Nos. 22-277, 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL
OF FLORIDA, ET AL., *Petitioners*,
v.
NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Respondents,

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

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

BRIEF OF WORLD FAITH FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NO. 22-277 AND RESPONDENT IN NO. 22-555

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INTEREST OF AMICUS CURIAE[1]

World Faith Foundation ("WFF") as *amicus curiae*, respectfully urges this Court to affirm the decision of the Fifth Circuit and reverse the decision of the Eleventh Circuit.

World Faith Foundation is a California religious non-profit, tax-exempt corporation formed on May 2, 2005 to preserve and defend the customs, beliefs, values, and practices of religious faith and speech, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, who has served as professor of law at Trinity Law School and Biola University in Southern California and is the author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). WFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has long recognized that the "vast democratic forums of the Internet" (*Reno v. American*

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[1] *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Civil Liberties Union, 521 U.S. 844, 868 (1997)), "and social media in particular," have become "the most important places . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Now that the internet has assumed this role as "the primary global platform to exchange ideas," freedom of expression online is essential to "both democracy and innovation." Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J. L. & Tech. 391, 393 (2020). But the exponential growth of social media has resulted in its "playing an oversized and often unaccountable role in shaping public discourse." *Id*. at 394. Control is concentrated "in the hands of a few private parties." *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring in denial of certiorari).

Texas and Florida both passed laws to reign in the control exercised by gigantic social media platforms like Facebook and Twitter. The Platforms challenge these laws, contending "they cannot be regulated as common carriers *because* they engage in viewpoint-based censorship—the very conduct common carrier regulation would forbid." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 474 (5th Cir. 2022) (emphasis added). But "[t]his contention is upside down," an attempt to "avoid common carrier obligations by violating those same obligations." *Paxton*, 49 F.4th at 474. The Platforms want to have their "cake" – favorable First Amendment treatment as publishers when they censor content – but "eat it too" as conduits free of liability for whatever platforms users post.

The Fifth Circuit upheld the Texas statutory scheme, while the Eleventh Circuit found the Florida statute unconstitutional. This Court is now faced with the task of applying established legal doctrines in this rapidly evolving context. "[B]asic principles of freedom of speech and the press . . . do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quotation marks omitted); *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022); *Paxton*, 49 F.4th at 479. But it is "rarely straightforward" to "apply[] old doctrines to new digital platforms." *Knight.*, 141 S. Ct. at 1221 (Thomas, J., concurring).

ARGUMENT

I. AS THE MODERN "PUBLIC SQUARE," THE PLATFORMS ARE OPEN TO A MULTITUDE OF VOICES AND VIEWPOINTS, COMPARABLE TO A TRADITIONAL PUBLIC FORUM.

The Platforms' role as "the modern public square" has become even "more entrenched" than when this Court first attached that label to them in *Packingham*, 137 S. Ct. at 1737. *Paxton*, 49 F.4th at 475. An increasing number of social and business interactions are facilitated through the Platforms. *Ibid.* But it is the Platforms—not the government—asserting a right to engage in "viewpoint-based censorship in this litigation." *Id.* at 454.

As Judge Jones observes in his concurrence, "[i]t is hard to construe as 'speech' what the speaker never says, or when it acts so vaguely as to be

incomprehensible." *Paxton*, 49 F.4th at 495 (Jones, J., concurring). Individuals who own and control huge social media platforms enjoy a multitude of other ways to express their personal views without intruding on the expression of the millions of platform users. *Ibid*. It would hardly be difficult to establish a separate private platform that is not large enough to be subject to the state restrictions. The state statutes are designed to "ensure that a multiplicity of voices will contend for audience attention on these platforms," a "pro-speech, not anti-speech result." *Ibid*.

A. The Platforms are private actors, yet they closely resemble a traditional public forum subject to constitutional constraints.

The Second Circuit recently found former President Trump's Twitter account to be a public forum, even though "a private company ha[d] unrestricted authority to do away with it." *Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring). Control over certain highly public platforms is often concentrated in one or two persons—"one person controls Facebook (Mark Zuckerberg), and just two control Google (Larry Page and Sergey Brin)." *Id*. at 1224. Neither Trump's Twitter account nor the Platforms are "government-controlled spaces." *Id*. at 1222; *see Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018). But much like Trump's Twitter account, the Platforms closely "resemble a constitutionally protected public forum." *Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring).

Constitutional violations require state action. Where "a *private* entity provides a forum for speech,

the *private* entity is not ordinarily constrained by the First Amendment because the *private* entity is not a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (emphasis added). There are narrow exceptions, including where a private entity performs "a traditional, exclusive public function," i.e., "exercises powers traditionally exclusively reserved to the State." *Halleck*, 139 S. Ct. at 1928-1929; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). This is a high bar, because "the government must have traditionally *and* exclusively performed the function." *Halleck*, 139 S. Ct. at 1929, citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson*, 419 U.S., at 352-353; *Evans v. Newton*, 382 U.S. 296, 300 (1966). Operating a public speech forum has not been recognized as an *exclusively* government function. The private operators of public access cable TV channels in *Halleck* did not qualify as state actors.

Building on the assumption that the Platforms are "indisputably private actors," the Eleventh Circuit framed the "question at the core of this appeal" as whether they are engaged in protected expression "when they moderate and curate" the material they disseminate. *AG, Fla.*, 34 F.4th at 1203. The circuit courted noted that "no one has a vested right to force a platform to allow her to contribute to or consume social-media content." *Id.* at 1204. But the analysis does not end there, as the Platforms serve a multitude of users whose own First Amendment rights of expression must be factored into the equation.

B. This case is about the rights of the public, the Platforms' *users*, not the Platforms *themselves*.

The internet, particularly through social media, has become the principal source of information about current events, employment ads, debating matters of public concern, "and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737. Websites online "provide perhaps the most powerful mechanisms available to a private citizen" to speak on public matters. *Ibid.*

The Eleventh Circuit's framing of this case, with its focus on the speech rights of the Platforms themselves, misses the point. Perhaps the Platforms are not merely "dumb pipes" . . . "reflexively transmitting data" created by others. *AG, Fla.*, 34 F.4th at 1204. But as the Fifth Circuit points out, "[f]ounding era Americans . . . viewed the freedom from prior restraints as a central component of the freedoms of speech and the press." *Paxton*, 49 F.4th at 453. Here, the Platforms hold the microphone and can freely impose a prior restraint on their users, while retaining the unrestrained right to express their own views. The question is *whose* speech will be published—the huge tech giants holding the "microphone," or the many smaller voices who lack the resources to establish a comparable forum of their own. In Texas, "Section 7 *protects* Texans' ability to freely express a diverse set of opinions," while the Platforms themselves retain their own freedom to speak. *Id.* at 454. With "virtually unlimited space for speech" in cyberspace—unlike the

limitations inherent in a newspaper—the Platforms are unrestrained and may also "distance themselves from the speech they host." *Id.* at 462. Considering the multitude of conflicting voices, opinions, and vigorous debates on social media, it is difficult or even illogical to associate all or even any of them with the Platform itself.

1. The Free Speech Clause does not protect the freedom to muzzle the speech of others.

There is "no amount of doctrinal gymnastics" that can transform "the First Amendment's protections for free *speech* into protections for free *censoring*." *Paxton*, 49 F.4th at 448, 455 (emphasis in original). The right of a speaker to remain silent, and to not be compelled to speak what he does not believe, is not a right to silence *other* speakers. "[C]ensorship is not speech under the First Amendment." *Id.* at 448, 466. Nor does "content-agnostic processing, organizing, and arranging of expression generate some First Amendment license to censor." *Id.* at 448, 492.

The Platforms do not have carte blanche to stifle the speech of others, even assuming they are "private companies with First Amendment rights." *AG, Fla.*, 34 F.4th at 1210, citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781-84 (1978). Yet the Platforms "attempt to extract a freewheeling *censorship* right" from the Free Speech Clause (*Paxton*, 49 F.4th at 494 (emphasis added)), an "*unenumerated* right to *muzzle* speech" that also has "staggering" implications for customers of "email providers, mobile phone company, and bank" (*id.* at 445).

The Fifth Circuit correctly discerned that the Texas statute (Section 7) "does not chill speech" but rather "chills censorship." *Paxton*, 49 F.4th at 448, 450. In prohibiting censorship, the state law "will cultivate rather than stifle the marketplace of ideas." *Id*. at 450. Upholding that law is consistent with the common carrier doctrine, "which vests the Texas Legislature with the power to prevent the Platforms from discriminating against Texas users." *Id*. at 448.

2. Platform discrimination impacts the First Amendment right to receive information.

As the Eleventh Circuit correctly observes, the Platforms "create[] a virtual space in which every user—private individuals, politicians, news organizations, corporations, and advocacy groups—can be both speaker and listener." *AG, Fla.*, 34 F.4th at 1204-1205. But the circuit court's definition of "speech" sweeps in blatant censorship, including a platform's selective removal of "what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation." *Id.* at 1210. This Court's review should not stop with considering whether the Platforms themselves are speaking, but should also consider the Platform users' rights to speak and to receive information. It is difficult to use the label "speech" or "editorial discretion" when a Platform determines what information a user is allowed to see, or the order in which content is seen. The blocked content was created by other speakers, and such "editing" also implicates the right to receive information. "Public health misinformation," including

content related to the recent COVID-19 pandemic, is a relevant example. Medical opinions vary, especially as knowledge constantly expands and changes.

The Texas law at issue in this Petition protects users by prohibiting the Platforms from blocking "a user's ability to receive the expression of another person" based on viewpoint. Tex. Civ. Prac. & Rem. Code, §§ 143A.001-002. Without that protection, the Platforms may stealthily encroach on their users' right to receive information about matters of public concern.

The right to speak and the corollary right to listen are "flip sides of the same coin." *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring) (medical marijuana). "[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them." *Bd. of Educ., Island Trees Union Free Sch. Dist. Number 26 v. Pico*, 457 U.S. 853, 867 (1982). The marketplace of ideas would be "barren" with only speakers and no listeners. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

Courts may not exercise "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens,* 130 S. Ct. 1577, 1586 (2010). The Platforms certainly may not arrogate such a right to themselves. Diverse opinions about public issues, however controversial, are not beyond the First Amendment. Suppression of information smothers expression and impedes access to information about alternatives. The government cannot wield its regulatory authority as a weapon to suppress opposing messages. The public has a right to hear

alternative views, including viewpoints that may conflict with the government's preferred narrative. For example, during the pandemic many private speakers used their social media accounts to question the wisdom, efficacy, and morality of government responses, and to consider and engage with other views. Platform users have First Amendment rights to voice their own concerns, and it is equally the right of others to access and hear the information—particularly when the content implicates an urgent matter of public concern.

3. The Platforms are not expressive associations established to disseminate a message of their own, but an open public forum to facilitate the expression of their users.

The "core business" and "specific purpose" of the Platforms is "disseminating the public's speech." *Paxton*, 49 F.4th at 491. This purpose is in sharp contrast to an expressive association formed to disseminate a specific message. The Platforms are also not analogous to other inherently expressive groups or events like the parade in *Hurley*. In *Hurley*, this Court concluded that parades are a "form of expression" where participants "are making some sort of collective point." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995); *see Paxton*, 49 F.4th at 457-458. The Court did not require a "narrow, succinctly articulable" or "particularized" message to conclude that the parade was inherently expressive and entitled to First Amendment protection. *Hurley*, at 569. In that environment, each unit

marching in the parade would affect the message conveyed by the sponsors, requiring them "to alter the expressive content of their parade" (*Hurley*, at 572-573) and forcing them to be "intimately connected" with the unit's message (*Hurley*, at 576; *Paxton*, 49 F.4th at 458).

In the *NetChoice* cases, there is no indication the Platforms have any particular message of their own, even the "collective point" present in a parade. It is difficult to even discern "*some* sort of message" that would qualify their actions as expressive conduct. *See AG, Fla.*, 34 F.4th at 1212, citing *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018). A social media platform is a free, open public forum that facilitates a multitude of smaller voices. Those voices present conflicting viewpoints, not a uniform, consistent message. It is far more analogous to a government-controlled traditional public forum than to a private forum or event.

4. The Platforms are not compelled to speak.

The state statutes at issue in this Petition do not in any way compel the Platforms either to speak or to be associated with a particular message. The diverse viewpoints expressed by social media users cannot all be identified with the Platforms themselves. This case is not comparable to the right-of-reply statute in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) that penalized a newspaper that spoke critically about a candidate. *Paxton*, 49 F.4th at 455-456. The Texas

law, for example, imposes no penalty on the Platforms' speech. *Id*. at 462. Unlike a social media platform, a newspaper's editors select and curate materials such that "everything it publishes is, in a sense, the newspaper's own speech." *Id*. at 456.

In contrast to *Tornillo*, the speech of the public mall shoppers in *PruneYard* was not attributable to the mall owner. *Paxton*, 49 F.4th at 456. "The views expressed by members of the public . . . will not likely be identified with those of the owner." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). In *Pacific Gas*, this Court distinguished *PruneYard*. The government had "impermissibly forced [the utility company] to associate with the views of other speakers." *Paxton*, 49 F.4th at 457. A plurality of this Court noted the absence of any concern about the speech of the mall owner, who "did not even allege that he objected to the content" of the shoppers' speech. *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 12 (1986); *Paxton*, 49 F.4th at 457; *AG, Fla.*, 34 F.4th at 1215.

The military recruiters in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) are comparable to the *PruneYard* shoppers. "Neither the shopping mall nor the law schools wanted to endorse the hosted speech." *Paxton*, 49 F.4th at 466. In the same way, this Court should reject any contention by the Platforms "that an observer might construe the act of hosting speech as an expression of support for its message," as that is "the precise contention t[his] Court rejected in both *PruneYard* and *Rumsfeld*." *Ibid*.

II. THE PLATFORMS SHOULD BE TREATED AS COMMON CARRIERS SUBJECT TO PUBLIC ACCOMMODATION RESTRICTIONS THAT PRESERVE FREE EXPRESSION AND REDUCE INVIDIOUS DISCRIMINATION.

The Platforms are privately owned entities but they control major avenues for public speech. Their extensive control raises "concerns about stifled speech." *Knight*, 141 S. Ct. at 1222 (Thomas, J., concurring). "[P]art of the solution may be found in doctrines that limit the right of a private company to exclude," including common carrier and public accommodation laws. *Id.* at 1222. "[C]lear historical precedent" supports such regulation. *Id.* at 1223; Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 398-405; *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1, 14 (1894) (telegraphs were "bound to serve all customers alike, without discrimination").

Definitions – Common Carriers. Courts and legal scholars have "spilled much ink" over common carriage doctrine. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 404. Rather than a clear, coherent framework, the result seems to be "a sprawling collection of principles with inconsistent application." *Ibid.* But some key characteristics have emerged. As the Fifth Circuit observed, common carrier doctrine dates "back long before our Founding," vesting states with "the power to impose nondiscrimination obligations on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining." *Paxton*, 49 F.4th at 469. This fits the

Platforms like a glove because they freely allow any adult to create an account and "transmit expression after agreeing to the same boilerplate terms of service." *Id.* at 474. These "boilerplate" terms are the "*same* terms and conditions" offered to all users. *Id.* at 474 (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960) (emphasis added)). Historically, communications firms have been "the principal targets of laws prohibiting viewpoint-discriminatory transmission of speech." *Paxton*, 49 F.4th at 492. The Platforms are quintessentially "communications firms," as their core business is disseminating the speech of others.

The Eleventh Circuit offered only a circular definition, first explaining that common carriers offer communications services to the public to transmit communications "of their own design and choosing" without "individualized decisions." *AG, Fla.*, 34 F.4th at 1220 (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)). But social media users are supposedly *not* free to transmit messages "of their own design and choosing" and the Platforms *do* make individualized decisions based on content and viewpoint. The Fifth Circuit saw through this circular reasoning. The Platforms argue they are not common carriers "because they engage in viewpoint-based censorship—the very conduct common carrier regulation would forbid. . . . The Platforms appear to believe that any enterprise can avoid common carrier obligations by violating those same obligations." *Paxton*, 49 F.4th at 474. Under this "ahistorical approach . . . a firm's existing desire to discriminate [would] somehow give[] it a permanent immunity from common carrier nondiscrimination

obligations." *Id.* at 475. Similarly, "in the Eleventh Circuit's view, a firm can't become a common carrier unless the law already recognizes it as such, and the law may only recognize it as such if it's already a common carrier." *Id.* at 494.

In contrast to the circular rationale of the Platforms and the Eleventh Circuit, the states (Florida and Texas) may regulate the conduct of private firms that facilitate communication by restricting viewpoint discrimination against platform users. *Paxton*, 49 F.4th at 455.

Historical Precedent. There is a reasonable argument that the Platforms are "sufficiently akin to common carriers or places of accommodation" to be subjected to regulations that "would have been permissible at the time of the founding." *Knight*, 141 S. Ct. at 1223-1224 (Thomas, J., concurring); *United States v. Stevens*, 559 U.S. 460, 468 (2010). At the founding, persons engaged in "common callings" had a recognized "duty to serve" that "had crystallized into a key tenet of the common law." *Paxton*, 49 F.4th at 469. The "duty to serve *without discrimination* was transplanted to America along with the rest of the common law." *Ibid* (emphasis added).

Over a century ago, this Court acknowledged that "a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation." *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914). Courts may consider "whether a firm's service play[s] a central economic and social role in society." *Paxton*, 49 F.4th at 471. Social media plays an increasingly

"central economic and social role in society," and free expression online is surely a "public concern." Common carriage may also be viewed as an offer to the public of a "fundamental, essential service to society," on a nondiscriminatory basis. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 403; Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514, 518-25 (1911). Social media is indisputably an "essential service" in modern times.

Common carriage doctrine applies to a wide variety of business enterprises. In the 19th and 20th centuries, and continuing now into the 21st century, it is the "dominant framework" for regulating telegraphs, telephones, and other communications networks. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 402. Early cases about telephone service illustrate the point. The Supreme Court of Nebraska granted a writ of mandamus compelling a telephone company to install a telephone in an attorney's office. *State ex rel. Webster v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N.W. 237 (Neb. 1885); *see also Walls v. Strickland*, 174 N.C. 298, 93 S.E. 857, 858 (N.C. 1917) (telephone company is a common carrier with a duty to provide services without discrimination); *Hockett v. Indiana*, 105 Ind. 250, 5 N.E. 178, 182 (Ind. 1886) (telephone is a "common carrier of news"); *Paxton*, 49 F.4th at 471-472. The Platforms have cited no cases "sustaining a constitutional challenge to a state law imposing nondiscrimination obligations on a common carrier." *Id.* at 473.

A. Common carriers are typically subject to a regulatory bargain, receiving certain government favors in exchange for certain immunities.

Early internet platforms had to choose between surrendering all control over postings and facing no liability, on the one hand, and "massive liability," on the other. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 421 (discussing early cases, e.g., *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)). When the Communications Decency Act was enacted in 1996, 47 U.S.C. §230 (Section 230) encouraged these early platforms to regulate matters like pornography while at the same time facilitating the free flow of ideas. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 396-397. Section 230 seems to offer a "deal" analogous to the protection historically offered for telegraphs. *Id*. at 422. Telegraphs were protected from defamation suits unless they knew or had reason to know that a message they distributed was defamatory; *see* Restatement (Second) of Torts §581 (1976); *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 542 (1st Cir. 1940). *Knight,* 141 S. Ct. at 1223 n. 3 (Thomas, J., concurring).

The Platforms want the best of both worlds—the right to censor disfavored viewpoints *and* immunity from legal liability as publishers. Congress seems to have accommodated their demands, providing certain legal immunities under Section 230 but without "impos[ing] corresponding responsibilities, like

nondiscrimination." *Knight,* 141 S. Ct. at 1226 (Thomas, J., concurring). "Facebook and Google to this day have no obligations to refrain from discrimination, carry all lawful messages, or provide any public good—even though they function as the dominant communications of their time." Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 422. Section 230 is much like "a common carriage-type deal—*but without the government demanding much in return from internet platforms* . . . all carrot and no stick." *Id*. at 418 (emphasis in original).

In contexts where large firms dominate, as the Platforms do with respect to internet communication, it is common for the government to provide special favors, including "market power, or even monopoly," or relief from legal liability, to preserve important public benefits such as a "universal communications platform, free speech, and democratic institutions." Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 397-398. Such a "deal" must be balanced by corresponding obligations, "such as non-discrimination or universal service." *Id*. at 398.

Instead of such regulatory leniency, "it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of" social media platforms. *Knight,* 141 S. Ct. at 1226 (Thomas, J., concurring) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 684 (1994) (*Turner I*) (opinion of O'Connor, J.)). As applied to communications networks, common carriage doctrine typically imposes "higher liability standards and other special obligations," to ensure "a universal

communications platform" free of content discrimination. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 396.

The Platforms are huge entities, broadly open to the public, that should be regarded as common carriers, subject to the same regulations as other communication industries, as a condition for receiving immunity from certain type of lawsuits. *Knight,* 141 S. Ct. at 1223 (Thomas, J., concurring); Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 402-407. Under such a regulatory bargain, the Platforms would relinquish the right to discriminate based on sender or content and in exchange receive immunity from liability for that content. *Id*. at 405-406.

B. The targeted Platforms are technology giants.

The two state statutes at issue in this Petition implicate only the very largest platforms. In Florida, the law applies to those whose annual gross revenues exceed $100 million or who host at least 100 million individual platform users globally. Fla. Stat. § 501.2041(1)(g); *AG, Fla.*, 34 F.4th at 1205. The Texas law regulates platforms who serve more than 50 million monthly active users, including Facebook, Twitter, and YouTube. Tex. Bus. & Com. Code § 120.002(b). The Texas legislature found that these are "central public forums for public debate" and that "social media platforms with the largest number of users are common carriers by virtue of their market dominance." *Paxton*, 49 F.4th at 445.

The Platforms argue that targeting such a small number of platforms should subject the law to strict scrutiny. *Paxton*, 49 F.4th at 481. They point to cases with a similarly small range of targets. The ink and paper tax declared unconstitutional in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue* "target[ed] a small group of newspapers." 460 U.S. 575, 591 (1983). The tax in *Arkansas Writers' Project, Inc. v. Ragland*, similarly, "target[ed] a small group within the press." 481 U.S. 221, 229 (1987). *See also Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936) (holding unconstitutional a tax singling out newspapers with weekly circulations above 20,000). But in these cases, unlike this Petition, the primary concern was "the danger of suppressing, particular ideas." *Grosjean*, at 453. Here, "the law aims at *protecting* a diversity of ideas and viewpoints by focusing on the large firms that constitute 'the modern public square.' *Packingham*, 137 S. Ct. at 1737." *Paxton*, 49 F.4th at 482.

In today's world, huge digital platforms enjoy a dominant share of the market and "derive much of their value from network size." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Accordingly, they are analogous to common carriers that may be regulated to ensure broad non-discriminatory access. It does not matter that there are other ways to communicate if those alternatives are not comparable. "A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail." *Id*. at 1225.

C. The Platforms, like common carriers or places of public accommodation, are widely open to the public.

The Platforms, "unlike newspapers," "hold themselves out to the public" as entities established to "distribut[e] the speech of the broader public." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Their function in "carrying" speech "from one user to another" thus "resemble[s] traditional common carriers." *Id.* at 1224. As "facilitators of *other people's* speech," they are "indispensable conduits for transporting information." *Paxton*, 49 F.4th at 479. It would be strange to "conclude each and every communication transmitted through that infrastructure still somehow implicates the Platforms' own speech for First Amendment purposes." *Id.* at 480.

The public character of the Platforms, coupled with their market power, is sufficient to subject them to regulation as common carriers or public accommodations. "[A] person [who] holds himself out to carry goods for everyone as a business . . . is a common carrier." *Ingate v. Christie*, 3 Car. & K. 61, 63, 175 Eng. Rep. 463, 464 (N. P. 1850); *Knight*, 141 S. Ct. at 1222-1223 (Thomas, J., concurring). A "place of public accommodation" has been defined as a place that provides "lodging, food, entertainment, or other services to the public . . . in general." Black's Law Dictionary 20 (11th ed. 2019) (defining "public accommodation"); *Knight*, 141 S. Ct. at 1225 (Thomas, J., concurring); *see also* 42 U.S.C. §2000a(b)(3).

D. The Platforms are less susceptible to government collusion pressure if viewpoint discrimination is prohibited.

The potential for government collusion with the Platforms is not merely an academic question. On October 20, 2023, this Court granted certiorari in *Murthy v. Missouri*, Docket No. 23-411. One of the questions presented is: Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights.

One commentator characterized internet platforms as "free expression's weakest link," observing that: "Contrary to the claim that the internet platforms can be trusted to police themselves, Facebook and Google face continuous accusations of politicization and unfair censorship—as well as pressure from governments." Adam Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 432 citing Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018). For private platform owners who want to resist government attempts at collusion, an anti-discrimination obligation would be helpful, because "then the government [could not] even ask." Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 433. In addition, such a requirement would serve the truly important government interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*).

E. The Platforms are digital conduits that can serve to reduce invidious discrimination and preserve other freedoms, including religious and political expression.

Imposing a non-discrimination requirement on the Platforms would "serve[] important social goals" by "encouraging full-throated public discussion . . . of political and social issues." Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 416-417. Such discussion in turn "promote[s] the dissemination of information and knowledge in society necessary for self-governance and creation of resilient political institutions." *Id*. at 401. Each of the states involved in these Petitions "has a fundamental interest in protecting the free exchange of ideas and information in [that] state." *Paxton*, 49 F.4th at 482. This Court has confirmed this interest as "a governmental purpose of the highest order" that "promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663; *Turner II*, 520 U.S. at 189 ("promoting the widespread dissemination of information from a multiplicity of sources" is an important government interest); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.").

In contrast to these long recognized fundamental interests in preserving free speech and widespread discussion of ideas, major social media platforms offer vague platitudes that the Eleventh Circuit agreed would justify their *censorship*, but "without even explaining how viewpoint-based censorship furthers

th[ose] interest[s]": YouTube (to create a "welcoming community"); Facebook ("foster authenticity, safety, privacy, and dignity"); Twitter ("to ensure all people can participate in the public conversation freely and safely"). *Paxton*, 49 F.4th at 493; *see AG, Fla.*, 34 F.4th at 1213. Viewpoint-based censorship interferes with these goals. The community is hardly "welcoming" to a user whose expression has been blocked, banned, or otherwise censored. It is impossible for "all people" to participate in a forum where their content can be censored. It is hardly "safe" to post content that is likely to be blocked. Such censorship attacks the dignity of users whose views differ from those who control the platforms.

In the world of television and radio, broadcasters are regulated "with a view to preserve a diversity of voices and a robust monopoly place of ideas" and "the explicit goal to maximize diversity of viewpoint," including minority viewpoints. Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 418. The same goals are equally relevant and perhaps even more urgent as applied to internet speech. Courts, however, have read "sweeping immunity" into 47 U.S.C. § 230, extending it "beyond the natural reading of the text" with potentially "serious consequences." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., concurring). "With no limits on an Internet company's discretion to take down material, §230 now apparently protects companies who racially discriminate in removing content." *Id*. at 17, citing *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017), aff'g 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015) (concluding that "'any activity

that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune'" under §230(c)(1)). The implications of such a broad rendering of section 230 are "breathtaking" and tend to "place the platforms above the law." Candeub, *Bargaining for Free Speech*, 22 Yale J. L. & Tech. at 429. That is precisely the concern behind the state laws at issue in these Petitions.

CONCLUSION

This Court should affirm the decision of the Fifth Circuit and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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