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, ET AL.,
Respondents.

NETCHOICE, LLC, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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

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BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF TEXAS AND FLORIDA

John W. Whitehead
Counsel of Record
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom of speech.

SUMMARY OF THE ARGUMENT

The Texas and Florida laws imposing content-moderation restrictions, which prohibit viewpoint-based censorship by social media platforms, comply with and further the purposes of the First Amendment, and therefore this Court should uphold those laws, especially the Texas law.

This Court has recognized that "the most important places (in a spatial sense) for the exchange of views . . . is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017) (cleaned up). Congress likewise recognized the vast democratic

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, and its counsel made a monetary contribution intended to fund its preparation or submission.

forums of the internet and noted in Section 230 of the Communications Decency Act of 1996 that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse," 47 U.S.C. §230(a)(3), which is what Section 230 sought to preserve. However, social media platforms, sometimes under the coercion of the federal government, have sought to suppress the diversity of political discourse by censoring and removing disfavored posts and users from their forums to suppress speech by citizens and to keep people ignorant of views which the social media companies do not like. A remedy to stop this suppression of citizens' speech is needed and is provided through the content-moderation restrictions of the states' laws in this case, especially the Texas law.

Censorship by social media platforms is not "speech"—and therefore warrants no First Amendment protection—for three reasons. First, social media censorship is non-expressive conduct. Second, under Section 230 of the Communications Decency Act of 1996, 47 U.S.C. §230, Congress has determined that social media platforms do not "speak" through third-party content, and therefore the platforms do not have rights related to that content. Third, social media companies have repeatedly claimed that third-party content is not their speech, and so they should be prohibited from now adopting a contrary position in this case.

Even if social media censorship were considered "speech," intermediate scrutiny would apply because it is expressive conduct at most and

the platforms have monopoly-like power to restrict others' speech.

Further, this Court's cases on cable must-carry rules, publication must-carry rules, and right-of-property-access rules show that prohibiting viewpoint-based censorship by social media platforms does not violate the First Amendment when these common carrier technologies are required to indiscriminately carry third-party speech. Finally, at least the Texas law easily satisfies intermediate scrutiny because it furthers two substantial government interests and does not burden substantially more or less speech than necessary.

ARGUMENT

1. Social media platforms are censoring disfavored viewpoints, sometimes under the coercion of the federal government.

Social media platforms censor in two primary ways. First, the platforms "remove[] posts that violate [their] terms of service or community standards." *NetChoice, LLC v. Att'y Gen. Fla.*, 34 F.4th 1196, 1204 (11th Cir. 2022). Second, the platforms can also "arrange[] available content by choosing how to prioritize and display posts—effectively selecting which users' speech the viewer will see, and in what order." *Id.*

Social media platforms have often removed a variety of users' posts for controversial reasons. Some of these posts involved disfavored scientific and medical information or discussions. For

example, both Facebook and Twitter initially removed posts claiming that the COVID-19 pandemic began with a lab leak in Wuhan. Emily Jacobs, *Twitter Won't Confirm If Users Can Post About Lab Leak COVID Origin Theory*, THE NEW YORK POST (May 28, 2021), https://nypost.com/2021/05/28/twitter-wont-confirm-users-can-post-about-covid-lab-leak-theory/. Facebook abruptly stopped removing these posts after President Biden recognized the Wuhan-lab origin story as a viable theory. *Id.* YouTube removed a video in which Florida Governor Ron DeSantis held a panel discussion of scientists, who questioned whether young children should wear masks to combat COVID-19. Corky Siemaszko, *YouTube Pulls Florida Governor's Video, Says His Panel Spread COVID-19 Misinformation*, CBS NEWS (Apr. 9, 2021), https://perma.cc/L6FD-5J5R.

Other posts involved disfavored political viewpoints or plans to protest. For example, YouTube removed a Clarmont Institute podcast that pointed to evidence that it believed questioned the integrity of the 2020 presidential election. Ben Weingarten, *Why Big Tech Censored Our Podcast Touching on 2020 Election Irregularities*, NEWSWEEK (Mar. 31, 2021), https://www.newsweek.com/why-big-tech-censored-our-podcast-touching-2020-election-irregularities-opinion-1579647. Facebook removed anti-quarantine protest events from its platform in some states. Elizabeth Culliford, *Facebook Removes Anti-Quarantine Protest Events in Some U.S. States*, REUTERS (Apr. 20, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-facebook/facebook-removes-anti-

quarantine-protest-events-in-some-us-states-idUSKBN2222QK/. Twitter alerted numerous users—including journalists—that it planned to ban their posts supporting Kashmir's independence from India. Vishal Manve, *Twitter Tells Kashmiri Journalists and Activists That They Will Be Censored at Indian Government's Request*, ADVOX GLOBAL VOICES (Sept. 14, 2017), https://advox.globalvoices.org/2017/09/14/kashmiri-journalists-and-activists-face-twitter-censorship-at-indian-governments-request/.

Social media platforms have also often removed users' accounts for similar controversial reasons of expressing disfavored political or scientific views. For example, Twitter suspended former Speaker of the House Newt Gingrich's account after he tweeted that illegal immigrants entering the United States could create a COVID-19 risk. Sarah Rumpf, *Newt Gingrich Fires Back at Twitter After His Account Gets Suspended For 'Hateful Conduct' (UPDATED)*, MEDIAITE (Mar. 5, 2021), https://perma.cc/JST7-AE72. Twitter suspended radio host Eric Erikson's account after he tweeted that transgender woman Laurel Hubbard was a man and should not be allowed to participate in women's sports. Valerie Richardson, *'Laurel Hubbard is a man' tweet lands Erick Erickson in Twitter jail*, THE WASHINGTON TIMES (Aug. 7, 2021), https://www.washingtontimes.com/news/2021/aug/7/erick-erickson-suspended-twitter-laurel-hubbard-ma/. Facebook blocked a former Pulitzer-prize-winning journalist for his posts claiming that high-ranking Maltese officials were receiving illicit payments through offshore shell companies. Julia Carrie Wong, *Facebook Blocks Pulitzer-winning*

Reporter Over Malta Government Exposé, THE GUARDIAN (May 19, 2017), https://www.theguardian.com/world/2017/may/19/facebook-blocks-malta-journalist-joseph-muscat-panama-papers. And in 2020, Facebook expanded its "Dangerous Individuals and Organizations" policy and banned hundreds of organizations. Natasha Lennard, *Facebook's Ban on Far-Left Pages Is an Extension of Trump Propaganda*, THE INTERCEPT (Aug. 20, 2020), https://perma.cc/Z2JC-YEEB.

Concern about this viewpoint-based censorship is heightened in light of substantial evidence showing that the federal government has repeatedly attempted to direct what content social media platforms censor. For example, in July 2021, White House Press Secretary Jen Paski declared that the White House was "in regular touch with social media platforms . . . about areas where we have concern" about public health "misinformation." *Press Briefing by Press Secretary Jen Psaki, July 16, 2021*, The White House (July 16, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021/. Paski explained that the White House "regularly" makes social media companies "aware of the latest narratives dangerous to public health" and seeks to "engage with them to better understand the enforcement of social media platform policies." *Id.* She even suggested that social media platforms should coordinate their efforts so that all platforms ban misinformation and do so more quickly. *Id.*

In 2021, the United States Surgeon General released a publication entitled "Confronting Health

Misinformation." Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment*, United States Department of Health and Human Services (2021), https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf. The publication included a section entitled "What Technology Platforms Can Do." *Id.* at 12. The publication suggested that the platforms change their policies and algorithms to avoid "amplifying misinformation," that they "impose clear consequences" on repeat misinformation offenders, and that they amplify "accurate" information. *Id.*

Courts have recognized the federal government's pervasive coercion of social media platforms. A Western District of Louisiana judge ordered—and the Fifth Circuit largely affirmed—an order prohibiting the White House and several federal agencies from communicating with social media companies about content moderation. *Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585 (W.D. La. July 4, 2023); *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), *stayed by Murthy v. Missouri*, 601 U.S. ___, 217 L.Ed.2d 178 (2023).

In its opinion, the Fifth Circuit declared that "a group of federal officials has been in regular contact with nearly every major American social-media company about the spread of 'misinformation' on their platforms." *Missouri v. Biden*, 83 F.4th at 359. The court explained that these federal officials "urged the platforms to remove disfavored content

and accounts from their sites. And, the platforms seemingly complied." *Id.*

The court noted several examples of federal coercion of social media platforms. For example, "a White House official told a platform to take a post down 'ASAP,' and instructed it to 'keep an eye out for tweets that fall in this same [] genre' so that they could be removed, too." *Id.* at 360. Additionally, "a White House official asked 'what good is' the reporting system, and signed off with 'last time we did this dance, it ended in an insurrection.'" *Id.* at 361.

The Fifth Circuit also found that the platforms complied with the federal government's demands. For example, "[o]ne platform employee, when pressed about not 'level[ing]' with the White House, told an official that he would 'continue to do it to the best of [his] ability, and [he will] expect [the official] to hold [him] accountable.'" *Id.* In another case, "one platform said it knew its 'position on [misinformation] continues to be a particular concern' for the White House, and said it was 'making a number of changes' to capture and downgrade a 'broader set' of flagged content." *Id.* The Fifth Circuit concluded that the White House, the Surgeon General, the CDC, the FBI, and CISA, all communicated with social media platforms, attempting to have them censor information. *Id.* at 360, 364–66.

The Texas and Florida laws are needed to help prevent such censorship on social media platforms so that all members of the public can exercise their

right to freedom of speech and be informed of different political and scientific viewpoints.

2. Censorship by social media platforms is not "speech" protected by the First Amendment.

a. Social media censorship is non-expressive conduct.

Conduct is expressive when the actor intends to communicate a particularized message and observers are likely to understand that intended message. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). Mere intent to communicate a message using one's conduct is not enough. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Examples of expressive conduct include wearing black armbands to protest the Vietnam War, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969), a black sit-in at a whites-only business to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966), and burning an American flag as a protest outside the Republican National Convention, *Texas v. Johnson*, 491 U.S. 397, 420 (1989). Additionally, a private Saint Patrick's Day parade was expressive conduct because, like a composer, the parade sponsors selected the participants who each contributed to the parade's overall message and common theme, and both participants and bystanders generally understand that a parade is a march to make a point. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568, 574, 576–77 (1995).

In contrast, this Court has also identified several examples of non-expressive conduct to include physically assaulting someone, *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993), public nudity, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), prostitution, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986), and refusing to pay income taxes to express disapproval of the IRS, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*"). And in *FAIR*, the Court found that allowing the military to use—or not to use—a law school's facilities for recruiting was not inherently expressive, and people would not interpret the school's actions as showing their disagreement. *Id.* at 64, 66. However, the law school could still freely speak about its views on the military's homosexuality policies. *Id.*

Government regulation of expressive conduct is constitutional if the regulation "furthers an important or substantial governmental interest," "is unrelated to the suppression of free expression," and imposes a restriction on free speech "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. This is a "relatively lenient standard," *Texas v. Johnson*, 491 U.S. at 407, and it is equivalent to intermediate scrutiny for time, place, and manner restrictions, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

Non-expressive conduct receives no First Amendment protection. *See Wisconsin v. Mitchell*, 508 U.S. at 484. Because censorship by social media platforms is non-expressive conduct, it deserves no

First Amendment protections. Social media censorship is conduct—not speech—because it consists entirely of actions, not words. Both removing posts or accounts and deemphasizing them in their algorithms are actions, not speech. And social media censorship is non-expressive conduct because observers would not understand any message to be conveyed by the platforms through the censorship, removal, or deemphasizing. Like the law school in *FAIR*, the platforms can make their own posts explaining their disagreement with certain content or viewpoints. And when the platforms remove or deemphasize a post or suspend an account, observers will not know why unless the platforms explain why. But no one sees the censored posts—in fact, that's the point. And even if someone sees the posts and then the posts disappear, the viewer does not know why, because either the platform or the poster could have removed the posts. And unlike the parade in *Hurley*, social media platforms are more like conduits, and less like composers. Social media platforms have almost no control over what content users publish, and the result is anything but a coherent message even if a programed algorithm selects content based on a viewer's preferences to encourage continued browsing. Finally, even if social media censorship is expressive conduct, the content-moderation restrictions of the state laws survive the *O'Brien* intermediate scrutiny standard, as discussed further below.

b. Congress has statutorily determined in Section 230 that user content is not the platforms' speech—and the platforms should be prevented from adopting a contrary position.

Under Section 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Lower courts have consistently upheld Section 230 and found that social media companies are not responsible for users' posts—even when they would be had the posts been their own speech. *See, e.g.*, *Force v. Facebook*, 934 F.3d 53, 71 (2nd Cir. 2019) (finding that Section 230 protected Facebook from liability for terrorist-conducting communications the Hamas terrorist group sent using the Facebook platform); *Parker v. Google*, 242 Fed. Appx. 833, 838 (3rd Cir. 2007) (finding that Section 230 protected Google from liability for providing website links allegedly defaming plaintiff); *Doe v. Twitter*, Nos. 22-15103, 22-15104, 2023 U.S. App. LEXIS 10808, at *6 (9th Cir. May 3, 2023) (finding that Section 230 protected Twitter from liability for child pornography posted on its platform).

Pursuant to Section 230, third-party accounts and posts on social media are not the platform's speech—and therefore should not provide any First Amendment rights to the platform to remove the content. Through Section 230, Congress has determined that social media accounts and posts

may not implicate social media platforms as a matter of law. This is true even if the accounts or posts do implicate their speakers. And courts have upheld Section 230, refusing to find that it violates the First Amendment. The only logical conclusion is that the social media platforms are not "speakers" of third-party content posted on the platforms. And because social media platforms are not the "speakers" of third-party accounts and posts, the platforms are not entitled to First Amendment protection from laws imposing content-moderation restrictions against the platforms removing those accounts and posts.

Social media companies have repeatedly used Section 230 to shield themselves from liability for third-party content on their platforms. *See, e.g.*, Opening Brief for Defendant-Appellant at 7, *Doe v. Twitter*, Nos. 22-15103, 22-15104, 2023 U.S. App. LEXIS 10808, at *6 (9th Cir. May 3, 2023) (stating that "Section 230 bars all causes of action that seek to hold online platforms like Twitter liable for hosting content created by a third party" and that this provision protects Twitter from needing to "tak[e] responsibility for all messages" posted on its platform); Brief for Defendant-Appellee at 14, *Force*, 934 F.3d at 71 (2nd Cir. 2019) (No. 18-397) (stating that Section 230 "bar[s] all claims seeking to hold a provider of an internet-based service like Facebook liable for speech or information posted on the service by a third-party user"); Brief for Respondent at 23, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (stating that Section 230 protected Google from liability because "petitioners' claims treat YouTube as a 'publisher' or 'speaker' because the claims fault

YouTube for sorting and displaying, i.e., publishing or speaking, ISIS videos.").

Because social media companies, which are represented by the trade associations that are parties in these cases, *NetChoice, LLC v. Attorney Gen. Fla.*, 34 F.4th at 1208, have taken such positions to shield themselves from liability, they should be prohibited from taking a contrary position in this case. Under the doctrine of judicial estoppel:

> [w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The purpose of this doctrine is to "protect the integrity of the judicial process." *Id.* Courts consider several factors when determining whether judicial estoppel applies. *Id.* at 750. First, the second position must be "clearly inconsistent" with the first. *Id.* Second, the party must have persuaded a court to accept its first position, creating inconsistent court rulings and the impression that the party misled the court with one of its positions. *Id.* at 750–51. Third, the party must derive an unfair advantage—or the opposing party must suffer an unfair detriment—if the court adopts both inconsistent positions. *Id.* at 751.

Judicial estoppel should apply here because these social media platforms claimed that users' posts are not the platforms' speech under Section 230 to protect themselves from liability for the content of those posts. Now that their interests have changed, they seek to adopt the contrary position—that these posts in fact are their speech insofar as they decide whether to publish them. Brief for Appellees at 17, *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178) (stating that controlling the "selection and presentation" of third-party content is "protected speech activity"). This position is inconsistent with the platforms' former ones, and could lead to inconsistent court rulings whereby social media platforms receive all the First Amendment speech protections for posts they host, while shouldering none of the responsibilities. Meanwhile, without these state laws' content-moderation restrictions, social media users would suffer the platforms' unchecked censorship even though the platforms would suffer no consequences from permitting the users' speech.

3. Even if censorship by social media platforms is considered "speech," intermediate scrutiny would apply because the states' laws limit only expressive conduct at most.

As previously explained, the states' laws at most limit expressive conduct—not speech. If the conduct is considered expressive, then the intermediate scrutiny standard from *O'Brien* applies.

This Court has recognized that the government has more latitude to restrict a company's speech when that company uses monopoly-like power to restrict others' speech. This Court has noted that cable broadcasting companies had tremendous power to control which television broadcasters obtained entrance into American homes. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 657 (1994) ("*Turner I*"). The Court warned that "[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked." *Id.* The Court explained that the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.* As a result, the Court refused to apply strict scrutiny to statutory requirements about which channels the cable companies must broadcast and applied intermediate scrutiny instead. *Id.*

This Court adopted a similar position when addressing a challenge to anti-trust measures against a newspaper publishing monopoly. *Associated Press v. United States*, 326 U.S. 1, 19–20 (1945). The Court observed, "[i]t would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Id.* Rather, the First Amendment "provide[d] powerful reasons" to support the anti-trust measures. *Id.* The First Amendment's foundation was that "the widest possible

dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* The Court also declared that freedom to publish is a constitutional right, but "freedom to combine to keep others from publishing is not." *Id.* Therefore, this Court upheld the anti-trust measures in *Associated Press*. *Id.*

Like the cable companies in *Turner I* and the newspaper publishing monopoly in *Associated Press*, a few social media companies hold near monopolies over social media use. Over 97% of social media visits in the United States occur on five platforms—Facebook, Instagram, Twitter, Pinterest, and YouTube. Stacy Jo Dixon, *Leading Social Media Websites in the United States as of August 2023, Based on Share of Visits*, STATISTA (Sept. 12, 2023), https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/. By market capitalization, Alphabet (which owns Google) is worth over $1.3 trillion, and Meta (which owns Facebook and Instagram) is worth nearly $600 billion. Einar H. Dyvik, *The 100 Largest Companies in the World by Market Capitalization in 2023*, STATISTA (Aug. 30, 2023), https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/. All three of Facebook, Google, and Twitter have been subjects of antitrust investigations—and Facebook and Google have faced anti-trust lawsuits. *Facebook, Inc., FTC v.*, Federal Trade Commission (Nov. 17, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v; *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, United States Department of Justice – Office of Public Affairs (Jan. 24, 2023),

https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies; *Musk's $44 Bln Buyout of Twitter Faces U.S. Antitrust Review –Report*, REUTERS (May 5, 2022), https://www.reuters.com/technology/musks-44-bln-buyout-twitter-faces-ftc-antitrust-review-report-2022-05-05/. In the face of corporations whose monopoly-like power threatens to control public discourse on social media, this Court should apply intermediate—and not strict—scrutiny and uphold the state laws' content-moderation restrictions.

4. Even if censorship by social media platforms were considered "speech," the state laws' content-moderation restrictions do not violate the First Amendment.

a. Similar restrictions did not violate the First Amendment in this Court's most analogous cases.

Three types of cases are most analogous to cases on social media censorship: cases on rights of access to cable television, cases on rights of access to newspapers and other publications, and cases on rights of access to private property and expressive events.

In *Turner I*, this Court ruled that the government might be able to require a cable television provider to use some of its channels for local broadcast television stations because the requirement was content-neutral, and therefore intermediate scrutiny applied. *Turner I*, 512 U.S. at

626, 627. Later, the Court upheld this local channel requirement because the requirement furthered important government interests and did not burden much more speech than necessary. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 185 (1997) ("*Turner II*").

In *Miami Herald*, this Court ruled that the government could not force a newspaper that published criticisms of a political candidate to publish the candidate's replies. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 243–44, 256 (1974).

In *PruneYard*, this Court ruled that a shopping mall which was open to the public could not prohibit visitors from passing out leaflets advocating for Zionism. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). In *Hurley*, the Court determined that the government could not require a private Saint Patrick's Day parade to include an LGBTQ group in the parade. *Hurley*, 515 U.S. at 559. And in *FAIR*, the Court held that the government could deny federal funding to a law school that refused to grant access on its campus to the United States military because of the military's policies on homosexuality. *FAIR*, 547 U.S. at 64, 66.

In these cases, this Court identified three primary factors that determine whether the First Amendment protects speech in situations like this. First, the Court considers whether the publisher is functioning more like a "conductor" or a "conduit" of third parties' speech. In other words, when a publisher chooses the materials that it publishes, it is "more than a passive receptacle or conduit," and the government may not control what it publishes.

Miami Herald, 418 U.S. at 258. On one hand, cable television providers did not receive First Amendment protection because they were conduits. *Turner I*, 512 U.S. at 655. Viewers do not assume that providers approve of the broadcast signals they carry, and providers regularly disclaimed approval of their content during the broadcasts. *Id.* On the other hand, a parade was expressive conduct because—like a composer—the parade sponsors selected the participants, who contributed to the parade's overall message. *Hurley*, 515 U.S. at 574, 576–77. In other words, the parade sponsors chose the participants that would contribute to a coherent theme. *Id.* And both participants and bystanders generally understand that a parade is a march that communicates a message. *Id.* at 568.

For the second factor, this Court considers whether the third parties' speech affects the platform-owner's own message. For example, in *PruneYard*, the Court noted that the shopping center was open to the public, and therefore people would not likely associate a visitor's speech with the shopping center. *PruneYard*, 447 U.S. at 87. The Court also found it significant that the shopping center could "expressly disavow" any connection with the speech, such as by posting a disclaimer. *Id.* And in *FAIR*, observers would not understand the law school's actions as protests against the military's policies, and the law school could still freely speak about its views on the military's homosexuality policies, even if the military used the school's facilities for recruiting. *FAIR*, 547 U.S. at 64, 66.

For the third factor, this Court considers whether the third party's speech takes up the

publisher's limited resources. In *Miami Herald*, the Court held that the government could not force a newspaper publisher to expend limited time, money, and print space on government-required material. *Miami Herald*, 418 U.S. at 256–57.

Social media platforms are more like conduits than conductors when they censor. The platforms passively allow nearly all content which third parties post. They remove only a minority of posts and users—a federal court in Florida has estimated the number at less than 1%. *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at *8 (N.D. Fla. June 30, 2021). The platforms do not select the accounts and posts that they will publish. Each user is free to post whatever they want, and the social media platforms generally cannot control the posts' content or viewpoints. Given that millions of people post nearly every possible content or viewpoint on social media platforms, the posts and accounts do not create a coherent message of the platform.

Further, allowing third-party posts or accounts with which social media platforms disagree will not affect the platforms' own speech. Observers will not assume that the platforms agree with accounts or posts simply because they appear on the platforms. And the platforms can make their own posts declaring their opposition to certain content or viewpoints. Finally, users do not assume that they rarely see certain types of content or viewpoints on the platforms because the platforms remove it and consider that removal part of the platform's "speech." Users could just as naturally conclude that the

content or viewpoints exist on the platforms, but that they simply have not seen them.

Unlike newspapers, social media platforms have no physical publishing limits. Newspapers may only publish a few articles in each issue, and therefore must reject some submissions if they receive more than their space will allow. But social media platforms have no real physical limitations. Instead, they can host millions of posts and accounts without the need to choose some and reject others. Therefore, social media platforms are conduits which can present their own viewpoints on their limitless platforms. Because of this, the Court should find that these platforms cannot use the First Amendment to justify censoring viewpoints it disfavors from the public's speech.

b. Social media platforms are common carriers, and restricting their ability to censor is permissible.

Though legal scholars disagree about what makes an entity a common carrier, the dominant theory is the "holding out" theory. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 475 (2021) ("Holding out thus appears to be the most widely accepted common law definition of common carriage that courts apply."). Under this theory, an entity is a common carrier if the entity claims that it serves all would-be customers.

Both this Court and lower courts have relied upon the holding out theory of common carriage. This Court has explained, "[a] common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (quoting *Nat'l Asso. of Regulatory Util. Comm'rs v. Fed. Commc'ns Com.*, 525 F.2d 630, 641 (D.C. Cir. 1976)). The United States Court of Appeals for the District of Columbia Circuit has likewise noted that "[w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently." *Nat'l Asso. of Regulatory Util. Comm'rs*, 525 F.2d at 641 (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

Common carriers generally may not discriminate against would-be customers. Instead, they "generally must afford neutral, nondiscriminatory access to their services." *United States Telecomms. Ass'n v. FCC*, 855 F.3d 381, 383–84 (D.C. Cir. 2017). Common carriers may not renounce or waive this non-discrimination requirement, which is part of "the essential duties of [their] employment." *Railroad Company v. Lockwood*, 84 U.S. (17 Wall.) 357, 378 (1873). In fact, claiming that a common carrier may waive this requirement "seems almost a contradiction in terms." *Id.*

The First Amendment provides little protection for common carriers' speech, particularly when that speech restricts users' access to the common carrier's services. When common carriers transmit others' speech, the First Amendment does

not shield them from the non-discrimination requirement. *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). This is true because common carriers are by definition conduits that "merely facilitate the transmission of the speech of others rather than engage in speech in their own right." *Id.* As a result, laws that require common carriers to indiscriminately carry all users' speech do not create "any First Amendment concern." *Id.*

Consistent with this principle, this Court has repeatedly stated that a low level of scrutiny applies to regulations of common carrier speech. *See FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]."); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 739 (1996) ("And in respect to leased channels, their speech interests are relatively weak because they act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies.").

Courts have required common carrier technologies similar to social media platforms to indiscriminately carry third-party speech. Perhaps the most telling example is the "net neutrality" cases. Net neutrality is "the principle that broadband providers must treat all internet traffic the same regardless of source." *United States Telecomms. Ass'n*, 825 F.3d at 689. Ultimately, net neutrality means that an internet provider "treats all content equally, regardless of origin or type." Simone A. Friedlander, *Cyberlaw And Venture Law: Net Neutrality and the FCC's 2015 Open Internet*

Order, 31 BERKELEY TECH. L.J. 905, 907 (2016). The United States Court of Appeals for the District of Columbia Circuit at one time prohibited net neutrality rules because broadband internet providers were not classified as common carries. *Verizon v. FCC*, 740 F.3d 623, 655, 658–59 (D.C. Cir. 2014). But after the providers were reclassified as common carriers, the court upheld the net neutrality restrictions because of the internet providers' common carrier status. *United States Telecomms. Ass'n*, 825 F.3d at 742.

Cable must-carry rules provide another telling example. As explained above, this Court has found that the government may regulate cable companies' channel offerings without violating the First Amendment. Though the Court did not determine whether cable companies were common carriers, it clearly stated that Congress could justify these regulations by imposing common carrier status. Congress could "obligate cable operators to act as common carriers" and then require them to provide some of their channels to all broadcasters through a "lottery system or timesharing arrangement." *Turner I*, 512 U.S. at 684. This system would avoid First Amendment problems, and "it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies." *Id.*

Social media platforms are common carriers because they hold themselves out as servants of all would-be users. For example, Facebook allows anyone to use its platforms—and only exempts people under 13 years old, former sex-offenders, people who cannot use Facebook's platform under

applicable law, and people whose accounts Facebook has previously banned. *Terms of Service*, Facebook (July 26, 2022), https://www.facebook.com/terms.php. Twitter (now X) allows all users except those under 13 years old and those who cannot use its platform under applicable law. *Terms of Service*, X (Sept. 29, 2023), https://twitter.com/en/tos. And both platforms' sign-up processes allow nearly anyone to join. To join Facebook, a new user must simply click "Create New Account;" enter their name, email address or cell phone number, password, date of birth, and gender; click "Sign Up;" and confirm their email address or cell phone number. *Creating an Account*, Facebook, https://www.facebook.com/help/570785306433644 (last visited Dec. 25, 2023). Similarly, to join Twitter (now X), a new user must click "Sign Up;" enter information such as their name and their email address or cell phone number; verify their email address or cell phone number; and customize their experience by choosing where they will see Twitter content. *Signing Up With X*, X, https://help.twitter.com/en/using-x/create-x-account (last visited Dec. 25, 2023). Given their own policies and sign-up process, social media platforms are common carriers because they hold themselves out as accepting all would-be users.

Because they are common carriers, social media platforms generally may not discriminate against posts or accounts based on their content or viewpoint. They must serve all would-be users—that is the meaning of being a common carrier. And like cable companies and broadband providers, social media platforms may not use the First Amendment to shield themselves from their non-discrimination

obligation. Instead, they must carry third parties' speech without discriminating based on content or viewpoint.

c. At least the Texas law satisfies intermediate scrutiny because it prevents monopolies from suppressing speech and preserves a vital forum for public discourse without substantially burdening more speech than necessary.

Intermediate scrutiny is satisfied if a law furthers a substantial government interest and does not burden substantially more speech than is necessary to further that interest. *Turner II*, 520 U.S. at 213–14. Because the Texas law in particular furthers two substantial government interests and does not burden more or less speech than necessary, the Texas law satisfies intermediate scrutiny.

Governments further two substantial interests when they prohibit social media censorship. First, governments have a substantial interest in preventing monopolies from suppressing private speech. In particular, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663. Congress intended the must-carry requirements for cable companies to further three interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the

market for television programming." *Id.* at 662. This Court held that "each of those is an important governmental interest" which can satisfy intermediate scrutiny. *Turner II*, 520 U.S. at 189–90.

This Court adopted a similar position when addressing a challenge to anti-trust measures against a newspaper publishing monopoly. *Associated Press*, 326 U.S. at 19–20. The Court observed, "[i]t would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Id.* In fact, the First Amendment "provide[d] powerful reasons" to support the anti-trust measures. *Id.* The First Amendment's foundation was that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* Freedom to publish is a constitutional right, but "freedom to combine to keep others from publishing is not." *Id.*

A second substantial government interest is in preserving social media as a vital forum for public discourse. A social media platform ban "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 582 U.S. at 107. Given these uses, social media "provides perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* "A fundamental principle of the First Amendment is that all persons have

access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Id.* at 104. And the internet—and social media particularly—is now "the most important place[] . . . for the exchange of views." *Id.*

The Texas law also does not burden substantially more or less speech than necessary. The statute prohibits no more speech than is necessary to achieve its substantial interests. The statute prohibits only content-based viewpoint discrimination. *See* TEX. CIV. PRAC. & REM. CODE § 143A.002(a). And the statute prohibits only the types of discrimination that the social media platforms practice. Social media platforms "remove[] posts that violate its terms of service or community standards." *NetChoice, LLC v. Att'y Gen. Fla.*, 34 F.4th at 1204. This removal power corresponds with the statute's "block, ban, remove, deplatform" prohibitions. TEX. CIV. PRAC. & REM. CODE § 143A.001(1). The platforms can also "arrange[] available content by choosing how to prioritize and display posts—effectively selecting which users' speech the viewer will see, and in what order." *NetChoice, LLC v. Att'y Gen. Fla.*, 34 F.4th at 1204. This arrangement ability corresponds with the statute's "demonetize, de-boost, restrict, deny equal access or visibility to" prohibitions. TEX. CIV. PRAC. & REM. CODE § 143A.001(1). The law still allows social media censorship when federal law authorizes it, when sexual exploitation or harassment are involved, when the speech incites crimes or threatens violence, and when the speech constitutes unlawful expression. TEX. CIV. PRAC. & REM. CODE § 143A.006; see also 47 U.S.C. §230(c)(2) and (e)(3)

(allowing social media platforms to restrict access to material which is obscene, lewd, lascivious, filthy, excessively violent, or harassing).

Additionally, the Texas statute prohibits all of the speech that violates the interests at stake. The statute defines "social media platform" to include "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." *See* TEX. BUS. & COM. CODE § 120.001(1). The statute imposes no limits based on the platform's size or other characteristics. The law specifies no content, viewpoints, or users that receive particular attention—all receive equal treatment.

CONCLUSION

The states' laws prohibiting viewpoint-based censorship by social media companies do not violate the First Amendment. Such censorship is not "speech"—and therefore warrants no First Amendment protection. But even if such censorship is considered expressive conduct, the Texas law certainly satisfies intermediate scrutiny and does not violate the First Amendment. Therefore, this Court should affirm the decision of the Fifth Circuit and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

John W. Whitehead
Counsel of Record
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, Virginia 22911
(434) 978-3888
legal@rutherford.org

Counsel for Amicus Curiae