Social media have not "enjoyed governmental support," see HB20 § 1(3), in any special or unique sense. They certainly have not received anything akin to the exclusive public easements that governments granted to railroads and telegraph companies.
- Social media do not possess "bottleneck" control over speech. In fact, the social media market remains highly fluid and competitive. In any event, the concept of "market dominance," see HB20 § 1(4), is not useful. Even an entity with substantial market power retains its First Amendment rights.

- Social media do not "hold" themselves "out" as willing to serve the public indiscriminately. Rather, they serve the public subject to various rules of conduct—rules that reflect the services' normative judgments about what expression they wish to foster or are willing to tolerate.

III. The main authorities cited by proponents of the common-carrier theory—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)—show, at most, that an entity can sometimes be required to host another's speech if doing so does not "interfer[e]" with the host speaker's "desired message," *Rumsfeld*, 547 U.S. at 64. The whole point of HB20 and SB7072, by contrast, is to "interfere" with social-media websites' "desired message." What's more, unlike the entities regulated in *PruneYard*, *Rumsfeld*, and *Turner*, social media function as editors, constantly making decisions about whether and how to allow, block, promote, demote, remove, label, or otherwise respond to content. Curation and editing of expression are antithetical to the concept of common carriage.

IV. Even if social media were similar to common carriers, HB20 and SB7072 would remain invalid. "[C]ommon carriers retain their First Amendment protections." Pet. App. 139a, No. 22-555 (Southwick, J., dissenting). And no common carrier has ever had to serve customers without regard to their behavior. Common carriers have always been entitled to refuse service to anyone who misbehaves, disrupts the service, harasses other patrons, and so on. Because

HB20 and SB7072 try to force social media to serve even such people, they are not themselves proper common carriage regulations.

ARGUMENT

I. SOCIAL MEDIA AND COMMON CARRIAGE ARE IRRECONCILABLE CONCEPTS.

"A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." *McCoy v. Pac. Spruce Corp.*, 1 F.2d 853, 855 (9th Cir. 1924). As its name suggests, "common carriage" is about offering, to the *public at large* and on *indiscriminate* terms, to carry generic *stuff* from point A to point B. Social media fulfill none of these elements.

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

Lumber is lumber. Once it has arrived at a construction site, one two-by-four (of a certain grade) is generally as good as another. How the wood got to the site is, for purposes of the construction itself, irrelevant. Putting common carriage in its proper historical context begins with this fundamental point. The "business of common carriers" is, at its core, "the transportation of property." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406 (1914). "Historically, common carriers have been those businesses

providing physical means of transportation for goods or people." *Republican Nat'l Comm. v. Google Inc.*, No. 2:22-cv-1904, Dkt. 53 at 16 (E.D. Cal. Aug. 24, 2023). See Interstate Commerce Act, 24 Stat. 379, 379-80 (1887) (prohibiting a "common carrier" in "the *transportation* of *passengers or property*" from discriminating, by price, among its similarly situated customers) (emphasis added).

True, the "transmission of intelligence" has sometimes been treated as "of cognate character" to traditional common carriage. *German Alliance*, 233 U.S. at 406-07. But that "cognate character" arose in fields, such as telegraphy and telephony, where information was treated as a commodity product to be purveyed through some sort of (typically scarce) public thoroughfare. See *id.* at 426-27 (Lamar, J., dissenting). The key is that, like traditional common carriage, "they all ha[d] direct relation to the business or facilities of *transportation*" itself. *Id.* at 426 (emphasis added). Although it contains a message, a telegram is best thought of as a widget of private information conveyed along "public ways," *id.*, by a commodity carrier, see Mann-Elkins Act, 36 Stat. 539, 544-45 (1910) (applying the Interstate Commerce Act to telegraph and telephone companies).

Social media are nothing like this. They are not interchangeable carriers of information widgets. The core aspect of these services, in fact, is not transportation at all. The FCC has long distinguished between "basic" services, which simply carry data along, and "enhanced" services, which process data in some way. See, e.g., FCC, *Amendment of Section 64.702 of the Commission's Rules and Regulations*

(Second Computer Inquiry), 77 FCC 2d 384, 420, ¶ 97 (1980). Any service that offers more than "pure transmission capability" is an "enhanced" service. *Id*. Social media are clearly "enhanced" services; they extensively manipulate data to enable, structure, and shape microblogs, photo-sharing, video-streaming, group chats, newsfeeds, and more. "Enhanced services" (now called "information services") are, by definition, not common carriers. See *Verizon v. FCC*, 740 F.3d 623, 629-30, 650 (D.C. Cir. 2014).

Proponents of the common-carrier theory are wrong, therefore, when they claim that social-media websites are simply "conduits" of information, akin to the telegraph or the telephone. Indeed, because the bar for qualifying as more than a "basic transmission" service is low, even some services that, unlike social media, involve an element of pure information "transport" are, nonetheless, not common carriers. Although telephony, which connects users without any intervention by the carrier, is common carriage, even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not. FCC, *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd. 12075 (2018). See Daphne Keller, *Carriage and Removal Requirements for Internet Platforms: What* Taamneh *Tells Us*, 4 J. Free Speech L. 87, 107-08 (2023) (noting that this Court omitted, in *Taamneh v. Twitter*, No. 21-1496 (U.S., May 18, 2023), to mention how much editorial intervention (and, thus, information processing), in the form of content moderation and algorithmic ranking, goes into creating a useable social-media product).

Social media constantly process information in new ways. What they do not do is passively act as "carriers" of information. Indeed, "the social media platforms" don't "actually carry or transport" anything at all. *Republican Nat'l Comm*, No. 2:22-cv-1904, Dkt. 53 at 21.

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

Common carriage, to repeat, involves the transportation of people and commodities. Telegraphy and telephony press the boundaries of that core, transportational conception of common carriage. One message, after all, is not interchangeable with another. There is, however, a key sense in which a telegram or a telephone call is indeed just a widget of information: such communications are usually private. And being private, they are usually treated as strictly between the individual sender and recipient. Cf. 18 U.S.C. § 2511 (criminal penalties for intercepting a wire or secretly recording a call). This means that a carrier may transmit a telegram or a call while remaining indifferent to its content. "The transmission" by "telephone companies" of "person-to-person calls" does "not implicate the same editorial discretion issues" as does "carrying or making mass communications." *U.S. Telecom*, 855 F.3d at 434 n.13 (Kavanaugh, J.).

Once a "telephone company becomes a medium for public rather than private communication," the "fit of traditional common carrier law becomes much less snug." *Carlin Commc'ns, Inc. v. Mountain States Tel.*

& Tel. Co., 827 F.2d 1291, 1294 (9th Cir. 1987). While transmitting a private call or message can be thought of as carrying an information widget, transmitting a public-facing call or message is clearly about broadcasting ideas and viewpoints. *Id*. It is a mode of expression, not only by the direct speaker, but also by the purveyor of the speech. "Mass-media speech," in short, "implicates a broader range of free speech values" than "person-to-person" speech does. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010). Clearly, therefore, social media are not—as some claim, Pet. App. 77a-78a, No. 22-555—a linear descendant of earlier, person-to-person communications technologies. "No traditional information-platform common carrier service, whether telegraph, telephone, or Internet access, has facilitated the kinds of multifarious many-to-many communications that can occur on social media platforms." Blake Reid, *Uncommon Carriage*, 76 Stan. L. Rev. ___, at 46-47 (2024), available at https://tinyurl.com/4ajz7wye.

None of this is to say that all private communications are common carriage. As we saw earlier, text messaging is not. Nor would an Internet-based messaging or calling service such as WhatsApp be. What is true, though, is that public communication is, virtually by definition, not common carriage. (Indeed, Congress considered, and rejected, proposals to make broadcasting common carriage in the Radio Act of 1927, and it explicitly declared that broadcasting is not common carriage in the Communications Act of 1934. *Columbia Broad. v.*

Democratic Comm., 412 U.S. 94, 105 (1973); see 47 U.S.C. § 153(h).)

As NetChoice explains (OB 20-22, No. 22-277), two of the key precedents governing this case are *Miami Herald*, 418 U.S. 241, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). *Miami Herald* strikes down a Florida law that required a newspaper to print a political candidate's reply to the newspaper's unfavorable coverage. *Hurley* holds that a private parade may exclude some groups from participating. Like newspapers (*Miami Herald*) or parades (*Hurley*), social media present a collection of messages to a wide audience. This public-facing expression is incompatible with—indeed, contradictory to—the concept of common carriage. Calling certain websites "common carriers" anyway doesn't make it so. Texas and Florida could not overturn *Miami Herald* or *Hurley* simply by declaring that newspapers or parades are "common carriers." The same holds true here.

Forcing upon a speaker "the dissemination of a view contrary to [its] own" curtails that speaker's "right to autonomy over [its] message," in violation of the First Amendment. *Hurley*, 515 U.S. at 576; *303 Creative*, No. 21-476, slip op. 8. That is the overriding principle that HB20 and SB7072 flout. "Common carriage" is not a magic label that can make this First Amendment violation go away.

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

An edited product is, inherently, not common carriage. Although the FCC has waffled over whether broadband is common carriage, for instance, what's clear is that if an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n*, 855 F.3d at 389 (Srinivasan, J., concurring in denial of rehearing en banc). Common carriage, in this context, is simply a matter of holding ISPs to their own commitments to provide "access to all of the lawful Internet." *Id*. So long as it's up front about what it's doing, an ISP that would rather engage in "editorial intervention"—and, thus, not common carriage—is free to do so. *Id*.

The common-carriage test for broadband applies, *a fortiori*, to social media. Indeed, a higher level of the tech "stack" (the application layer—the one consumers interact with) should enjoy *at least* as much editorial control as a lower level (the Internet-service layer). See Reid, supra, at 27-28 & n.178. A contrary approach would be nonsensical. It would be like treating television networks (e.g., NBC, ESPN), but not cable companies (e.g., Xfinity), as common carriers.

No prominent social-media website claims to provide an "indiscriminate pathway." Even X (formerly Twitter), which, as we discuss below, now engages in comparatively loose content moderation, purports to bar "violence, harassment and other

similar types of behavior [that] discourage" open conversation. X, *The X Rules*, https://bit.ly/3cpc75S (last accessed Nov. 29, 2023). Not surprisingly, bans on things like harassment and hate speech are common among social media. See, e.g., JA 84a-85a, 111a-115a, 139a-141a, No. 22-555. Such bans have always been common. "You agree not to use the Web site," Facebook's terms of service said in 2005, to post "any content that we deem to be harmful, threatening, abusive, harassing, vulgar, obscene, hateful, or racially, ethnically or otherwise objectionable." Wayback Machine, *Facebook Terms of Use*, https://bit.ly/3w1gYC5 (Nov. 26, 2005). See also *Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995) (describing similar policies imposed by Prodigy, one of the first social networks, in 1990).

Without intermediaries, moreover, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries enable users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day." Yoo, supra, 78 Geo. Wash. L. Rev. at 701. It is only because websites engage in curation and editing that "social" media is navigable by—and a worthwhile experience for—the average user. "Very few users would want to spend time on YouTube or Facebook if it meant seeing the hate speech, extreme pornography, and scams that major platforms currently exclude … [but that] common carriage laws [like HB20 and SB7072] would unleash." Keller, supra, at 109-10.

Proponents of the common-carrier theory "gloss over the role of content moderation in the [social-media] companies' product offerings." Jeff Kosseff, *Liar in a Crowded Theater: Freedom of Speech in a World of Misinformation* 257 (Johns Hopkins Univ. Press 2023). "The essential truth of every social network is that the product is content moderation." Nilay Patel, *Welcome to Hell, Elon*, The Verge, https://tinyurl.com/46hrr7b4 (Oct. 28, 2022). Distinct "content moderation practices" are a major part of what "help[s] differentiate" social-media products, in the eyes of users. Kosseff, supra, at 259.

Companies, civil rights groups, news outlets, and other organizations, too, hold social media responsible for the content they spread. See, e.g., Suzanne Vranica, et al., *Elon Musk's Campaign to Win Back Twitter Advertisers Isn't Going Well*, Wall St. J., https://on.wsj.com/3IASicw (Dec. 22, 2022) (discussing companies' unwillingness to purchase social-media ads that get displayed next to hate speech); Peter Kafka, *Why Disney Didn't Buy Twitter*, Vox, https://bit.ly/3VYI74w (Sept. 7, 2022) (discussing Disney's decision to back out of buying Twitter, after CEO Bob Iger realized that the "nastiness" on the service would damage Disney's image as a "manufactur[er of] fun"); Analis Bailey, *Premier League, English Soccer Announce Social Media Boycott in Response to Racist Abuse*, USA Today, https://bit.ly/3xIpfdT (Apr. 24, 2021).

Since HB20 and SB7072 were enacted, Elon Musk has conducted something of a natural experiment in content moderation—one that has wrecked those laws' underlying premise. Musk purchased Twitter,

transformed it into X, and reduced content moderation on the service. The new approach "privileges" extreme content from "edgelords." Alex Kantrowitz, *The Elon Effect*, Slate, https://tinyurl.com/yrfz6b34 (Oct. 23, 2023). This, in turn, places "a larger burden on the user" to find quality content (and to tolerate being exposed to noxious content). *Id*. But users don't have to put up with this—*and they aren't*. "Since Musk bought Twitter in October 2022, it's lost approximately 13 percent of its app's daily active users." *Id*.

"It turns out that most people do not *want* to participate in horrible unmoderated internet spaces." Patel, supra. HB20 and SB7072 would not "open up" social-media websites; it would destroy them. This is perhaps the most obvious of the many signs that these services are not, and cannot be treated as, common carriers.

II. SOCIAL MEDIA BEAR NONE OF THE INDICIA OF COMMON CARRIAGE.

"There is no coherent, widely-agreed-upon understanding of what 'common carriage' law actually is." Reid, supra, at 18. Nonetheless, proponents of the common-carrier theory purport to find the essence of common carriage in a set of "criteria"—criteria that they claim social media meet. Even if these criteria properly track common-carrier status (maybe, maybe not), and even if meeting these criteria could result in a loss of First Amendment rights (definitely not), social media meet none of these criteria.

A. "Affected With a Public Interest."

Proponents of the common-carrier theory claim that social media are "affected with a public interest." HB20 § 1(3). But whether a business serves a "public interest" is "an unsatisfactory test of the constitutionality of legislation directed at [the business's] practices[.]" *Nebbia v. New York*, 291 U.S. 502, 536 (1934). A "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'" *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

B. Have "Enjoyed Governmental Support."

Proponents of the common-carrier theory claim that social media have "enjoyed governmental support." HB20 § 1(3). They point, as evidence for this claim, to Section 230 of the Telecommunications Act of 1996. 47 U.S.C. § 230.

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

- Section 230 was not a gift to a few large social-media firms (none of which existed when Section 230 was enacted). It applies to every Internet website and user. See 47 U.S.C. §§ 230(c)(1-2), (f)(2-4). If Section 230 doesn't turn a blog, or Yelp, or a newspaper's comments sections, or an individual social-media account, into a common carrier, neither can it turn Facebook, YouTube, or TikTok into one.
- Section 230 simply ensures that the initial speaker or "developer" of content is the one liable for speech that causes legally actionable harm. See *id.* §§ 230(c)(1), (f)(3). It is not a "privilege" akin to the government handing real property to one firm, to the exclusion of potential competitors, for use as a railroad or a telegraph line.
- Far from being a sign that the government wants social-media websites to act as "conduits" or common carriers, Section 230 is a sign that it recognizes them as editors. Section 230 ensures that a website can "exercise" a "publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" —without (in most cases) worrying that doing so will trigger liability. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230 does not curtail social media's First Amendment rights; it endorses them.

Even if Section 230 conferred special privileges on social media (which it does not), "there's no argument for how [Section 230] could be framed as a *deal*" between social media and the government. Reid, supra, at 54. The government can't simply "frame a carriage obligation" as a fictional "'deal' and thereby avoid First Amendment scrutiny." *Id*.

C. "Market Dominance."

Proponents of the common-carrier theory claim that large social-media websites "are common carriers by virtue of their market dominance." HB20 § 1(4). The first problem, here, is that an entity does not forfeit its constitutional rights by succeeding in the market. This Court accepted that the *Miami Herald* enjoyed near-monopoly control over local news; yet the newspaper retained its First Amendment right to exercise editorial control and judgment as it saw fit. 418 U.S. at 250-52, 256-58; see Kosseff, supra, at 253.

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

Unlike telephone lines or broadcast airwaves, the Internet is not "a 'scarce' expressive commodity." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). "It provides relatively unlimited, low-cost capacity for communication of all kinds." *Id.* Even the largest social-media websites are just a piece of that "relatively unlimited" world of "communication." Social media are "equivalent not to the telegraph line," but to a few "of the telegraph line's many customers." Charles C.W. Cooke, *No, Big Tech Firms Are Not Common Carriers*, National Review Online, https://bit.ly/3hQMYDQ (Aug. 2, 2021).

It is hardly surprising, therefore, that the social media market remains as lively as ever. It continues to offer many avenues of expression and communication. Even if one rejects the leading services, one can blog on Substack (or a personal site), post on Gab, Telegram channels, Mastodon, or Bluesky, message on Signal or Discord, and watch and share videos on Rumble. We've already touched on Twitter's transformation into X—a shift that, successful or not, shows that the social media market remains open to major disruption. Anyone who claims that network effects thwart competition, meanwhile, must grapple with the rapid rise of TikTok.

In the HB20 appeal, Judge Oldham, writing for himself alone, tried to turn social media's *diversity* into a *reason* for common-carrier rules. "Each Platform," he claimed, "has an effective monopoly over its particular niche of online discourse." Pet. App. 71a, No. 22-555. In his view, "sports 'influencers' need access to Instagram," "political pundits need access to Twitter," and so on. *Id.* at 72a. Judge Oldham offered

no support for this *ipse dixit*. In reality, there is immense crossover among social-media websites. An "influencer," for instance, can gain a large following not only on Instagram, but also on Snapchat, TikTok, YouTube, or Rumble. See, e.g., Emma Roth, *The CEOs of Meta, X, TikTok, Snap, and Discord will Testify Before the US Senate on Child Safety*, The Verge, https://tinyurl.com/3k8e5tb2 (Nov. 29, 2023) (congressional committee treats *five* services as popular with younger users). And anyway, Judge Oldham's theory proves far too much. His "mode of analysis tautologically treats literally any associative context capable of hosting discourse among two or more people, from churches to coffee shops to niche online forums, as 'monopolies' amenable to common carrier treatment." Reid, supra, at 25 n.159.

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

Proponents of the common-carrier theory note that common carriers hold themselves out as willing to deal with all comers. But social media don't do this. Although it might be said that they welcome most everyone *to join*, whether one gets *to stay* is contingent on one's complying with terms of service. Social media are not "willing to deal" with users who promote violence, engage in harassment, or spew hate speech. See Sec. I.C., supra.

In any event, the "holding out" theory of common carriage is "conspicuously empty." Thomas B. Nachbar, *The Public Network*, 17 CommLaw Conspectus 67, 93 (2008). A "holding out" standard is easy to evade. See Christopher S. Yoo, *The First*

Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy, 1 J. Free Speech Law 463, 475 (2021). Suppose HB20 or SB7072 went into effect, and social-media firms responded by tightening their terms of service further, thereby making even clearer that they do not serve the public at large. What then? Would Texas and Florida simply *order* that the public at large be served? Such an order would confirm that the "holding out" theory is meaningless. See Reid, supra, at 21 (noting that the "holding out" theory "leads to confusing Möbius-strip arguments").

Indeed, before the Fifth Circuit, Texas agreed that the "holding out" rule is "circular," if a company can avoid common-carrier status simply by not "holding" itself "out" to the public. Texas AOB 27, No. 21-51178 (5th Cir., Mar. 2, 2022). It then tried to save the test precisely by claiming that a state can simply *order* a company to "hold" itself "out" to the public. *Id*. But the test remains circular under Texas's formulation; the locus of the circularity has just moved from a decision of the website to a decision of the state. (At least Texas did not contend that the "holding out" rule applies to any business that "offer[s] [its] services to the public, even if not all the public"—a standard that would make virtually every business, right down to a local bakery, a common carrier. Amicus Br. of Philip Hamburger 15-16, No. 21-51178 (5th Cir., Mar. 6, 2022). But cf. *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018).)

III. SUPREME COURT CASE LAW DOES NOT SAVE THE COMMON-CARRIER THEORY.

Some proponents of the common-carrier theory resort to the odd expedient of "importing" to their analysis "lines of First Amendment case law that don't involve common carriers." Reid, supra, at 50. The three Supreme Court cases they most often invoke are *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). None is relevant.

A. *PruneYard Shopping Center v. Robins.*

At issue in *PruneYard* was whether a shopping mall could be forced, under the California Constitution, to let students protest on its private property. Yes, *PruneYard* says, it could. In so saying, however, *PruneYard* distinguishes *Miami Herald*. That case involved "an intrusion into the function of editors," *PruneYard* notes—a "concern" that "obviously" was "not present" for the mall. 447 U.S. at 88. Here, by contrast, that concern obviously is present. See Sec. I., supra. "Intru[ding]" into social-media websites' "function" as "editors" is what HB20 and SB7072 are all about.

What's more, *PruneYard* announces that "the views expressed by members of the public" on the mall's property would "not likely be identified with that of the owner." *Id*. at 87. Even if that evidence-free declaration was true, at the time, of the mall (we have our doubts), it is certainly not true today of social-

media websites. As we've discussed, those services are "identified" with the speech they spread. A website that publishes a certain speaker is widely considered to have deemed that speaker "worthy of presentation," and "quite possibly of support as well." *Hurley*, 515 U.S. at 575.

The mall also challenged the speech-hosting obligation under the Takings Clause. On its way to rejecting that challenge, *PruneYard* makes further findings pertinent to this case. The students, *PruneYard* notes, "were orderly," and the mall remained free to impose "time, place, and manner regulations" on others' speech that would "minimize any interference with its commercial functions." 447 U.S. at 83-84. This makes *PruneYard* nothing like the case here, in which Texas and Florida seek to make social media publish hostile, abusive, highly disruptive speech. In effect, HB20 and SB7072 require the websites to allow disorderly conduct, and it bars them from imposing reasonable time, place, and manner regulations.

B. *Rumsfeld v. FAIR.*

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

Distinguishing *Miami Herald* and *Hurley*, *FAIR* concludes that "accommodating the military's message d[id] not affect the law schools' speech." *Id*. at 63-64. Unlike "a parade, a newsletter, or the editorial page of a newspaper," *FAIR* explains, "a law school's decision to allow recruiters on campus is not inherently expressive." *Id*. at 64. The pertinent distinction between job-recruitment meetings, on the one hand, and parades, newsletters, and newspapers, on the other, is not hard to divine. One-on-one recruitment meetings are akin to telegraphic or telephonic communication—the passage of private information widgets—and not at all like the public-facing expression of views undertaken by a parade, a publication, or a website. See *303 Creative*, No. 21-476, slip. op. 18-19; *id*. oral arg. trans. 64-65 (Chief Justice Roberts, author of *FAIR*: "that case … involved the schools providing rooms for the military recruiter, and … empty rooms don't speak.").

HB20 and SB7072 require social media to serve various speakers, and to spread and amplify, far and wide, almost anything those speakers wish to say. They thus look nothing like the law at issue in *FAIR*, a case about providing rooms for direct communication between a recruiter willing to talk and a law student willing to listen. For *FAIR* to resemble this case, Congress would have had to pass a law altogether different from the Solomon Amendment. Picture a law requiring law schools to let neo-Nazis maraud their halls toting signs and bullhorns. That is the equivalent of what HB20 and SB7072 require of select social-media websites.

C. *Turner Broadcasting System v. FCC*.

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

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

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

Second, "cable personnel" generally "do not review any of the material provided by cable networks," and "cable systems have no conscious control over program services provided by others." *Id.* at 629 (quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988)). Cable operators are thus, "in essence," simply "conduit[s] for the speech of others." *Id.* They generally transmit speech "on a continuous and unedited basis to subscribers." *Id.* This makes sense, given that most broadcast television content is comparatively sanitized and, certainly when compared to the worst online speech, uncontroversial. *Turner* concludes, therefore—again while distinguishing *Miami Herald*—that "no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that 'the safe course is to avoid controversy,' and by so doing diminish the free flow of information and ideas." *Id.* at 656 (quoting *Miami Herald*, 418 U.S. at 257). This is the precise opposite of the situation with social media. Those services, to repeat, are not simply "conduits"; they are provided on a curated and edited basis, and they do sometimes take "the safe course" and "avoid controversy." (Twitter, for instance, once decided to stop publishing political advertisements. See *Wash. Post v. McManus*, 944 F.3d 506, 517 n.4 (4th Cir. 2019).)

Third, and relatedly, *Turner* declares—again while distinguishing *Miami Herald* (and it could have added

Hurley to boot)—that there was "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655. This, again, because of the cable operators' "long history of serving" merely "as a conduit for broadcast signals." *Id.* The cable operators did not even contest this point; they did "not suggest" that "must-carry" would "force" them "to alter their own messages to respond to the broadcast programming they [we]re required to carry." *Id.* As we've explained, the "long history" behind social media could not be more different. Naturally, given that history, social-media websites vigorously contend that they would have to "respond" to certain messages they might be required "to carry."

Fourth, the central issue in *Turner* was whether the must-carry provisions were content-neutral. "Broadcasters, which transmit over the airwaves, are favored," *Turner* acknowledges, "while cable programmers, which do not, are disfavored." *Id.* at 645. But this distinction, *Turner* concludes, did not make the must-carry provisions a content-based law subject to strict scrutiny. According to *Turner*, "Congress' overriding objective … was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free [broadcast] television programming." *Id.* at 646. In other words, the law was purely about "economic incentive[s]." *Id.* The cable operators, for their part, did little to argue otherwise, raising only "speculati[ve]" "hypothes[es]" about "a content-based purpose" for the law. *Id.* at 652. Here, by contrast, HB20 and SB7072 compel the dissemination of speech

based on its viewpoint. NetChoice OB 40-41, No. 22-555; NetChoice OB 32-35, No. 22-277. See *Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015) (viewpoint discrimination is simply "a more blatant and egregious form of content discrimination").

IV. AS USED IN THIS CASE, "COMMON CARRIER" IS AN EMPTY LABEL.

Even if proponents of the common-carrier theory could overcome all the aforementioned obstacles, and establish that social media *can* be treated as common carriage, HB20 and SB7072 would remain invalid. The First Amendment would still apply with full force, and, in any event, the two laws would not be defensible common-carrier regulations.

A. Common-Carrier Status Does Not Affect First Amendment Rights.

Ultimately, the states invoke the "common carrier" label "not to borrow the substance of any regulatory regime, but rather to summon some special set of First Amendment considerations applicable only to 'common carriers.'" Reid, supra, at 30. But there is no such set of special rules.

"Labeling" HB20 or SB7072 a "common carrier scheme" has "no real First Amendment consequences." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). The Eleventh Circuit understood as much, in regard to SB7072. Pet. App. 43a-44a, No. 22-277 ("Neither law nor logic recognizes government authority to strip an

entity of its First Amendment rights merely by labeling it a common carrier."). So did the dissent, in the Fifth Circuit, in regard to HB20. Pet. App. 139a, No. 22-555 (Southwick, J., dissenting) ("A common carrier designation, which I doubt is appropriate, would not likely change any of my preceding analysis."). And so did this Court, in *303 Creative v. Elenis*, when it distinguished between a law "requiring an ordinary, non-expressive business to serve all customers," on the one hand, and a law that compels speech in violation of the First Amendment, on the other. No. 21-476, slip. op. 14, 21 n.5. See also *id*. at 14 ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail."); *PG&E v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 17 n.14 (1986) ("Appellees also argue that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We … reject[] this argument.").

"It turns out," in short, "that the First Amendment law of common carriage is just regular old First Amendment law." Reid, supra, at 48.

B. The Burdens Imposed by HB20 and SB7072 Go Far Beyond Common Carriage.

In enlisting the common carrier label as support for HB20 and SB7072, Texas and Florida have engaged in superficial "folk-law historicism," in service of a cynical bid to compel speech. Reid, supra, at 3. The two states have not engaged with the *substantive policy* of common carriage. A study of that policy, at common

law, reveals that HB20 and SB7072 are not valid common-carrier statutes.

HB20 and SB7072 compel large social-media websites to deal with certain users, however obnoxious their behavior. This is unprecedented. Common carriers have always enjoyed broad discretion to "restrain" and "prevent" "profaneness, indecency, [and] other breaches of decorum in speech or behavior." Bruce Wyman, *Public Service Corporations* § 644 (1911), available at https://bit.ly/3xekNXI; see *Lombard v. Louisiana*, 373 U.S. 267, 280 (1963) (Douglas, J., concurring). "Telegraph companies," for instance, were not obliged to "accept obscene, blasphemous, profane or indecent messages." Wyman, supra, § 633. Common carriers were not even "bound to wait until some act of violence, profaneness or other misconduct had been committed" before expelling those whom they suspected to be "evil-disposed persons." *Id.* § 628.

True, there were limits. A telegraph company that refused to carry an "equivocal message"—one whose offensiveness was debatable—did so "at its peril." *Id.* § 632. Although a telephone service could "cut off" a "habitually profane" subscriber, it had to show some tolerance to someone who "desisted from objectionable language upon complaint being made to him." *Id.* And regulators could (and in some areas still can) assess whether certain of a common carrier's rules and prohibitions are "just and reasonable." See, e.g., 47 U.S.C. §§ 201(b), 202(a). In general, however, the "principle of nondiscrimination does not preclude distinctions based on reasonable business classifycations." *Carlin*, 827 F.2d at 1293. A telephone

company, for example, could bar price advertising in its yellow pages directory (a common-carrier service) even though this was an "explicit content-based restriction." *Id*.

Although a common carrier's First Amendment rights exist apart from its common-law powers over patrons' behavior, it still bears noting that, under those common-law rules, HB20 and SB7072 are not proper common-carriage laws. A valid common-carriage regulation would not bar social media from setting reasonable rules governing "indecent messages" or "disorderly guests." Wyman, supra, §§ 630, 633.

CONCLUSION

The Court should affirm the judgment in No. 22-277, and reverse the judgment in No. 22-555.

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Respectfully submitted,

CORBIN K. BARTHOLD
Counsel of Record
BERIN SZÓKA
ARI COHN
TECHFREEDOM
1500 K Street NW
Washington, DC 20005
(771) 200-4997
cbarthold@techfreedom.org