No. 22-555

IN THE
Supreme Court of the United States

NETCHOICE, LLC, AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
Petitioners,

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES IN SUPPORT OF PETITIONERS

Lawrence J. Spiwak
PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
5335 Wisconsin Avenue, NW Suite 440
Washington, D.C. 20015
(202) 274-0235
lspiwak@phoenix-center.org

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MISCELLANEOUS:

BRIEF OF *AMICUS CURIAE* PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

The Phoenix Center for Advanced Legal & Economic Public Policy Studies ("Phoenix Center") submits this brief as *amicus curiae* in support of Petitioners.*

INTEREST OF *AMICUS CURIAE*

The Phoenix Center is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. The primary mission of the Phoenix Center is to produce rigorous academic research to inform the policy debate. Among other research areas, the Phoenix Center and its scholars have published significant academic work on the topics of telecommunications law and common carriage regulation. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and we believe that our perspective will assist the Court in resolving this case.

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* Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question presented in this case is straightforward: whether the First Amendment prohibits viewpoint-, content-, or speaker-based laws restricting select websites from engaging in editorial choices about whether, and how, to publish and disseminate speech or otherwise burdening those editorial choices through onerous operational and disclosure requirements. The answer is a resounding "yes."

Texas, along with the Fifth Circuit, attempt to circumvent this Court's state-action doctrine by claiming that Internet platforms are analogous to telephone companies, which—as "common carriers"—are obligated under the Communications Act of 1934 to take all comers upon reasonable request. But if one is to argue that Internet platforms are "like" telephone companies and that we should look to the Communications Act as the primary legal analogy, then a better understanding of the telecommunications industry—and its governing statute—are required. Internet platforms do not provide a "public good" and they do not act like telephone companies (which is why Internet platforms are currently not subject to common carrier regulation by the Federal Communications Commission). Moreover, the Fifth Circuit has misunderstood the Communications Act, where Congress carefully detailed what services are subject to common carrier regulation and what are not, and what services are subject to federal jurisdiction and what are left to the states.

The Court must also keep in mind the "Law of Unintended Consequences" when reviewing this case.

For example, under Section 5 of the Federal Trade Commission Act, the FTC lacks any jurisdiction over "common carriers." 15 U.S.C. § 45(a)(2). Should this Court agree with the Fifth Circuit, then the federal government will immediately lose much of its oversight authority over Internet platforms, particularly in the areas of consumer protection and privacy—an unintended consequence which the Fifth Circuit does not mention.

Moreover, because Internet platforms provide an interstate service, the Commerce Clause is implicated. U.S. Const. art. I, § 8, cl. 3. If Internet platforms are communications networks, and if the Communications Act is the primary legal analogy, then states have no authority in this area. To hold otherwise would subject the platforms to a Death by Fifty State Cuts.

Finally, if this Court finds that government can regulate the content moderation policies of Internet platforms, then we should expect assorted political constituencies to petition the government to force Multichannel Video Program Distributors (i.e., cable and satellite companies)—who do not provide a common carrier service—to de-platform programming networks they find offensive. Senior Members of Congress have already pushed the FCC for exactly this outcome with regard to conservative news outlets, and the silence from the Commission in response to such an outrageous threat to free speech was deafening.

When Congress amended the Communications Act with the Telecommunications Act of 1996, one of

its stated policy goals was to "reduce regulation in order to … encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Public Law 104–104. In fact, Section 230(b)(2) specifically states that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

For all its warts, the Telecommunications Act was designed to speed the transition from monopoly to competition. Efforts to impose common carrier status on Internet platforms run contrary to this design. To treat Internet platforms as common carriers is, at bottom, an attempt to take a framework designed to govern the *economic behavior* of the Old Ma Bell monopoly and misapply it to govern questions of *speech*—the only constant being that the government would act as the final arbiter of a firm's conduct. As such a regime has never been attempted before (probably because a regime designed to govern economic behavior was never intended to be used to regulate speech in the first instance), upholding the Fifth Circuit would inexorably force us to cross the "Regulatory Rubicon," bringing the entire weight of legacy public utility regulation along as baggage.

And if we cross this Regulatory Rubicon, what then? There has been little meaningful discussion about how Internet platform regulation would comport with the due process protections guaranteed by the Fifth Amendment, nor has anyone conducted a basic cost-benefit analysis to determine whether

efforts to increase government intervention into the market would pay off. All we will know for sure is that if we take the logic of the common carrier argument to its inescapable conclusion, then the government will have vastly expanded powers to regulate Americans' speech— and no one should be surprised when the government inevitably (and aggressively) seeks to use it.

Which brings us back to the point of the pencil: Chief Justice Roberts famously observed that the federal bureaucracy "wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC,* 569 U.S. 290, 313 (2013). We must ask ourselves, therefore, do we really want the government to determine what speech is acceptable? Given our hyper-partisan times, the answer should be a resounding "no." Otherwise, the definition of "reasonable" content curation could shift with the political winds: Democrats in power would allow stringent curation of conservative content, and Republicans in power would allow stringent curation of liberal content. Thus, should this Court uphold the Texas law, then that ruling will represent a dive down a very slippery slope toward government control over speech on the Internet.

ARGUMENT

I. COMMON CARRIAGE PROVIDES NO END-RUN AROUND THE FIRST AMENDMENT

Under the First Amendment to the U.S. Constitution, "Congress shall make no law … abridging the freedom of speech." U.S. CONST. amend. I. Moreover, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable to the states. U.S. CONST. amend. XIV, § 1. As Justice Kavanaugh wrote for the majority in *Manhattan Community Access Corp. v. Halleck,* the "text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." 139 S. Ct. 1921, 1928 (2019) (emphasis in original).

Some argue that because Internet platforms serve as the "modern public square," *cf. Packingham v. North Carolina,* 582 U.S. 98, 107 (2017), they take on a quasi-governmental role and are therefore subject to First Amendment *obligations* rather than enjoying First Amendment *protections*. Not so. Under this Court's state-action doctrine, a private entity may be considered a state actor "when it exercise[s] a function 'traditionally exclusively reserved to the State.'" *Halleck*, 139 S. Ct. at 1926.[1] As this Court observed, it is:

[1.] A private entity can also qualify as a state actor "when the government compels the private entity to take a particular action" or "when the government acts jointly

> [N]ot enough that the federal, state or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function. *Id.* at 1928-29 (emphasis in original).

And, noted the Court, "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally provided." *Id.* at 1930.

Internet platforms squarely fit this Court's description of a "forum for speech"; social media is obviously not service that "only governmental entities have traditionally provided." Following this Court's reasoning, even though Internet platforms—which are *private* entities—provide "a forum for speech," they are "not transformed by that fact alone into a state actor" and may therefore "exercise editorial control over speech and speakers in the forum." *Id.* Other courts have reached similar conclusions. *See*

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with the private entity." *Id.* at 1928 (citations omitted). However, there is a big difference between "collusion" with the government and being "coerced" by the government to take action in response to the constant political pressures of the Administrative State. *See, e.g.,* T. Randolph Beard *et al., Regulating, Joint Bargaining, and the Demise of Precedent*, 39 MANAGERIAL & DECISION ECON. 638 (2018). This Court announced it will take up this question in another case this term.

generally, Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

The logic supporting this Court's holding in *Halleck* is compelling: the Court understood that the government placing restrictions on the ability of private entities to control the content on their platforms would have a chilling effect on their First Amendment rights. As this Court pointed out, if all private property owners who open their property for speech are placed on the government side of the First Amendment equation, then they "would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum." *Halleck*, 139 S. Ct. at 1931. In such a case, private property owners "would face the unappetizing choice of allowing all comers or closing the platform altogether." *Id*. Accordingly, this Court held that:

> [T]o hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property. *Id.* (citations omitted).

In light of this Court's precedent on what constitutes a state actor—and the repeated failure of

arguments that Internet platforms are state actors, *see* Goldman and Miers, *supra*—proponents of Internet platform regulation have developed a new legal theory: Internet platforms are communications networks and thus should be regulated as common carriers just like telephone companies, including being subject to a non-discrimination obligation to ensure that all voices are treated equally. This theory motivated both the Texas and Florida laws now on review before this Court.

However, common carriage—at least in the communications context—was never designed to govern a private entity's *speech*; instead, common carrier regulation was designed to govern the *economic behavior* (i.e., prices) of the old Bell monopoly. *See* Lawrence J. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers,* 76 FED. COMM. L.J. 1 (2023). The Texas law confuses the two regulatory regimes. Thus, as the Eleventh Circuit correctly observed, '[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier." *NetChoice, LLC v. Attorney General of Florida*, 34 F.4th 1196, 1221 (11th Cir. 2022).

This Court recently agreed with this logic in *303 Creative LLC v. Elenis,* noting that:

> No public accommodations law is immune from the demands of the Constitution. In particular, this Court has held that public accommodations statutes can sweep too broadly when deployed to compel speech…. When a state public accommodations law

> and the Constitution collide, there can be no question which must prevail.

143 S.Ct. 2298, 2315 (2023). The Constitution also prevails in a collision with an arbitrary common carrier designation. Accordingly, declaring Internet platforms—again, *private entities who are engaged in a form of speech*—to be "common carriers" provides no end run around the First Amendment.

II. ANALOGIES TO THE TELECOMMUNICATIONS INDUSTRY ARE FLAWED

Proponents of the common carrier argument often point to the telecommunications industry as the prime supporting analogy for regulating Internet platforms as "common carriers." For example, Justice Thomas wrote in his concurrence to *Biden v. Knight First Amendment Institute,* 141 S. Ct. 1220 (2021), that although Internet platforms are "digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another." *Id.* at 1224. According to Justice Thomas, a "traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way." *Id.* The Fifth Circuit in *NetChoice, LLC v. Paxton,* 49 F.4th 439 (5th Cir. 2022) also made significant analogies to the telecommunications industry. But if one is to argue that Internet platforms are "like" telephone companies, then a better understanding of the industry and its governing statute—the Communications Act of 1934, Congress's most definitive statement on how the industry is to be

regulated at both the Federal and state level—are required. (For a detailed critique demonstrating how these assorted common carrier proposals both misstate communications law and policy, *see* Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, supra.*)

A. Internet Platforms Do Not Provide a "Public Good"

According to the Texas legislature, Internet platforms "are affected with a public interest" and are "central public forums for public debate…" *Paxton,* 49 F.4th at 445. Stated another way, Texas contends that because Internet platforms provide a "public good," it has the right to regulate their speech. Texas misunderstands the concept of "public good."

A public good is an economic concept explaining a kind of product or service that theoretically may be underprovided without policy intervention. The standard economic definition of a public good as one that is "(i) non-rivalrous, meaning that when a good is consumed, it doesn't reduce the amount available for others and (ii) non-excludable, meaning that one cannot provide the good without others being able to enjoy it." *See generally,* W.H. Oakland, *Theory of Public Goods* in HANDBOOK OF PUBLIC ECONOMICS (Vol. 2, pp. 485–535) (Elsevier 1987).

Internet platforms do not fit this definition. The fact that *information* is non-rivalrous in consumption does not imply that a service offering *access to information* is also a public good. Newspapers, books, and magazines are not public goods because exclusion is

feasible through prices and subscriptions. Likewise, Internet platforms are excludable, as are the Internet accounts that make access possible. In fact, it is the platforms' ability to exclude that motivates the Texas law to regulate such exclusions, so the statute effectively rebuts its own public good presumption. Any user of an Internet platform must have an account, and there are all kinds of technical, policy, and even price restrictions on the use of their platforms. (If you think Facebook is a non-excludable service, try using it without logging in.) Since non-excludability is a necessary attribute of a public good, then the ability to discriminate—which Texas seeks to legislate away—implies that Internet platforms are not a public good. It may be possible through regulatory fiat to make platforms look more like public goods, but doing so is a regulatory creation, not an economic descriptor.

It is also important not to conflate something that is "good for the public" with a "public good." Many Americans use Internet platform services as their primary source of news and information, which makes them useful and important. Perhaps that is a separate reason for government oversight, but not because it makes platforms public goods.

For example, we have discovered that several Internet platforms blocked posts about Hunter Biden's laptop shortly before the 2020 election (a decision which was hardly the industry's finest, but a decision the First Amendment permits them to make nonetheless). But the central policy question is not whether some Internet platforms censored content; instead, the relevant policy question is whether these Internet platforms were able to suppress this information so

totally that an inquisitive American could not avail herself of sufficient alternative news sources to make an informed decision. The answer, of course, is "no." If anything—as the "Streisand Effect" dictates (*see* Alison Eldridge, "*Streisand Effect",* ENCYCLOPEDIA BRITANNICA (accessed 28 November 2023))—these Internet platforms' decision to curate content about the laptop simply amplified attention to the story by a plethora of other news outlets. Abby Ohlheiser, *Twitter's Ban Almost Doubled Attention for Biden Story,* MIT TECH. REV. (Oct. 16, 2020). If it is true that Americans have such a profound confirmation bias that they are unwilling to question what they see on the Internet, then that is hardly a compelling reason for massive government intervention into the market. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, supra.*[2]

B. Internet Platforms Do Not Act like Telephone Companies

A good explanation on why Internet platforms do not act like telephone companies can be found in the Eleventh Circuit's opinion in *Attorney General of Florida*, *supra.*

First, the Eleventh Circuit pointed out that Internet platforms have never acted like common carriers (i.e., telephone companies). In particular, the court

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[2] This anecdote also belies the argument that Internet platforms are "monopolists." And even if they were, market power alone does not *a fortiori* mean that a firm must also be a common carrier. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *see also* Spiwak, *id.*

noted that while common carriers do not "make individualized decisions … whether and on what terms to deal," 34 F.4th at 1220 (citations omitted), Internet platforms behave differently:

> While it's true that social-media platforms generally hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by their community standards. In other words, Facebook is open to every individual if, but only if, she agrees not to transmit content that violates the company's rules. Social-media users, accordingly, are *not* freely able to transmit messages "of their own design and choosing" because platforms make—and have always made—"individualized" content- and viewpoint-based decisions about whether to publish particular messages or users. *Id.* (emphasis in original).[3]

Second, the Eleventh Circuit found that neither the facts nor the case law supported treating Internet platforms as common carriers. To begin, the court noted that Internet platforms "aren't 'dumb pipes:'"

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[3] *See also U.S. Telecom Ass'n v. FCC,* 855 F.3d 381, 392 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of *rehearing en banc*) ("Facebook, Google, Twitter, and YouTube … are not common carriers that hold themselves out as affording neutral, indiscriminate access to their platforms without any editorial filtering").

> They're not just servers and hard drives storing information or hosting blogs that anyone can access, *and they're not Internet service providers reflexively transmitting data from point A to point B.* Rather, when a user visits Facebook or Twitter, for instance, she sees a curated and edited compilation of content from the people and organizations that she follows. *Id.* at 1204 (emphasis supplied).

Thus, reasoned the court, the case law dictates that "social media platforms should be treated more like cable operators, which retain First Amendment rights to exercise editorial discretion, than traditional common carriers." *Id.* (citations omitted).[4]

Moreover, the Eleventh Circuit noted that in Section 223(e)(6) of the Telecommunications Act of 1996, Congress "explicitly differentiate[ed] 'interactive computer services'—like social-media platforms—from

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[4] Justice (then-Judge) Kavanaugh found the same in *Comcast Cable Corp. v. FCC,* 717 F.3d 982, 993-97 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Just as a newspaper exercises editorial discretion over which articles to run, a [cable company] exercises editorial discretion over which video programming networks to carry and at what level of carriage." Thus, "the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the WALL STREET JOURNAL or POLITICO or the DRUDGE REPORT what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature.").

'common carriers or telecommunications services.'" *Id.* at 1220-21 (*citing* 47 U.S.C. § 223(e)(6)).[5] According to the court, "Federal law's recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights." *Id.* at 1221.

C. The Fifth Circuit Misunderstands Telecommunications Law

According to the Fifth Circuit, Internet platforms "are communications firms of tremendous importance that hold themselves out to serve the public without individualized bargaining." *Paxton,* 49 F.4th at 469. As such, reasoned the court, the Texas law "imposes a basic non-discrimination requirement that falls comfortably within the historical ambit of permissible common carrier regulation." *Id.* To find otherwise, argued the court, "would represent the first time … that federal courts have prevented a State from requiring interstate … communications firms to serve customers without discrimination." *Id.*

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[5] This Court should note that the violation of a similar statutory prohibition (47 U.S.C. § 153(51)—which provides that a "telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services…."—was the exact reason why the D.C. Circuit reversed and remanded the FCC's *2010 Open Internet Order* in *Verizon v. FCC,* 740 F.3d 623, 658 (D.C. Cir. 2014).

When the petitioners below pointed out that platforms are not members of the communications industry because their mode of transmitting expression differs from what other industry members do, the court flatly called that distinction "wrong." *Id.* at 474. Pointing to the Texas law—as opposed to the Communications Act of 1934—the Fifth Circuit found that the "whole purpose of a social media platform … is to 'enable[] users to communicate with other users.'" *Id.* Thus, reasoned the court, because Internet platforms "are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest," Texas permissibly determined that platforms are common carriers and, as such, can be "subject to nondiscrimination regulation." *Id.* at 473-74.

However, if Internet platforms are indeed communications firms, then the Communications Act and its decades of implementing case law cannot be swept under the rug. The Communications Act is Congress's most definitive statement about whether and how assorted communications firms should be regulated and must be included in any analysis. And with all due respect, the Fifth Circuit patently misunderstood Communications Law 101.

First, Internet platforms do not engage in providing interstate common carrier telecommunications services and therefore do not currently fall under the Federal Communications Commission's ("FCC") subject matter jurisdiction under Title II of the Communications Act. *See, e.g.,* 47 U.S.C. § 201. Rather, they provide an unregulated information service subject to Title I of the Communications Act. 47 U.S.C.

§ 153(24). Moreover, the infrastructure that carries their services to end-users is not their own but that of communications firms which are regulated under FCC jurisdiction.

Second, although Texas passed a statute that specifically declares Internet platforms to be common carriers, the Fifth Circuit's opinion ignores Congress's careful balancing of Federal and state interests in the Communications Act. Internet platforms do not provide an "intrastate" service; their service is clearly *interstate* (if not international). Accordingly, if the Fifth Circuit is going to hold that Internet platforms provide a communications service, then it cannot also conclude that states are allowed to require "interstate communications firms to serve customers without discrimination." *Paxton*, 49 F.4th at 469. The Communications Act expressly prohibits such an extra-jurisdictional reach by states into interstate common carrier telecommunications services (which is under the FCC's exclusive purview). State jurisdiction is limited to *intrastate* telecommunications services. *See* 47 U.S.C. § 152. But again, this reasoning assumes that these alleged communications networks are subject to the Communications Act.

Furthermore, if telecommunications law is the analytical template for common carriage regulation of Internet platforms, then there is an interesting legal paradox at play that the Fifth Circuit missed. Not only does the Communications Act prohibit states from regulating interstate telecommunications services, but Congress gave the FCC additional power to preempt states when local policy conflicts with federal policy. Under Section 253(d):

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C. § 253(d).

Thus, when the FCC classified "broadband internet access services ("BIAS") as a common carrier telecommunications service in its *2015 Open Internet Order*, states were preempted from regulating any interstate BIAS service. When the FCC subsequently returned BIAS back to an information service in its *2018 Restoring Internet Freedom Order*, however, California decided to pass its own net neutrality law. *Cf.* Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services*, 21 FEDERALIST SOC'Y REV. 32 (2020). Although Internet Service Providers challenged the California law on the grounds of field, express, and conflict preemption, the Ninth Circuit ruled that by choosing to return BIAS back to a Title I information service, the FCC had surrendered its regulatory authority under Title II, and, as such, states were free to step in to fill the regulatory void. *ACA Connects-America's Commc'ns Ass'n v. Bonta,* 24 F.4th 1233 (9th Cir. 2022).

Under this logic, the Fifth Circuit has placed Texas into a box: On the one hand, if Internet platforms provide an interstate common carrier telecommunications service, then Texas has no authority to

pass its own law because federal law preempts it. Conversely, as Internet platforms clearly provide an information service under Title I of the Communications Act, then—as the Eleventh Circuit correctly pointed out—states may not turn them into common carriers by statute (thus defeating the point of the legislative exercise). *See Att'y Gen., Fla.*, 34 F.4th at 1221. If anything, and assuming the relevant statutory criteria are met, the Communications Act exclusively bestows the power to decide whether the service Internet platforms provide should be regulated as an interstate common carrier telecommunications service under Title II or as an information service under Title I of the Communications Act to the FCC—not to the individual states. *See ACA Connects, supra; see also National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967 (2005).

III. BEWARE OF THE "LAW OF UNINTENDED CONSEQUENCES"

Given our hyper-political times, politicians often rush to pass sweeping laws with little attention to real-world consequences. *See, e.g.*, George S. Ford, *Is Social Media Legislation Too Broad? An Empirical Analysis,* PHOENIX CENTER POLICY PAPER NUMBER 59 (July 2023); *see also Att'y Gen., Fla.,* 34 F.4th at 1204 (the fact that platforms are "private enterprises, not governmental (or even quasi-governmental) entities" would be "too obvious to mention if it weren't so often lost or obscured in political rhetoric.") As economist Dr. George Ford explained in the YALE JOURNAL OF REGULATION:

> Firms are not passive recipients of regulation. When new rules or taxes are put in place, firms adjust their activities to accommodate the new setting, maximizing profits across a multitude of margins. Some of these altered behaviors can reflect the intent of the regulation, while others will not. Obamacare wanted employers to pay for employee's healthcare, but many employers avoided the mandate by reducing hours below the threshold thirty hours per week. Affected workers faced lower incomes and had to search for second jobs. A 1990s effort to regulate cable television prices left prices largely untouched while cable companies curtailed quality and reduced industry investment.
>
> This is the "Law of Unintended Consequences."
>
> Unintended consequences are universal. Inevitable. And, often painful. No regulatory intervention can fully escape them. The unforeseen (though often predictable) responses to a regulatory intervention may cause the regulation to do more harm than good. George S. Ford, *Antitrust Reform and the Law of Unintended Consequences*, NOTICE & COMMENT BLOG – YALE J. ON REGULATION (Jan. 7, 2022).

Thus, if this Court upholds the Fifth Circuit and allows a state to declare Internet platforms to be "common carriers" by legislative fiat, then no one should

be surprised when the inevitable "Law of Unintended Consequences" rears its ugly head.

For example, little thought was given to how the Texas law would implicate the common carrier exemption in the Federal Trade Commission Act. Under Section 5 of the Act, the FTC lacks any jurisdiction over "common carriers." 15 U.S.C. § 45(a)(2). Should this Court agree with the Fifth Circuit, then the federal government will immediately lose much of its existing authority over Internet platforms, particularly in the areas of consumer protection and privacy—an unintended consequence which the Fifth Circuit does not mention.

To remedy this situation, Congress would have two options: On the one hand, it could eliminate the common carrier exemption. In this scenario, while Congress would effectively return FTC oversight of Internet platforms back to the *status quo*, the practical effect would be to expose existing common carrier services such as railroads and voice telephony (mobile and fixed)—to redundant and potentially conflicting regulatory oversight (and with it, increased compliance costs). On the other hand, because Internet platforms' service offerings do not fall under Title II of the Communications Act, if Congress chooses not to eliminate the common carrier exemption, then Congress would probably have to opt for a totally new regulatory agency—complete with its own enabling statute—to regulate Internet platforms. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, supra*. This is an idea that has gained steam over the last several years, but has many unintended consequences of its own.

See, e.g., George S. Ford, *Beware of Calls for a New Digital Regulator,* NOTICE & COMMENT BLOG – YALE J. ON REGULATION. (Feb. 19, 2021); Lawrence J. Spiwak, *A Poor Case for a "Digital Platform Agency",* PHOENIX CENTER POLICY PERSPECTIVE NO. 21-02 (Mar. 9, 2021); Neil Chilson, *Does Big Tech Need its Own Regulator?*, GEO. MASON UNIV. GLOB. ANTITRUST INST. (2020).

Along the same lines, if this Court rules that government can regulate the content moderation policies of Internet platforms, then we should not be surprised when assorted political constituencies petition the government to force Multi-Channel Video Distributors (i.e., cable and satellite companies)—who do not provide a common carrier telecommunications service—to de-platform programming networks they find offensive. Senior Members of Congress have already pushed the FCC for exactly this outcome with regard to conservative news outlets, and the silence from the Commission in response to such an outrageous threat to free speech was deafening. Kimberley A. Strassel, *"Just Asking" for Censorship*, Wall St. J. (Feb. 25, 2021, 6:26 PM).

Moreover, given that Internet platforms provide an interstate service, the Commerce Clause is implicated. U.S. CONST. art. I, § 8, cl. 3. That is, if Internet platforms are communications networks, and if the Communications Act is going to be ignored (as the Fifth Circuit does), then the Court must also decide how to allocate regulatory powers between the federal government and the individual states. Upholding the Texas law would open up the Internet to a Death by Fifty State Cuts. *See, e.g.*, T. Randolph Beard *et al.*,

Developing a National Wireless Regulatory Framework: A Law and Economics Approach, 16 COMMLAW CONSPECTUS 391 (2008); *but cf. Nat'l Pork Producers Council v. Ross,* 143 S. Ct. 1142 (2023) (severely limiting the judicial doctrine of the dormant Commerce Clause).

And if we are going down the common carrier road to prevent viewpoint discrimination by Internet platforms, will that regulatory regime apply to *all* online platforms—including, say, Amazon, which does not provide a social media service but is a large online retailer—to prevent discrimination? The country just went through a major political fight when a bi-partisan group of legislators tried to pass the American Innovation and Choice Online Act ostensibly to prevent a select number of firms from favoring their own goods and services (i.e., to impose a non-discrimination obligation). Due to the numerous legal and economic deficiencies of this poorly crafted legislation, the bill died in Congress. *See* Lawrence J. Spiwak, *The Third Time is Not the Charm: Significant Problems Remain With Senator Klobuchar's Antitrust Reform Bill*, FEDSOC BLOG (June 7, 2022); Lawrence J. Spiwak, *Why Does Congress Want to Break Amazon Prime?*, NOTICE & COMMENT BLOG – YALE J. ON REGULATION (Feb. 18, 2022); George S. Ford, *The American Innovation and Choice Online Act is an "Economics-Free Zone",* NOTICE & COMMENT BLOG – YALE J. ON REGULATION (June 10, 2022). Still, as "non-discrimination" is the political buzzword *du jour*, the potential for future legislative and regulatory mischief is endless. This Court should limit this particular avenue of such mischief.

IV. POLICY IMPLICATIONS

When Congress passed the Telecommunications Act of 1996, one of its stated policy goals was to "reduce regulation in order to … encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Public Law 104–104. In fact, Section 230(b)(2) specifically states that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). While the U.S. government took occasional steps in that direction over the ensuing twenty-five-plus years, history has borne out that the siren call of regulation was often too strong to ignore. *See, e.g.*, George S. Ford, *"Regulatory Revival" and Employment in Telecommunications*, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-05 (June 12, 2017); *President Biden Executive Order on Promoting Competition in the American Economy,* EXEC. ORDER NO. 14036, 86 FED. REG. 36987 (July 14, 2021). Such is the current push to impose common carrier regulation on Internet platforms.

For all its warts, the Telecommunications Act was designed to speed the transition from monopoly to competition. *See, e.g.*, George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FED. COMM. L.J. 95 (2016). Efforts to impose common carrier status on Internet platforms run contrary to this design. To treat Internet platforms as common carriers is to take a framework designed to govern the *economic behavior* of the Old Ma Bell monopoly and misuse it to govern questions of

speech—the only constant being that the government would act as the final arbiter of a firm's conduct. As such a regime has never been attempted before (probably because a regime designed to govern economic behavior was never intended to be used to regulate speech in the first instance), upholding the Fifth Circuit would inexorably force us to cross the "Regulatory Rubicon," bringing the entire weight of legacy public utility regulation as baggage.

And if we cross this Regulatory Rubicon, what then? There has been little meaningful discussion about how Internet platform regulation would comport with the due process protections guaranteed by the Fifth Amendment, nor has anyone conducted a basic cost-benefit analysis to determine whether efforts to increase government intervention into the market would pay off. All we will know for sure is that if we take the logic of the common carrier argument to its inescapable conclusion, then the government will have vastly expanded powers to regulate Americans' speech—and no one should be surprised when the government inevitably (and aggressively) seeks to use it.

Which brings us back to the point of the pencil: Chief Justice Roberts famously observed that the federal bureaucracy "wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC,* 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted). We must ask ourselves, therefore, do we really want the government to determine what speech is acceptable? Given our hyper-partisan times, the answer should be a resounding "no." Otherwise, the definition of "reasonable"

content curation could shift with the political winds: Democrats in power would allow stringent curation of conservative content, and Republicans in power would allow stringent curation of liberal content. Thus, should this Court uphold the Texas law, then that ruling will represent a dive down a very slippery slope toward government control over speech on the Internet.

CONCLUSION

For the foregoing reasons, we join with Petitioners and ask this Court to reverse the Fifth Circuit's ruling below.

Respectfully submitted,

Lawrence J. Spiwak
Counsel of Record
PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
5335 Wisconsin Ave., NW
Suite 440
Washington, D.C., 20015
(202) 274-0235
lspiwak@phoenix-center.org

Counsel for Amicus Curiae

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