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

BRIEF OF *AMICI CURIAE* THE BABYLON BEE AND NOT THE BEE IN SUPPORT OF PETITIONERS IN NO. 22-277 AND RESPONDENTS IN NO. 22-555

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INTEREST OF AMICI CURIAE[1]

The Babylon Bee, LLC, is a website that exposes foolishness, mocks absurdity, and highlights hypocrisy in faith, politics, and culture through satire, humor, and parody. Not the Bee, LLC, is a Christian news website that runs entirely accurate headlines one might expect to find in The Bee. The Bee's and Not the Bee's headlines highlight, among other things, social media platforms' viewpoint-based censorship of conservative groups, conservative leaders, and their own satire.

As a Florida limited liability company that not only documents social media censorship but suffers from it, The Bee has a direct interest in the outcome of these appeals. Because Not the Bee's success relies almost entirely on The Bee's, and because social media platforms' censorship and shadow-banning of The Bee have hampered internet traffic to its site, Not the Bee likewise has an interest in this appeal.

Amici also desire an intellectually diverse social media universe in which all Americans—including those of the religious center-right—have an equal platform to advocate their views. At a minimum, *Amici* want social media platforms to transparently announce and evenhandedly apply their content standards, as Florida's Senate Bill 7072 and Texas House Bill 20 require them to do.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Social media platforms serve as the "modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Today, they "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* These platforms present themselves as a service open to the public. They represent that they host third-party speech according to objectively administered standards. Their user agreements do not disclose that they will unevenly enforce their standards against disfavored viewpoints or speakers. Yet these platforms now assert the unlimited and unilateral right to censor, deplatform, or shadow-ban disfavored users, disfavored content, and disfavored viewpoints.

In response, Florida and Texas passed laws restricting social media titans' ability to do so. Florida Senate Bill 7072 and Texas House Bill 20 keep social media platforms accountable to the image of neutrality that they project. Their modest provisions do not dictate the screening and removal standards that platforms should adopt. Rather, the laws require merely that platforms disclose—and evenhandedly apply—the standards that they voluntarily choose.

That accountability is badly needed. Social media platforms have repeatedly engaged in ideologically driven censorship of individuals and organizations, including *Amici*. They have targeted conservative users and religious messages for censorship, selectively invoking vague policies against "hate" and "misinformation" to stunt the free flow of information and silence conservative voices. Those instances of

censorship matter for the permissible scope of state regulation in this sphere. Because platforms are not good-faith, neutral content hosts, they do not qualify for civil immunity under Section 230 of Communications Decency Act.

Moreover, as both Florida and Texas explain, these consumer protection laws do not violate the platforms' First Amendment rights. They merely require social media titans to honor the representations they make to the public whose communications they carry. And because these platforms have all the hallmarks of common carriers, the modest nondiscrimination requirements imposed by the Florida and Texas laws "fall[] comfortably within the historical ambit of permissible common carrier regulation." Tex. Pet. App. 55a (Oldham, J.).

Finally, these laws advance core First Amendment values by promoting the free exchange of ideas and by protecting religious viewpoints, among others, from censorship. And they restore trust and consumer confidence in social media.

The Court should uphold both laws.

ARGUMENT

I. Social media platforms are not the good-faith, neutral content hosts that Section 230 envisioned.

A. Platforms selectively apply their standards to censor conservative viewpoints.

Throughout this litigation, social media platforms have repeatedly invoked the immunity offered by Section 230 of the Communications Decency Act to "assure the public and the courts that they are mere conduits of their users' speech rather than 'the publisher or speaker of any information provided by' users." Moody Br. at 5 (quoting 47 U.S.C. §230(c)(1)). And section 230 has "shielded" these platforms from billions of dollars in liability "by instructing courts not to 'treat[]' them as 'publisher[s] or speaker[s]' of other people's speech for the purpose of defamation and similar torts." Paxton Br. at 24 (quoting 47 U.S.C. §230(c)(1)). But the platforms have selectively applied their ever-evolving "standards" to repeatedly censor, deplatform, and shadow-ban conservative viewpoints. Those instances matter to the civil immunity that section 230 confers on social media platforms and thus for the permissible scope of state regulation.

When Congress enacted section 230, it envisioned an internet that "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* at §230(a)(3). It imagined an internet where users enjoy "a great degree of control over the information they receive." *Id.* at §230(a)(2). And it

believed the internet was a place where platforms host users' content according to standards that they evenhandedly enforce in "good faith." *Id.* at §230(c)(2)(A).

That world, however, is not the one we live in today. Consider these ten headlines, which might prompt Hamlet to ask a modern rewrite of a profound question: The Bee, or Not the Bee?

- *Priorities: Twitter says Taliban terrorists can post propaganda on platform while Donald Trump remains banned.*[2]
- *Twitter suspended a Spanish politician for tweeting 'A man cannot get pregnant. A man has no womb or eggs.'*[3]
- *Twitter says calling the Syrian Muslim CO shooter a 'white Christian terrorist' does not violate its policies on misinformation or hate.*[4]
- *You know who doesn't get blocked on Twitter for spreading misinformation about Covid? The Chinese Communist Party.*[5]
- *Former Twitter CEO says he'll 'happily' watch as capitalists are lined up and shot.*[6]

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[2] Not The Bee (Aug. 18, 2021), perma.cc/WQ9D-J75H.

[3] Not The Bee (May 17, 2021), perma.cc/T2LD-ZTM6.

[4] Not The Bee (Mar. 27, 2021), perma.cc/8A68-XMFG.

[5] Not The Bee (Oct. 22, 2020), perma.cc/2TKV-EMC3.

[6] Not The Bee (Oct. 1, 2020), perma.cc/7ETQ-XKJ2.

- *Facebook rejects police group's Officer of the Year ad.*[7]
- *Facebook whistleblowers say company is censoring 'vaccine hesitant' content without users' knowledge but I'm sure it's for our own good.*[8]
- *Facebook, in all its wisdom and glory, will finally allow you to have an opinion on the origin of Covid-19. Thanks, Facebook!*[9]
- *Quick! Check to see if Instagram is forcing you to follow The White House account!*[10]

There once was a simpler time when these headlines might have appeared in The Babylon Bee, "the world's best satire site." *See What is The Babylon Bee?*, The Babylon Bee, perma.cc/8YT7-SSAZ. But these headlines did not run in The Bee. They ran in Not the Bee, The Babylon Bee's non-satire news site and are entirely factual.

As Not the Bee has painstakingly documented in its headlines, America's social media titans have shattered Congress's expectations for a free and intellectually diverse internet by repeatedly targeting conservative viewpoints for censorship through the selective and inconsistent application of ever-shifting standards. In doing so, platforms have effectively "license[d] one side of a debate to fight freestyle, while

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[7] Not The Bee (Aug. 4, 2021), perma.cc/AF3Y-YSGY.

[8] Not The Bee (May 25, 2021), perma.cc/GRF7-3A64.

[9] Not The Bee (May 26, 2021), perma.cc/XWM9-KT2E.

[10] Not The Bee (Jan. 23, 2021), perma.cc/TS66-XJGE.

requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

There are too many instances of differential treatment to describe, so *Amici* list only a few. For example, Twitter, like most social media platforms, prohibits users from posting "hate." The dictionary definition of "hate" is "intense hostility and aversion usually deriving from fear, anger, or sense of injury"; "extreme dislike or disgust"; or (tautologically) "a systematic and especially politically exploited expression of hatred." *Hate*, Merriam-Webster.com, perma.cc/U5WH-RKVR. But, according to Twitter, posting "hate" includes those who simply post facts. In Twitter's judgment, a politician's biologically correct statement that "[a] man has no womb or eggs" is hate speech, but a college professor's profoundly racist statement, "I block white people" because "[t]here is nothing white people can say and do that is creative, profound, and intimidating," is valuable discourse deserving to remain on the platform. *See Twitter suspended a Spanish politician for tweeting 'A man cannot get pregnant. A man has no womb or eggs,'* Not the Bee (May 17, 2021), perma.cc/4LKL-S2NG; *Check out this profoundly racist tweet from a college professor that Twitter allows for some reason*, Not the Bee (Mar. 12, 2021), perma.cc/XA4D-A543. Thus in Twitter's judgment, biology is hate, but unadorned racism—at least of a certain variety—is not.

Twitter's approach to "misinformation" is similarly inconsistent, to the point of being nonsensical, and can be explained only by ideologically driven enforcement. In 2020, Twitter suspended the

account of a Chinese scientist and whistleblower for suggesting that the novel coronavirus originated from a Wuhan lab. *See* Anagha Srikanth, *Twitter suspends account of Chinese virologist who claimed coronavirus was made in lab*, The Hill (Sept. 16, 2020), perma.cc/G6KP-W777. Meanwhile, it allowed the Chinese Communist Party to tweet that it had "[e]vidence that the [v]irus [o]riginated in the US." *See You know who doesn't get blocked on Twitter for spreading misinformation about Covid? The Chinese Communist Party*, Not the Bee (Oct. 22, 2020), perma.cc/2TKV-EMC3. There was, of course, ample reason to question the Chinese government's accusation at that time. And as Congress's Select Subcommittee on the Coronavirus Pandemic more recently concluded, "Mounting evidence" today "continues to show that COVID-19 may have originated from a lab in Wuhan, China." Press Release, COVID Origins Hearing Wrap Up: Facts, Science, Evidence Point to a Wuhan Lab Leak (Mar. 8, 2023).

The Bee and Not the Bee have also experienced censorship firsthand. During Justice Barrett's confirmation hearing, Facebook determined that The Bee "incit[ed] violence" by posting a Monty Python inspired satire piece entitled, "Senator Hirono Demands ACB Be Weighed Against a Duck to See If She Is a Witch." When challenged, Facebook refused to change its determination. *See AGAIN! Facebook censors and penalizes The Babylon Bee for the most ridiculous article ever*, Not the Bee (Oct. 20, 2020), perma.cc/7FG5-GENV.

Not to be outdone by its parent company, Instagram similarly censored The Bee. It determined that The Bee's CEO violated community guidelines against "harmful false information" and "hate speech or symbols" for sharing a Slate article entitled, "It's About Time for Us to Stop Wearing Masks Outside," along with the comment, "Sane people never did this." *See Babylon Bee CEO posted this to Instagram and they're now threatening to ban him for "harmful false information" and "hate speech." WHAT??*, Not the Bee (Apr. 18, 2021), perma.cc/4WUV-5AYY.

At the same time, Slate continues to have a robust social media presence even after promoting—and re-promoting—a podcast episode that advocated violent protest. *Best of 2020: A History of Violent Protest*, Slate (Dec. 24, 2020), perma.cc/E9Y9-TUH7; *A History of Violent Protest*, Slate (June 3, 2020), perma.cc/567N-4R4Z. The tagline to its Facebook post reads that "[a] nice, peaceful protest may not bring about" desired social change, and its tweet more directly states that "[n]on-violence is an important tool for protests, but so is violence." Slate, Facebook.com (Dec. 24, 2020), perma.cc/WVU6-RFXN; *Oops, looks like Twitter forgot to ban Slate for promoting violence*, Not the Bee (Jan. 10, 2021), perma.cc/BE2L-AX5S. Weeks later, an Antifa group tweeted its hope that President Biden will "be the last" U.S. president, unambiguously calling for the end of our democratic republic. *Antifa group openly hopes that Biden is the last U.S. president EVER and promotes inauguration-day violence, but is still allowed on Twitter*, Not the Bee (Jan. 15, 2021), perma.cc/9B5K-FYJ8. Yet platforms censored neither of these expressions of support for violence. *Id.*

The takeaway is that left-of-center groups and publications may expressly advocate violence from their social media accounts, but it apparently crosses a dangerous line when a right-of-center publication implies that outdoor mask-wearers (or a U.S. senator from Hawaii) are out-of-touch with reality.

The censorship has not let up in the last two years. In 2022, Twitter suspended The Bee's account for "hateful conduct" after it named U.S. Assistant Secretary for Health Dr. Rachel Levine the site's "Man of the Year." @SethDillion, Twitter (Mar. 20, 2022, 5:52 PM), perma.cc/7M3L-XJGZ. Twitter refused to reinstate The Bee unless The Bee agreed to delete the tweet, something The Bee refused to do on principle. Had Twitter not been sold to new ownership, The Bee would have almost certainly remained banned from the platform. Gabriel Hays, *The Babylon Bee's Twitter account reinstated by Elon Musk after suspension for transgender joke: 'We're back,'* Fox News (Nov. 18, 2022), perma.cc/TU3A-8NGD. And just two months ago, YouTube flagged The Bee as a "violent criminal organization" and removed its video titled "If the LEAKED Nashville Shooter Manifesto is legit, what does it say about censorship in the US?" @SethDillion, Twitter (Nov. 8, 2023, 8:44 AM), perma.cc/ZCJ6-4WJ7. Even after appealing the mischaracterization of the content, YouTube held to its determination that the video violated its violent criminal organization policy. @SethDillion, Twitter (Nov. 8, 2023, 10:48 AM), perma.cc/FMF9-R8MY.

This censorship is not unique to *Amici*. Censorship is a common experience among conservative voices on social media platforms. Recently, the U.S. House of

Representatives Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government issued a report revealing that the federal government worked with elite universities and social media to censor Americans before the 2020 election. *See The Weaponization of 'Disinformation' Pseudo-Experts and Bureaucrats: How the Federal Government Partnered with Universities to Censor Americans' Political Speech*, Select Subcomm. on the Weaponization of the Fed. Gov. of the H. Comm. on the Judiciary, 118th Cong. (Nov. 6, 2023). That report concluded that "[w]hat the federal government could not do directly, it effectively outsourced" to social media platforms—"the newly emerging censorship-industrial complex." *Id.* at 1. The report revealed that social media companies had worked with the government to "censor true information, jokes, and political opinions." *Id.* And this scheme largely "benefitted one side of the political aisle: true information posted by Republicans and conservatives was labeled as 'misinformation' while false information posted by Democrats and liberals was largely unreported and untouched by the censors." *Id.* at 2. Specifically, it targeted "a veritable who's who of prominent conservative voices" (including *Amici*) for censorship. *Id.* at 66.

At least one platform's employees have recently admitted in an internal memo that the platform's "decision-making on content policy is influenced by political considerations.'" Jeff Horowitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, Wall St. J. (Sept. 13, 2021), perma.cc/9MFQ-9Q9Y. In 2021, leaked documents revealed that Facebook had a secret

program, XCheck, designed to "exempt[] high-profile users from some or all of [Facebook's] rules" and "shield[] millions of VIP users from the company's normal enforcement process[.]" *Id.* Facebook's internal review of its white-listing practices found them "both widespread and 'not publicly defensible.'" *Id.* The review determined that Facebook is "not actually doing what [they] say [they] do publicly," and it acknowledged the program is "a breach of trust." *Id.* In operating the program, Facebook admitted that it "misled the public and its own Oversight Board." *Id.*

B. This bad-faith conduct does not qualify for civil immunity.

These countless instances of viewpoint-based censorship, deplatforming, and shadow-banning matter to the civil immunity that section 230 confers on social media platforms and thus for the permissible scope of state regulation in this sphere. Section 230 shields only the "good faith" removal of "objectionable" "material," rather than the bad-faith removal of certain disfavored viewpoints or disfavored users.

Much of the Florida and Texas law falls outside section 230's immunity because they concern consistency, notification, and publication requirements rather than social media's actions "to restrict access to or availability of material[.]" 47 U.S.C. §230(c)(2)(A). Neither the Florida nor the Texas law prevents platforms from removing "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* §230(c)(2)(A). But even if these laws did regulate social media's screening and removal functions, their

provisions are directed toward activities that fall outside the ordinary meaning of "action[s] voluntarily taken in good faith." *Id.* §230(c)(2)(A).

The ordinary meaning of "good faith" is "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *See Good Faith,* Black's Law Dictionary 713 (8th ed. 2004). The Florida and Texas laws do not target activities that fit within this definition. S.B. 7072 merely requires social media companies to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among [their] users," prohibits them from engaging in these activities "without notifying the user," and prohibits them from engaging in these activities against "a journalistic enterprise based on the content of its publication or broadcast." H.B. 20 similarly requires platforms to disclose their policy and to inform users why they are denied service.

Each of the prohibited activities falls outside the natural and ordinary meaning of "good faith." Censoring, deplatforming, and shadow-banning targeted viewpoints through inconsistent application of standards is hardly motivated by "honesty in belief or purpose." It certainly doesn't align with what social media companies tell the public. Nowhere in Twitter's, Facebook's, or Instagram's user agreements will one find a provision announcing that their standards will be applied one way for conservatives, and another way for everyone else. Systematically inconsistent

censorship under cover of supposedly neutral standards is dishonesty, plain and simple.

At the very least, the real-world examples of social media's bad-faith targeting of conservatives should more than suffice to demonstrate the many circumstances in which the Florida and Texas laws can be applied without abridging section 230's immunity for "good faith" actions.

II. Social media platforms act as common carriers of communications, and Florida and Texas permissibly regulated them as such.

Social media platforms act as common carriers of third-party communications, and Florida and Texas permissibly regulated them as such. SB 7072 and HB 20 are, at heart, nondiscrimination requirements. These laws do not prohibit social media platforms from censoring, deplatforming, or shadow-banning users and the content they post. They simply require platforms to avoid employing deceptive and unfair practices when they do so. Both the Florida and Texas laws require platforms to publish and consistently apply their own content standards; they do not dictate what those standards should be. These modest nondiscrimination requirements "fall[] comfortably within the historical ambit of permissible common carrier regulation." Tex. Pet. App. 55a (Oldham, J.).

A. The common carrier doctrine is "the body of law that has regulated transportation and communications networks for centuries." Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22

Yale J. L. & Tech. 391, 396 (2020). It gives states the "power to impose nondiscrimination obligations on communication and transportation providers" that have certain features. Tex. Pet. App. 55a (Oldham, J.). Compared to conventional private companies, common carriers traditionally have been subject to more robust governmental regulation, "including a general requirement to serve all comers." *Biden v. Knight First Amend.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring). In this way, the government has treated "communications networks," such as telegraphs and telephones, like common carriers. *Id.* at 1223. And the "long history" of restricting the ability of these entities to exclude shows that the founding generation accepted those restrictions as permissible under the First Amendment. *Id.* at 1224 (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

Both Florida and Texas "permissibly determined that the Platforms are common carriers subject to nondiscrimination regulation." Tex. Pet. App. 66a (Oldham, J.). That's because the platforms have all the hallmarks of a common carrier: They (1) are "communications firms," (2) "hold themselves out to serve the public without individualized bargaining," and (3) "are affected with a public interest." *Id.*; *see* S.B. 7072 §1(6) (platforms "hold a unique place in preserving [F]irst [A]mendment protections for all Floridians and should be treated similarly to common carriers"); H.B. 20 §1(3) ("social media platforms … function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States); *id.* at §1(4) ("social media platforms … are

common carriers by virtue of their market dominance").

To start, social media platforms "are primarily 'conduit[s] for news, comment, and advertising.'" Tex. Pet. App. 35a (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). They are "communications networks" that "'carry' information from one user to another." *Knight First Amend.*, 141 S. Ct. at 1224 (Thomas, J., concurring). And they "hold themselves out" as "distribut[ors]" of speech to "the broader public," rather than as selective publishers or as private speakers themselves. *Id.* Platforms have previously "told their users" that they "explicitly" do not "view [them]selves" as "editors"; that they "don't want to have editorial judgment" over content; and that "they 'may not monitor,' 'do not endorse,' and 'cannot take responsibility for' the content on their Platforms." Tex. Pet. App. 36a-37a (citations omitted). They have also "told Congress that their 'goal is to offer a platform for all ideas.'" *Id.*

Yet the platforms now claim that since they "exercise editorial control," everything they publish is, in a sense, the *platforms' own speech*. *Id.* at 44a. That claim is, as Judge Jones explained, "ludicrous." *Id.* at 114a (Jones, J., concurring). Unlike newspapers, who "print[] a curated set of material selected by [their] editors," social media platforms "exercise virtually no editorial control or judgment." *Id.* at 27a, 35a (majority op.). They "use algorithms to screen out certain obscene and spam-related content. And then virtually everything else is just posted to the Platform with zero editorial control or judgment." *Id.* As the district court found, more than "99% of th[is] content

… never gets reviewed further. The content on a site is, to that extent, invisible to the [Platform]." *Id.*

Next, platforms "hold themselves out to serve the public without individualized bargaining." *Id.* at 55a (Oldham, J). They advertise themselves as "broadly available to everyone." *See, e.g.*, *Terms of Service*, Facebook.com, perma.cc/5XQ8-VWUZ (last visited Nov. 11, 2023). And they "permit any user who agrees to their boilerplate terms of service" to speak "on any topic, at any time, and for any reason." Tex. Pet. App. 38a.

Consequently, Florida and Texas permissibly determined that social media platforms are "affected with the public interest." *See* S.B. 7072 §1(5) ("Social media platforms have become as important for conveying public opinion as public utilities are for supporting modern society."); *id.* at §1(3) ("Floridians increasingly rely on social media platforms to express their opinions."); H.B. 20 (finding that social medial platforms "are affected with a public interest" and "are central public forums for public debate"). Social media platforms undeniably serve as "the modern public square." *Packingham*, 582 U.S. at 107. The public depends on these platforms to "communicate about civic life, art, culture, religion, science, politics, school, family, and business." Tex. Pet. App. 69a-70a (Oldham, J). Much of what previously might have been broadcast or carried by cable, telephone, or telegraph now appears in news feeds. As with those utilities, the social media marketplace is dominated by a handful of large, powerful companies. And the public's "usage of and dependance on the Platforms" has only "continued to increase." *Id.*

On top of that, multiple federal courts have held that "replies to a public official's Twitter feed constitute a government 'public forum' for First Amendment purposes." *Id.* at 70a-71a (collecting cases). That alone shows the "centrality of the Platforms to public discourse." *Id.* "These decisions reflect the modern intuition that the Platforms are the forum for political discussion and debate, and exclusion from the Platforms amounts to exclusion from the public discourse." *Id.*

When social media platforms are correctly categorized in this way, the facial constitutionality of the Florida and Texas laws are clear. Indeed, both laws stop short of an "all comers" requirement.[11] Rather than require social media companies to platform everyone, these laws simply require that they evenhandedly and transparently enforce their own content standards. This modest regulation survives whatever First Amendment scrutiny might apply.

B. Like common carriers, social media platforms receive enormous benefits from the protections their status affords them. Platforms may claim the common carrier doctrine traps them in a constitutional no-man's land where, unlike most other private entities, they lack core First Amendment protections. Even though common carriers enjoy fewer constitutional protections and are subject to more governmental

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[11] For this reason, *Amici* diverge from Texas' invocation of *Christian Legal Society v. Martinez*. Tex. Br. at 38 (citing *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez*, 561 U.S. 661, 694 (2010)).

regulation, they can't discount the other end of the bargain. *See Knight First Amend.*, 141 S. Ct. at 1222-25 (Thomas, J., concurring); Candeub, *supra*, at 410 (discussing the "carrots" of common carrier policy). Common carriers "have dominant market share" of a critical public service that Americans are unwilling to live without. *See Knight First Amend.*, 141 S. Ct. at 1224 (Thomas, J., concurring). And they receive "special government favors" in exchange for higher levels of regulation, *id.* at 1223—including immunity from civil liability for defamation and similar torts. *See, e.g.*, 47 U.S.C. §230; Candeub, *supra*, at 410. With limited market competition and special civil immunity, having to announce and even-handedly apply the user standards that their own lawyers and policy officials wrote—and users must agree to—is not too much to ask.

But even indulging modern media's tone-deaf claims of victimhood, this status is one of their own choosing. Platforms could easily stop holding themselves out as a neutrally administered public service and start acknowledging that they will selectively enforce their policies against disfavored viewpoints. Until they do so, however, the First Amendment allows Florida and Texas to take them at their word and treat them as the common carriers.

III. The Florida and Texas laws promote the free exchange of ideas and protect religious viewpoints from censorship.

The states' interest in protecting their citizens' online religious expression is particularly important because "the First Amendment doubly protects religious speech." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). The Florida and Texas laws are a proper exercise of state power that advance core First Amendment values by promoting the free exchange of ideas and by protecting religious viewpoints, among others, from censorship. These laws protect consumers by increasing transparency and reducing arbitrary enforcement of platforms' terms. And they restore trust and consumer confidence in social media platforms that "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 582 U.S. at 107.

Many Americans share the concern that social media platforms are run amok. A Pew poll found that 66 percent of Americans (52 percent of Democrats, 84 percent of Republicans) have little confidence in platforms' ability to identify "inaccurate or "misleading" posts. Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, Pew Rsch. Ctr. (Aug. 19, 2020), perma.cc/L3DL-B42V. Ninety percent of Republicans and even a majority of Democrats say that social media platforms likely censor disfavored political viewpoints. *Id.* And many rightly consider suppression of speech as a manipulation of public debate "through coercion

rather than persuasion," and view censorship as an attempt to "effectively drive certain ideas or viewpoints from the marketplace." *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

Nowhere is this more evident than for religious Americans whose faith animates traditional views on many issues of intense public debate. "The American experiment was founded, and has always thrived, on the freedom of religious believers to speak, teach, preach, practice, serve and work in peace—not only in private, but in the public square." Archbishop Salvatore Cordileone & Jim Daly, *Social Media's Threat to Religious Freedom*, Wall St. J. (Aug. 12, 2021), bit.ly/3S1YRbi. Many Christians, Jews, and Muslims believe that marriage is the lifelong union of a man and a woman; that God created humans male and female; and that abortion is the wrongful taking of innocent human life. But while the Supreme Court has recognized that these perspectives are held "in good faith by reasonable and sincere people," *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015), today's social media platforms disagree. To them, these perspectives are not dissenting views to be given a voice, but hateful bigotry to be silenced. And these companies have not hesitated to press their outsized power over speech into service to censor individuals holding such views.

Social media platforms have repeatedly "kick[ed] organizations off their platforms for supporting traditional marriage, opposing abortion, questioning transgenderism, or holding any other belief currently out of cultural or political favor with Silicon Valley." Joshua Holdenried, *How Big Tech Targets Faith*

Groups for Censorship, Real Clear Religion (Aug. 5, 2021), perma.cc/Z2E8-PTSQ. In the first quarter of 2021 alone, "faith-based organizations were de-platformed at least weekly" by social media platforms. *De-platforming: The Threat Facing Faith-Based Organizations*, Napa Legal Inst. (last updated Dec. 1, 2023), perma.cc/2VPR-7WF8. And after this Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), "pro-life and religious organizations were being de-platformed at the same almost weekly rate." *De-platforming: The Threat Facing Faith-Based Organizations*, *supra*.

Examples of censorship and deplatforming of religious voices abound. When Focus on the Family's Daily Citizen explained transgenderism for its unwoke followers—noting that a "transgender woman" is "a man who believes he is a woman"—Twitter permanently banned the publication for posting "hate." *See Twitter dropped the banhammer on a Christian magazine for this "hateful" sentence*, Not the Bee (Feb. 2, 2021), perma.cc/754W-AVXM. It also restricted the profile of a Catholic Bishop who publicly opposed the effort to legalize assisted suicide in Ireland. *See Twitter restores Irish Catholic bishop's post on assisted suicide after review*, CNA Daily News (Feb. 23, 2021), perma.cc/TXW6-S7B8. Facebook gave Pastor Franklin Graham a 24-hour timeout for "hate speech" after he criticized Bruce Springsteen's boycott of North Carolina and supported the state's law prohibiting men from using women's restrooms and locker rooms. Aris Folley, *Facebook temporarily banned evangelist Franklin Graham from site*, The Hill (Dec. 29, 2018), perma.cc/2CNH-KV9J. Only after receiving immense backlash did Facebook apologize.

Id. Instagram labeled worship videos by popular Christian artist Sean Feucht as "harmful or false information." Andrea Morris, *Instagram Censors Worship Leader's Praise Post, Labeling His Faith 'False and Harmful,'* CBN News (June 24, 2020), perma.cc/G4SQ-DDKP. YouTube temporarily booted theologian John Piper's audiobook, *Coronavirus and Christ*, for "violating community guidelines." Melissa Barnhart, *YouTube restores John Piper's 'Coronavirus and Christ' audiobook after 'violation' ban*, Christian Post (May 19, 2020), perma.cc/PY3G-DHTR. And it suspended global Catholic television network EWTN's affiliate channel in Poland, which streamed "videos of devotional content, movies, lectures, and homilies." Zelda Caldwell, *YouTube shuts down EWTN's Polish channel*, Catholic News Agency (Oct. 25, 2022), perma.cc/D78B-4GT3.

Social media's bias against religious pro-life viewpoints have also been well-documented. When Susan B. Anthony List ran ads describing then-candidate Joe Biden's position on late-term abortions, Facebook pulled them, giving a delayed reinstatement only after substantial pushback. Sam Dorman, *Facebook reversing ban on ad that claimed Biden-Harris supports 'abortion up to the moment of birth'*, Fox News, perma.cc/9AZ3-JYY5. Facebook also removed the page of Heartbeat International, a pro-life organization that "informs pregnant mothers about the life-saving abortion pill reversal treatment." Micaiah Bilger, *Facebook Bans Pregnancy Center's Page That Saved 3,000 Babies From Abortions*, LifeNews (July 21, 2022), perma.cc/M7FL-YWCW. Twitter likewise took down a pro-life campaign ad by then-candidate Marsha Blackburn that described her

efforts to stop Planned Parenthood's sale of aborted body parts by labeling it as "inflammatory." Kevin Robillard, *Twitter pulls Blackburn Senate ad deemed 'inflammatory,'* Politico (Oct. 9, 2017), perma.cc/4U7B-MHYS. TikTok banned the pro-life group Live Action, reinstating it only after a national backlash, and opaquely citing "human error." Lila Rose, *Twitter's suppression of pro-life speech must stop*, The Hill, (Oct. 18, 2017), perma.cc/Z6NG-SYSE. TikTok and Instagram have similarly censored Students for Life of America. Brenna Lewis, *Instagram Just Censored this Pro-Life Post*, Students for Life of America (June 4, 2021), perma.cc/CQK5-BCR7; Brenna Lewis, *TikTok Censors Students for Life, Then Reinstates Video Without Explanation*, Students for Life of America (Apr. 14, 2020), perma.cc/7AYN-8V38. Meanwhile, Planned Parenthood's pro-abortion political ads were never censored. John Wesley Reid, *A Double Standard? Unpacking Twitter's Pro-Life Ad Ban*, CBN News (June 29, 2017), perma.cc/Z28C-LUZB.

To be sure, some of these censorship decisions were retracted, but many were not. Even so, the sheer number of examples makes clear that these episodes are hardly random. Social media titans try to hide behind their algorithms, pretending they didn't foresee the viewpoint-based outcomes that those algorithms would generate. But after a consistent pattern of conservative and religious viewpoint suppression, the algorithms begin to look more like the result of an intelligent and intentional design than a big bang in a circuit board.

Recognizing this problem, the Florida and Texas laws seek to put users and platforms on an even playing field. The law "*protects* [users'] ability to freely express a diverse set of opinions through one of the most important communications mediums used in that State." Tex. Pet. App. 24a (emphasis in original). And platforms "can still say whatever they want (or decline to say anything) about any post by any user." *Id.*; *see also About Community Notes on X (Twitter)*, X (Twitter) Help Ctr., perma.cc/6ZNG-XTJE (last visited Dec. 1, 2023). By ensuring content standards will not be inconsistently applied to target disfavored viewpoints—including traditional religious viewpoints—the Florida and Texas laws help preserve the internet as "a forum for a true diversity of political discourse," 47 U.S.C. §230(a)(3), and promote the "marketplace of ideas" that the First Amendment protects, *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

CONCLUSION

For these reasons, the Court should affirm the Fifth Circuit's decision and reverse the Eleventh Circuit's decision.

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