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.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., PETITIONERS

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

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

BRIEF OF PROFESSOR CHRISTOPHER S. YOO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae is a law professor who has researched and published on the applicability of common carriage to social media platforms.[2]

[1] No counsel for a party in this case authored any part of this brief, and no person or entity other than *amicus* contributed monetarily to its preparation or submission.

[2] *Amicus curiae's* title and institutional affiliation are listed for identification purposes only. Their inclusion does not imply any endorsement of the views expressed herein by his institution.

SUMMARY OF THE ARGUMENT

Both the Florida and Texas statutes at issue in these cases attempt to characterize social media platforms as common carriers. This attempt is somewhat incomplete in that it is effectuated through legislative findings and substantive provisions that stop short of the quintessential characteristics of common carrier status. In any event, common carrier status is determined by functions, not by denominations, and firms that are common carriers remain subject to the same standards as other First Amendment protected activity. The most universally accepted definition of common carriage turns on whether the firm eschews exercising editorial discretion over the content it carries and instead holds itself out as serving all members of the public without engaging in individualized bargaining. Social media platforms do not hold themselves out in this manner. Moreover, the fact that reasonable observers are likely to attribute platforms' carriage of content to their own editorial choices makes requiring them to carry content constitutionally impermissible.

Supreme Court precedent establishes that regulations that force a platform to carry speech that it would prefer not to carry constitutes an impermissible intrusion on its editorial judgment. The exceptions for broadcasting recognized in *Red Lion* and for cable television recognized in *Turner* turn on control of limited physical resources, considerations that do not apply to social media platforms.

Lastly, the four alternative criteria that Justice Thomas's *Knight* concurrence and Judge Oldham's

opinion in the Fifth Circuit decision below suggest might justify restricting social media platforms' speech—involvement in the transportation or communications industries, the fact that social media platforms might be "affected with a public interest," the fact that social media platforms might possess monopoly power, and the fact that restrictions social media platforms may be characterized as a quid pro quo for other benefits—do not alter the First Amendment analysis.

ARGUMENT[3]

I. Restrictions on Common Carriers' Speech Are Assessed Under the Same First Amendment Standards as Restrictions on Other Actors.

The Florida statute includes legislative findings that social media platforms should be "treated similarly to common carriers." Act of May 24, 2021, ch. 2021-32, § 1(6), 2021 Fla. Laws 503, 505. The legislative findings included in the Texas statute were more direct, stating that "social media platforms function as common carriers" and that "social media platforms with the largest number of users are common carriers by virtue of their market dominance." Act of Sept. 9, 2021, ch. 3, § 1(3)–(4), 2021 Tex. Gen. Laws 3904, 3904.

Legislative findings, however, have limited impact on constitutional analysis. The Supreme Court has recognized that although "Congress' predictive judgments are entitled to substantial deference," that deference "does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)). In short, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."

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[3] The substance of this brief draws heavily from Christopher S. Yoo, *What's in a Name?: Social Media, Common Carriage, and the First Amendment*, 118 NW. U. L. REV. ONLINE (forthcoming 2024) (preprint available at https://ssrn.com/ abstract=4610515).

Sable, 492 U.S. at 129 (quoting *Landmark Commc'ns, Inc. v. Virginia,* 435 U.S. 829, 843 (1978)).

Moreover, courts have recognized that "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (*NARUC I*). As Justice Thomas explained in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, "Labeling [a regulation] a common carrier scheme has no real First Amendment consequences." 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). Relying on Justice Thomas's concurrence in *Denver*, the Eleventh Circuit in one of the decisions below similarly held, "Neither 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. Att'y Gen.*, 34 F.4th 1196, 1221 (11th Cir. 2022), *cert. granted*, 92 U.S.L.W. 3054 (Oct. 5, 2023) (No. 22-277).

Focusing, as these precedents indicate, on the functions involved, although the legislative findings of these statutes purport to classify social media as common carriers, their substantive provisions fell short of doing so. Instead of mandating nondiscrimination, which courts have recognized to be the "*sine qua non* of common carrier status," *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (quoting *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 533 F.2d 601, 08 (D.C. Cir. 1976) (*NARUC II*), these statutes employed newly defined terms of art, including "censor,"

"deplatform," and "shadow ban."[4] Courts have yet to explore the extent to which these terms coincide with or differ from nondiscrimination. As such, it is not clear whether the substantive provisions of these statutes can be fairly read as treating social media platforms as common carriers.

That said, even if Florida or Texas had implemented their legislative findings by imposing true common carriage obligations on social media platforms, doing so would not have affected the First

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[4] The Florida statute requires that social media platforms "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." FLA. STAT. § 501.2041(2)(b). The statute defines "censor" to "include any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform." *Id.* § 501.2041(1)(b). It defines "deplatform" as "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* § 501.2041(1)(c). It defines "shadow ban" as "action by a social media platform, through any means, . . . to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." *Id.* § 501.2041(1)(f).

The Texas statute prohibits censorship based on the viewpoint of users, their expression, or their geographic location. TEX. BUS. & COM. CODE ANN. § 143A.002(a). The statute defines "censor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). The canon *ejusdem generis* confirms that the inclusion of "discriminate" in the catchall phrase should be construed as limited by the terms preceding it and not as a separate, independent basis for liability.

Amendment analysis. The Eleventh Circuit properly held that, "if social-media platforms currently possess the First Amendment right to exercise editorial judgment, . . . then any law infringing that right—even one bearing the terminology of 'common carri[age]'—should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity." *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1221 (alteration in original).

As Justice Thomas and both opinions below recognized, the most universally accepted definition of common carriage turns on whether the firm eschews exercising editorial discretion over the content it carries and instead holds itself out as serving all members of the public without engaging in individualized bargaining. *Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 471 (5th Cir. 2022) (opinion of Oldham, J.), *cert. granted*, 92 U.S.L.W. 3054 (Oct. 5, 2023) (No. 22-255); *NetChoice v. Att'y Gen.*, 34 F.4th at 1220. Indeed, this criterion constitutes the central consideration in all leading discussions of common carriage.[5]

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[5] *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016); *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014); *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012); *NARUC II*, 533 F.2d at 608; *NARUC I*, 525 F.2d at 641. Congress, courts, and agencies have applied the same formulation in a wide variety of contexts. *See* 15 U.S.C. § 375(3); 46 U.S.C. § 40102(7)(A); 40 C.F.R. § 202.10(b); *Edwards v. Pac. Fruit Express Co.*, 390 U.S. 538, 540 (1968); *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516 524 n.2.

Holding out simply requires that the provider "abide by its representation and honor its customers' expectations." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc). The fact that providers can being treated as common carriers simply by refraining from offering to carry all comers removes the coercive element needed to constitute a violation of the First Amendment. *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241, 254–56 (1974); *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945).[6] It also means that firms can evade being treated as

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(5th Cir. 1993); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 887–88 (D.C. Cir. 2015); *Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 326 (2d Cir. 1972); *Kelly v. Gen. Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd*, 204 F.2d 692 (3d Cir. 1953).

[6] A similar issue arose under the Takings Clause. In *FCC v. Florida Power Co.*, the Court considered the constitutionality of the Pole Attachments Act of 1978, which simply regulated the rates that utility companies could charge cable companies for access to their utility poles should the utility company choose voluntarily to enter into such commercial agreements without mandating that the utility companies to provide such access. 480 U.S. 245, 251–52 (1987). The Court held that this type of permissive regime lacked "the element of required acquiescence" needed to constitute a per se taking and would violate the Takings Clause only if confiscatory. *Id.* at 252–54. The Act was later amended to make access to utility poles mandatory, after which courts held that the Act did raise constitutional issues. *Gulf Power Co. v. United States*, 187 F.3d 1324 1328–29 (11th Cir. 1999). The Court's reversal of a subsequent decision in this litigation regarding which type of entities fell within the Act's scope did not disturb this holding. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

common carriers simply by making individualized decisions about what types of content to carry.

Courts have recognized that social media platforms do not hold themselves out to all members of the public. As the Eleventh Circuit held, social-media platforms "require[] users, as preconditions of access, to accept their terms of service." *NetChoice v. Att'y Gen.*, 34 F.4th at 1220. This means that "[s]ocial-media users . . . 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 decision about whether to publish particular messages or users." *Id.* (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)).

The exchange that took place during the D.C. Circuit's decision not to rehear the decision upholding the 2015 Open Internet Order en banc confirms this conclusion. When then-Judge Kavanaugh objected that classifying ISPs as common carriers impermissibly abridged their editorial discretion, *U.S. Telecom Ass'n*, 855 F.3d at 484–89 (Kavanaugh, J., dissenting from the denial of rehearing en banc), the authors of the majority opinion countered that "web platforms such as Facebook, Google, Twitter, and YouTube . . . are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering." *Id.* at 392 (Srinivasan, J., joined by Tatel, J., concurring in the denial of the petition for rehearing en banc). The Open Internet Order did not implicate the First Amendment because it only

purported to regulate services over which providers exercised no editorial discretion. *Id.* at 388–89. This discussion not only confirmed that social media platforms do not satisfy the holding-out criterion for common carriage. It implicitly recognized that speech over which providers exercise editorial control, including the leading social media platforms, is protected by the First Amendment. If that were not the case, the fact that the Open Internet Order affected only speech over which providers exercised no editorial discretion would have been completely unresponsive to the concerns raised by then-Judge Kavanaugh.

Another line of cases confirms that First Amendment protection for speech carried on a platform depends on whether observers will believe whether the messages contained in that speech reflect the platform's editorial discretion. For example, decisions such as *Hurley* and *Dale* invalidated nondiscrimination mandates that forced platforms to carry messages with which they disagreed when those messages were likely to be attributed to the platform. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575–77 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 653, 658 (2000). Conversely, decisions such as *Rumsfeld v. FAIR* and *PruneYard* upheld laws requiring require entities to convey speech with which they disagreed because reasonable observers would not attribute that speech to those entities. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006);

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 86–88 (1980).

Together, these cases establish that laws requiring a social media platform to carry others' speech without exercising any control over it violate the First Amendment whenever others are likely to attribute the content of that speech to the platform. When read together these cases recognize that imposing nondiscrimination mandates on social media platforms would violate the First Amendment whenever others would attribute the views these platforms would be forced to carry. The vitriol aimed at social media platforms over their decisions to carry or block certain content leaves little doubt that people regard decisions about what to carry as part of the platforms' expression and responsibility.

II. Core First Amendment Principles Bar Requiring Social Media Platforms to Carry Content with Which They Disagree

The Court has held that requiring a platform to carry speech that it would prefer not to carry constitutes an impermissible intrusion on the platform's editorial judgment. *Hurley*, 515 U.S. at 575; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 9–15 (1986) (plurality opinion). The leading case is *Tornillo*, in which the Court invalidated a state statute giving a right of reply to candidates whose character or record a newspaper had criticized as an impermissible "intrusion into the function of editors" regardless of whether those decisions were considered

fair or unfair or whether or not including such content crowded out other content. 418 U.S. at 258.

The Court has upheld laws requiring platforms to carry content balancing points of view that they chose to express in only two contexts.[7] The first such exception, recognized for broadcasting, was based on the inherent scarcity of the airwaves as a medium of communication. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The Court impliedly recognized that *Red Lion* was based on the unique physical scarcity of the electromagnetic spectrum in *Tornillo*, when it held that the fact that a newspaper might be a local monopoly was insufficient to justify intruding upon the newspaper's editorial discretion. 412 U.S. at 248–49, 250–51. The Court made this point explicit in *Turner*, in which, after noting the heavy criticism to which the scarcity doctrine had been subject, 512 U.S. at 638 & n.5, it held the doctrine inapplicable to cable television because cable was not subject to the same limitations to the number of speakers as broadcasting. *Id.* at 638–39. The Court also reaffirmed *Tornillo* and confirmed that the mere fact that a daily newspaper "may enjoy monopoly status in a given locale" did not affect the constitutional analysis. *Id.* at 653–54, 656.

The lack of any inherent physical limitation to the number of social media platforms that can operate

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[7] For a broader discussion of these issues, see Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 729–37 (2010); Christopher S. Yoo, *Technologies of Freedom and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747, 758–64 (2011).

simultaneously precludes any reliance on the scarcity doctrine to justify interference with their editorial discretion. Indeed, the Court held as much in *Reno v. ACLU*, when it ruled the scarcity doctrine inapplicable to Internet content. 521 U.S. 844, 870 (1997). The fact that the Internet imposed no technological limit on the number of people who can speak meant that, "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity," *Id.*

The Court's decision in *Turner* recognized a second rationale for mandating access to a platform when it upheld the statute requiring cable operators to carry all full-power local television stations, but did so in ways that render it inapposite to these cases. As an initial matter, *Turner* involved a content-neutral restriction on speech, 512 U.S. at 642–52, whereas the statutes under review in these cases are clearly content based. In addition, the result in *Turner* turned on the "gatekeeper" or "bottleneck" control resulting from "the fact that there could only be one cable connection to any home" that places the cable operator in a position to block any other content providers from gaining access to subscribers. *Id.* at 656. In so doing, the Court again emphasized the *physical* (rather than *economic*) nature of this consideration by contrasting cable with newspapers, which, "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications." *Id.* The inapplicability of this rationale to platforms that lack control over an exclusive physical connection, *see*

Hurley, 515 U.S. at 570, precludes applying it to social media platforms.

III. Other Rationales Do Not Justify Extending a Lower Level of First Amendment Protection to Social Media Platforms.

Justice Thomas's *Knight* concurrence and Judge Oldham's opinion in the Fifth Circuit decision below both entertained the possibility that other criteria might justify treating social media platforms as common carriers that they argue could be required to carry content that contradicted their editorial judgment without violating the First Amendment. On closer inspection, none of these criteria can serve as an adequate basis for determining whether a firm is a common carrier. Nor do any of them affect the First Amendment analysis.[8]

A. Involvement in Transportation or Communication

Justice Thomas and Judge Oldham have suggested that the fact that social media are part of the larger communications industry can justify treating them as common carriers. Justice Thomas argued

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[8] In addition to Yoo, *supra* note 3, the following sections draw on Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 465–75 (2021); Christopher S. Yoo, *Common Carriage's Domain*, 35 YALE J. ON REGUL. 991, 994–97 (2018); and Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 552–63 (2013).

that "whatever may be said of other industries, there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). Judge Oldham's opinion in the Fifth Circuit's decision below similarly suggested that the federal government had traditionally been permitted to "require[e] interstate transportation and communications firms to serve customers without discrimination." *NetChoice LLC v. Paxton*, 49 F.4th at 469 (opinion of Oldham, J.).

Industry classifications do not necessarily translate into legal categories. The most eloquent statement of the perils of using such industry classifications comes from Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), in which he criticized the practice of grouping legal phenomena "under the head of Railroads or Telegraphs." *Id.* at 474–75. Simply gathering principles "under an arbitrary title which is thought likely to appeal to the practical mind" provides little basis "to discern the true basis for prophecy." *Id.* at 475. Rather, the proper approach is to begin by "discover[ing] from history how it has come to be what it is" and then proceeding with "consider[ing] the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price." *Id.* at 476. The danger of simply accepting an industry classifications is ending up with "too little theory in the law rather than too much." *Id.* That is, instead of imputing common carrier status to all transportation or

communication firms, the better course would be to analyze the reasons why these industries were historically regulated. From there, one can determine whether classifying a firm as a common carrier would be consistent or inconsistent with the historical purpose of the designation.

Even proponents of using ties to transportation and communications concede that "the mere existence of a long history of state involvement with transport does not necessarily tell us what the principled *basis* of that involvement is." Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 884 (2009). As Adam Candeub, whose article provided the foundation for Justice Thomas's concurrence in *Knight*, observed:

> It is a fair riposte to these ideas that they are descriptive at too general a level and fail to provide a convincing rule of decision. How involved in transportation or communications must an industry be before it becomes a common carrier[?] Why private car services but not Uber? . . . Teasing out common carriage law's definitional criteria may be, in the end, desultory.

Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 405 (2020). The ambiguity of the link between common carriage and all segments of the transportation and communications industry is underscored further by the growing practice since the 1970s to lift nondiscrimination mandates

from an increasing number of segments of the transportation and communications industries. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1335–39 (1998).

Most importantly, it is hard to see why the mere fact that a firm operates in the transportation and communications industry would alter the First Amendment analysis. Indeed, were connection to the communications industry sufficient, there would be no point for the Supreme Court to engage in the extensive discussions of the physical details of the underlying technology that is the hallmark of its decisions on broadcasting and cable television. *See supra* pp. 11–13. On the contrary, these cases confirm that constitutionality depends on an analysis of the characteristics of specific communications technologies rather than industry-level generalizations.

B. "Affected with a Public Interest"

Another oft-cited component of the definition of common carriage turns on whether the firm in question is "affected with a public interest." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring); *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 471, 473 (opinion of Oldham, J.). As Judge Oldham's opinion noted, the Supreme Court first advanced the concept in *Munn v. Illinois*, 94 U.S. 113, 125–26, 130 (1876). as a justification to uphold economic regulation during the *Lochner* era, when the Court routinely struck down such regulation as a violation of substantive due process. The opinion failed to note the fact that the

concept immediately drew a steady stream of criticism that culminated in the abandonment of the test in *Nebbia v. New York*, which concluded "there is no closed class or category of businesses affected with a public interest" and that the principle is "not susceptible of definition and form[s] an unsatisfactory test of the constitutionality of legislation directed at business practices." 291 U.S. 502, 536 (1934). Thereafter, the Supreme Court regarded the doctrine as "discarded." *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 245 (1941). Most recently, in *Jackson v. Metropolitan Edison Co.*, the Court reiterated that whether a firm was affected with a public interest was "not susceptible of definition and form[ed] an unsatisfactory test." 419 U.S. 345, 353 (1974). Thus, after *Nebbia*, the test "disappeared from constitutional jurisprudence." Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 206 n.85 (1984).

It thus comes as no surprise that Justice Thomas denigrated this tenet as "hardly helpful, for most things can be described as 'of public interest.'" *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). Unfortunately, Judge Oldham's opinion in the Fifth Circuit's decision below endorsing the doctrine failed to discuss the substantial authority rejecting it.

Even more importantly for purposes of this Article, the courts that have considered the issue have concluded that the fact that a party may be affected with a public interest has no impact on the First Amendment analysis. A prime example is a Seventh

Circuit decision, which rejected arguments that the fact that a newspaper was supposedly affected with a public interest justified preventing it from "arbitrarily refus[ing] to publish advertisements expressing ideas, opinions or facts on political and social issues." *Chicago Jt. Bd., Amalgamated Clothing Workers of Am. v. Chicago Trib. Co.*, 435 F.2d 470, 472, 478 (7th Cir. 1970). If a newspaper was not a firm affected with a public interest during the 1970s, it is hard to see how a modern social media platform could be classified so today. These precedents also explain why the Eleventh Circuit held that public importance alone was not "sufficient reason[] to recharacterize a private company as a common carrier." *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1221. As this Court held in *New States Ice Co. v. Liebmann*, if the fact that a product or service was indispensable were sufficient to make it affected with a public interest, then the concept should logically include such critical needs as food, clothing, and shelter, items that the Court had clearly held as falling outside the category. 285 U.S. 262, 277 (1932).

C. Monopoly Power

Both Justice Thomas and Judge Oldham suggested that possession of monopoly power formed part of the justification for treating a firm as a common carrier. *Knight*, 141 S. Ct. at 1222, 1224 (Thomas, J., concurring); *NetChoice, L.L.C. v. Paxton*, 49 F.4th at 472, 476 (opinion of Oldham, J.). The three Justices dissenting from the Supreme Court's decision to vacate the Fifth Circuit's stay of the

district court's mandate below also entertained the possibility that the "possess[ion of] some measure of common carrier-like market power" might justify mandating nondiscrimination. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (mem.) (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting from grant of application to vacate stay). In contrast, the Eleventh Circuit below disagreed, rejecting claims that market power could justify classifying a firm as a common carrier. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1221. The judges reviewing the FCC's 2015 Open Internet Order split on the issue. *Compare U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 708 (D.C. Cir. 2016) (rejecting the argument that common carriage depended on monopoly power), *with id.* at 744–54 (Williams, J., concurring in part and dissenting in part) (drawing the opposite conclusion); *U.S. Telecom Ass'n*, 855 F.3d at 418, 431–35 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (same).

The claim that monopoly power is a key criterion for common carriage is questionable as a historical matter. Monopoly power was not a traditional requirement at English common law nor during the 19th century regulation of the railroads. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 131–48 (1991); Kearney & Merrill, *supra*, at 1332–33. It was first put forth by Bruce Wyman in 1904 as part of his attempt to justify certain types of economic regulation in the face of the *Lochner* era's constitutionalization of laissez-faire economics. Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 217,

232–40 (1904).[9] Wyman's proposal prompted responses from Charles Burdick and Edward Adler, which pointed out that monopoly power had never been a requirement for common carriage. Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 148 (1914); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518–25 (1911). Indeed, none of the leading judicial precedents on the definition of common carriage included monopoly power as a requirement. *See, e.g.*, *NARUC II*, 533 F.2d at 608; *NARUC I*, 525 F.2d at 641, 642.

Even if monopoly power were a requirement, it is not clear that the social media platforms covered by the statues at issue in these cases would meet it. Indeed, Justice Thomas's concurrence in *Knight* noted that whether Twitter fell within that standard remained an open question. *Knight*, 141 S. Ct. at 1225 (Thomas, J., concurring).

In any event, as discussed earlier, Supreme Court precedent makes clear that the possession of monopoly power does not affect the First Amendment analysis. In addition to the Court's rejection in *Tornillo* and *Turner* that possession of monopoly power affects the First Amendment's analysis discussed above, *see supra* pp. 11–13, Justice Douglas stated in *CBS, Inc. v. Democratic National Committee* that even though "[s]ome newspapers in our history have

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[9] For an excellent discussion of the debate surrounding Wyman's proposal, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292–93, 1304–21, 1403–10 (1996).

exerted a powerful—and some have thought—a harmful interest on the public mind," government intervention to compensate for any such adverse effects "would be the greater of two evils." 412 U.S. 94, 152–53 (1973) (Douglas, J., concurring in the judgment). Douglas continued: "Of course there is private censorship in the newspaper field. . . . But if the Government is the censor, administrative *fiat*, not freedom of choice, carries the day." *Id.* at 153.

Justice Douglas's words reflected the well-established state action doctrine, which holds that the First Amendment restrictions on interfering with speech apply only to the state, not private individuals. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (providing the most recent reaffirmation of the state action doctrine). In the words of Justice O'Connor, "the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals." *Turner*, 512 U.S. at 685 (O'Connor, J., joined by Scalia and Ginsburg, JJ., and joined by Thomas, J., in part, concurring in part and dissenting in part). In fact, Justice Thomas's endorsement of the constitutionality of treating social media as common carriers was accompanied by a statement approving the decision not to grant certiorari in a case holding that editorial judgments exercised by private Internet websites were protected by the First Amendment. *Knight*, 141 S.

Ct. at 1221 (Thomas, J., concurring) (opining that the Court "properly reject[ed]" the petition for certiorari in *Freedom Watch, Inc. v. Google Inc.*, 816 Fed. Appx 497 (D.C. Cir. 2020).

As the Eleventh Circuit eloquently put it in the context of social media, *Tornillo* "squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the market place and hits it big." *NetChoice v. Att'y Gen.*, 34 F.4th at 1222. The exceptions recognized in *Red Lion* and *Turner* turned on control of limited physical assets that social media platforms simply do not possess.

D. Quid Pro Quo

Justice Thomas's *Knight* concurrence suggested that common carriage status might be a quid pro quo for "special government favors," such as monopoly franchises (or some other measures to protect the firm from competition) or "immunity from certain types of suits." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). Judge Oldham suggested that the immunity provided by Section 230 represented such a benefit. *NetChoice v. Paxton*, 49 F.4th at 477 (opinion of Oldham, J.).

As an initial matter, quid pro quo is a questionable basis for common carriage as a historical matter. Historically, courts have routinely rejected arguments that the fact that a company is operating under a franchise or exercises the power of eminent domain is sufficient to justify regulating it as a common

carrier. FORD P. HALL, THE CONCEPT OF A BUSINESS AFFECTED WITH A PUBLIC INTEREST 96–97 (1940). Indeed, it bears noting that one of the seminal cases on common carriage (*Munn v. Illinois*) was selected specifically because the entity in question was not operating under state corporate charter. Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801, 813–14 (1999).

Furthermore, the landmark Supreme Court case *Charles River Bridge* and its modern reaffirmation in *Winstar* make clear that any such quid pro quo must be explicitly spelled out at the time the supposed benefit is accepted. *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837); *United States v. Winstar Corp.*, 518 U.S. 839 (1996). As such, a quid pro quo arrangement cannot justify a statutory nondiscrimination mandate imposed after the fact.

It is true that the federal government may employ its taxing and spending power to impose conditions on the receipt of federal funding that it could not impose directly as regulatory restrictions. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561–63 (2012) (opinion of Roberts, C.J.); *South Dakota v. Dole*, 483 U.S. 203, 209–11 (1987). Exercises of those powers are subject, however, to the unconstitutional conditions doctrine, which limits the government's ability to make benefits contingent on permitting infringement of the recipients' constitutionally protected rights, particularly the freedom of speech. *Perry v. Sinderman*, 408 U.S, 593, 597 (1972). To cite

one classic example, the Supreme Court has held that a state may not deny tax-exempt status to veterans just because they refused to sign an oath eschewing any advocacy to overthrow the government. *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958). In the absence of any overarching theory explaining the doctrine, *see, e.g.*, *Dogan v. City of Tigard*, 512 U.S. 374, 407 n.2 (1994) (Stevens, J., dissenting), courts have looked to particular factors to determine its scope. For example, such restrictions are less permissible when imposed on actors that act as advocates against the government in ways that require that they be free of governmental control. *United States v. Am. Libraries Ass'n*, 539 U.S. 194, 213 (2003) (citing *Legal Services Corp. v. Velasquez*, 531 U.S. 553 (2001)). The fact that media often serve as a check against governmental action and carry a strong presumption of independence from state control arguably places them in a similar position.

With respect to the purported benefits supposedly giving rise to the quid pro quo, the supposed benefits at issue in this context do not involve either taxing or spending. They are also subject to constraints that limit the extent to which they can provide benefits. Modern communications statutes prohibit licensing authorities from issuing exclusive franchises, undercutting government's ability to use the grant of a legal monopoly as part of a quid pro quo. 47 U.S.C. §§ 253, 541(a)(1).

It is also unlikely that Section 230 can properly be regarded as a benefit provided to common carriers. The immunity that Section 230 provides extends only

to *interactive computer services*. 47 U.S.C. § 230(c). As the Eleventh Circuit noted, an amendment to another provision enacted as part of the same statute specifies, "Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers." *NetChoice v. Att'y Gen.*, 34 F.4th at 1220–21 (citing 47 U.S.C. § 223(e)(6)). This distinction undercuts characterizing Section 230 as a benefit extending to common carriers.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Fifth Circuit and affirm the judgment of the Eleventh Circuit.

Respectfully submitted.

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