

SOCIAL MEDIA AND THE FIRST AMENDMENT: ARE SOCIAL MEDIA PLATFORMS “COMMON CARRIERS” WITHOUT A CONSTITUTIONAL RIGHT TO ENGAGE IN CONTENT MODERATION?

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ABSTRACT

The United States Supreme Court will resolve a circuit split during the 2023-2024 term regarding the right of social media companies to engage in content moderation on their sites. In 2022, the United States Court of Appeals for the Eleventh Circuit held that social media platforms are not common carriers. Accordingly, common carrier nondiscrimination regulations cannot prohibit social media platforms from moderating site content. Shortly afterward, the United States Court of Appeals for the Fifth Circuit reached the opposite conclusion, holding that social media platforms are common carriers that do not enjoy a First Amendment right to engage in content moderation. The Supreme Court must now decide: 1) whether provisions in Texas and Florida laws violate the First Amendment by regulating technology “companies’ ability to remove, edit, or arrange the content that appears on their platforms,” and 2) whether provisions that require these “companies to explain their decisions to remove or edit specific content violate the First Amendment.”¹

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1. Amy Howe, *Biden Administration Recommends Grant in Challenges to Social-Media Laws*, HOWE ON THE CT., (Aug. 15, 2023), <https://amylhowe.com/2023/08/15/biden-administration-recommends-grant-in-challenges-to-social-media-laws/> [https://perma.cc/7MRA-PEAH].

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I. INTRODUCTION

In 2021, Florida and Texas passed laws that aimed to restrict the ability of social media platforms to moderate content on their platforms.² Both statutes were enacted to redress a perceived social media platform bias against conservative viewpoints.³ Core to these enactments was the legislative viewpoint that social media platforms are common carriers that do not enjoy First Amendment protections to engage in content moderation pursuant to “nondiscrimination” regulations prohibiting the moderation of user content.⁴ Social media trade associations, led by NetChoice, challenged

2. Emily Bernhard, *Content Moderation Circuit Split: NetChoice v. Attorney General, State of Florida and NetChoice v. Paxton*, 75 FED. COMM’NS L.J. 411, 411 (2023).

3. *Id.*

4. *See id.* at 412, 414.

the Florida and Texas laws in federal court, arguing that social media platforms are not common carriers and that social media platforms have a First Amendment right to moderate user content on their platforms.⁵ The United States Court of Appeals for the Eleventh Circuit ruled in favor of the social media platforms, holding that social media platforms are not common carriers and have the right under the First Amendment to moderate the content on their websites.⁶ The United States Court of Appeals for the Fifth Circuit reached the opposite result, holding that social media platforms are common carriers and do not enjoy First Amendment rights to moderate the content on their platforms.⁷ The United States Supreme Court agreed to hear the appeals from both cases.⁸ The Supreme Court will resolve the following questions: 1) “whether provisions in the Texas and Florida laws that regulate tech companies’ ability to remove, edit, or arrange the content that appears on their platforms violate the First Amendment,” and 2) “whether provisions that require tech companies to explain their decisions to remove or edit specific content violate the First Amendment.”⁹

This article addresses whether social media platforms should be regulated as common carriers without a First Amendment right to moderate user content on their platforms or whether social media platforms are not common carriers and thus enjoy a First Amendment right to moderate the content on their platforms. This article will begin with an in-depth analysis of what the Florida and Texas statutes require of social media platforms. Next, this article discusses the circuit split caused by the United States Courts of Appeal for the Fifth and Eleventh Circuits in the *NetChoice* litigation. The article will then conclude by discussing why social media platforms should not be considered common carriers and why the First Amendment protects the right of social media platforms to engage in content moderation on their sites. Ultimately, this article argues that in the present *NetChoice* litigation before it, the United States Supreme Court should conclude that social media platforms are not common carriers, and the First Amendment protects the social media platforms’ right to moderate user content on their platforms.

5. *Id.*

6. *Id.* at 415.

7. *Id.*

8. Amy Howe, *Justices Take Major Florida and Texas Social Media Cases*, SCOTUSBLOG, (Sept. 29, 2023, 9:48 AM), <https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases> [<https://perma.cc/765S-QYK4>].

9. *Id.*

II. STATE LAWS PROHIBITING SOCIAL MEDIA CONTENT MODERATION

A. FLORIDA'S SENATE BILL 7072

“The relevant provision of S.B. 7072 . . . can be divided into three categories: (1) content-moderation restrictions; (2) disclosure obligations; and (3) a user-data requirement.”¹⁰

1. *Content-Moderation Restrictions*

Senate Bill 7072 provides that a social media platform “may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate,” starting on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.¹¹ “Deplatforming” refers to 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.”¹²

“A social media platform must provide each user with a method by which the user may be identified as a qualified candidate”¹³ Additionally, the method must “provide[] sufficient information to allow the social media platform to confirm the user’s qualification [for office] by reviewing the website of the Division of Elections or the website of the local supervisor of elections.”¹⁴ Senate Bill 7072 similarly makes it illegal for a social media platform to: “apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate . . . beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.”¹⁵

“Post-prioritization” refers to “action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results.”¹⁶ “Post-prioritization” under Senate Bill 7072 “does not include post-prioritization of content and material of a third party, including other users, based on payments by that third party, to the social media

10. *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1206 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. Netchoice, LLC*, No. 22-277, 2023 WL 6319654 (U.S. Sept. 29, 2023), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S.Ct. 69 (2023) (mem.).

11. FLA. STAT. § 106.072(2) (2022).

12. *Id.* § 501.2041(1)(c).

13. *Id.* § 106.072(2).

14. *Id.*

15. *Id.* § 501.2041(2)(h).

16. *Id.* § 501.2041(1)(e).

platform.”¹⁷ “Shadow banning” under Senate Bill 7072 refers to “action by a social media platform . . . 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.”¹⁸ Shadow banning may be accomplished through any means, regardless of whether it is committed by a natural person or through the use of an algorithm.¹⁹ Senate Bill 7072 prohibits acts of shadow banning regardless of whether they are readily apparent to a user.²⁰

Under the Florida law, “a social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.”²¹ The statute defines a “journalistic enterprise” as

an entity doing business in Florida that: 1. [p]ublishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users; 2. [p]ublishes 100 hours of audio or video available online with at least 100 million viewers annually; 3. [o]perates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or 4. operates under a broadcasting license that was issued by the Federal Communications Commission.²²

Senate Bill 7072 does not prohibit “[p]ost-prioritization of certain journalistic enterprise content based on payments to the social media platform” by the journalistic enterprise.²³ “Censoring” under Senate Bill 7072 is defined broadly 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.”²⁴ Censoring “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.”²⁵

“A social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among all of their users on the platform.”²⁶ However, the statute does not define “consistent” here.²⁷ “A social media platform must inform each user about any changes to its user

17. *Id.*

18. *Id.* § 501.2041(1)(f).

19. *Id.*

20. *Id.*

21. *Id.* § 501.2041(2)(j).

22. *Id.* § 501.2041(1)(d).

23. *Id.* § 501.2041(2)(j).

24. *Id.* § 501.2041(1)(b).

25. *Id.*

26. *Id.* § 501.2041(2)(b).

27. *See id.*

rules, terms, and agreements before implementing the changes and may not make changes to agreements, rules, or terms more than once every 30 days.”²⁸ Social media platforms must “categorize algorithms used for post-prioritization and shadow banning” and “allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content.”²⁹ Additionally, “a social media platform must provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annually the opt-out opportunity.”³⁰

2. *Disclosure Obligations*

Senate Bill 7072 provides that a social media platform must publish the standards it uses or previously used in determining how the platform censors, deplatforms, or shadow bans, along with detailed definitions.³¹ “A social media platform must: . . . [p]rovide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user’s content or posts.”³² Senate Bill 7072 requires that if “[a] social media platform . . . willfully provides free advertising for a candidate [the platform] must inform the candidate of such in-kind contribution.”³³

Before a social media platform may censor, deplatform, or shadow ban a user, the platform must provide the user with a detailed notice.³⁴ The detailed notice must: (1) “[b]e in writing”; (2) “[b]e delivered via electronic mail or direct electronic notification to the user”; (3) be delivered “within seven days after the censoring action”; (4) contain “a thorough rationale explaining the reason that the social media platform censored the user”; and (5) contain a “precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user’s content or material as objectionable.”³⁵

3. *User Data Requirements*

Senate Bill 7072 provides that a social media platform shall permit “a user who has been deplatformed to access or retrieve all of the user’s

28. *Id.* § 501.2041(2)(c).

29. *Id.* § 501.2041(2)(f).

30. *Id.* § 501.2041(2)(g).

31. *Id.* § 501.2041(2)(a).

32. *Id.* § 501.2041(2)(e)(1).

33. *Id.* § 106.072(4).

34. *Id.* § 501.2041(2)(d).

35. *Id.* § 501.2041(3).

information, content, material, and data.”³⁶ The social media platform must allow the deplatformed user to access or retrieve these items for a minimum of sixty days following the user’s receipt of notice that the user has been deplatformed.³⁷

The Florida Elections Commission may fine a social media platform \$250,000 per day if it violates Senate Bill 7072’s prohibition on deplatforming a political candidate for statewide office.³⁸ If a social media platform has deplatformed a political candidate running for a non-statewide office in violation of Senate Bill 7072, then the Florida Elections Commission may fine the social media platform \$25,000 per day.³⁹ For other violations of Senate Bill 7072, the Florida Department of Legal Affairs and platform users are authorized to file a lawsuit against the social media platform.⁴⁰ If the Department of Legal Affairs, as a result of a complaint or through its own inquiry, believes that “a violation of [Senate Bill 7072] is imminent, occurring, or has occurred, the department may investigate the suspected violation . . . [and] bring a civil or administrative action.”⁴¹ If a user files a private cause of action for a violation of Senate Bill 7072, the user may receive the following remedies: (1) “[u]p to \$100,000 in statutory damages per proven claim”; (2) “actual damages”; (3) “[i]f aggravating factors are present, punitive damages”; (4) “other forms of equitable relief, including injunctive relief”; and (5) an award of “costs and reasonable attorney fees.”⁴²

“For purposes of bringing an action [under this statute], each failure to comply with [Senate Bill 7072] shall be treated as a separate violation, act, or practice.”⁴³ The statute also provides that “a social media platform that censors, shadow bans, deplatforms, or applies post-prioritization algorithms to candidates and users in [Florida] is conclusively presumed to be both engaged in substantial and not isolated activities within [Florida] and operating, conducting, engaging in, or carrying on a business, and doing business in” Florida such that the social media platform is subject to the jurisdiction of Florida’s courts.⁴⁴

36. *Id.* § 501.2041(2)(i).

37. *Id.*

38. *Id.* § 106.072(3).

39. *Id.*

40. *Id.* § 501.2041(5)-(6); *see also id.* § 501.203(4) (defining Department in Section 501.2041 as the Department of Legal Affairs).

41. *Id.* § 501.2041(5).

42. *Id.* § 501.2041(6).

43. *Id.* § 501.2041(7).

44. *Id.*

B. TEXAS'S HOUSE BILL 20

The relevant portions of House Bill 20 may be divided into two categories: (1) “viewpoint-based censorship of user posts” and (2) disclosure and operational requirements for social media platforms.⁴⁵

1. *Viewpoint-Based Censorship of User Posts*

House Bill 20 provides that a social media platform “may not censor a user, a user’s expression, or a user’s ability to receive the expression of another person based on” the following criteria: “(1) the viewpoint of the user or another person; (2) the viewpoint represented in the user’s expression or another person’s expression; or (3) a user’s geographic location” within the state of Texas.⁴⁶ Here, House Bill 20 “applies regardless of whether the viewpoint is expressed on a social media platform or through any other medium.”⁴⁷ A “social media platform” is defined as “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.”⁴⁸ A user is “a person who posts, uploads, transmits, shares, or otherwise publishes or receives content through a social media platform . . . [,] includ[ing] a person who has a social media platform account that the . . . social media platform has disabled or locked.”⁴⁹ House Bill 20 specifically excludes from the definition of a “social media platform” electronic mail services and internet service providers.⁵⁰ Additionally, House Bill 20 excludes from the definition of a “social media platform” any “online service, application, or website that consists primarily of news, sports, entertainment, or other information or content that is not user-generated but is preselected by the provider.”⁵¹ “Censor” under House Bill 20 “means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.”⁵² “Expression” is defined by House Bill 20 as “any word, music, sound, still or moving image, number, or other perceivable communication.”⁵³

House Bill 20 applies to a user who is a resident of Texas, a user who does business in Texas, or a user who “shares or receives expression” in

45. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445-46 (5th Cir. 2022).

46. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (West 2021).

47. *Id.* § 143A.002(b).

48. TEX. BUS. & COM. CODE ANN. § 120.001(1) (West 2021).

49. *Id.* § 120.001(2).

50. *Id.* § 120.001(1).

51. *Id.*

52. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001(1) (West 2021).

53. *Id.* § 143A.001(2).

Texas.⁵⁴ Additionally, House Bill 20 applies to any “expression that is shared or received” in Texas.⁵⁵ The legislature intended for House Bill 20 to only govern the largest social media platforms, and accordingly, House Bill 20 “applies only to a social media platform that functionally has more than 50 million active users in the United States within a calendar month.”⁵⁶ House Bill 20 “applies to the maximum extent permitted by the United States Constitution and the laws of the United States but no further.”⁵⁷

If a user believes that he or she has been subjected to viewpoint-based discrimination in violation of House Bill 20, the user may file a lawsuit against the social media platform.⁵⁸ If the user is victorious in the lawsuit against the social media platform, then the user is entitled to declaratory relief, injunctive relief, and an award of costs and attorney’s fees.⁵⁹ “If a social media platform fails to promptly comply with a court order in an action brought under [House Bill 20], the court shall hold the social media platform in contempt and shall use all lawful measures to secure immediate compliance with the order,” which may “include daily penalties sufficient to secure immediate compliance.”⁶⁰ House Bill 20 provides that “[n]onmutual issue preclusion and nonmutual claim preclusion” cannot be asserted by a social media platform as defenses in civil actions.⁶¹

House Bill 20 also empowers the Texas Attorney General to bring suit against a social media platform.⁶² House Bill 20 encourages private persons to notify the Texas Attorney General if he or she believes that a social media platform is violating any provision against viewpoint-based discrimination.⁶³ The Texas Attorney General may commence a civil action against a social media platform to enjoin a violation or potential violation of House Bill 20.⁶⁴ If the court enters an injunction, the Texas Attorney General may receive an award of costs, attorney’s fees, and investigative costs incurred.⁶⁵

House Bill 20 provides that “[a] waiver or purported waiver of the protections” afforded to social media users under the statute “is void as unlawful and against public policy.”⁶⁶ Accordingly, House Bill 20 instructs

54. *Id.* § 143A.004(a).

55. *Id.* § 143A.004(b).

56. *Id.* § 143A.004(c).

57. *Id.* § 143A.004(d).

58. *Id.* § 143A.007(a).

59. *Id.* § 143A.007(b).

60. *Id.* § 143A.007(c).

61. *Id.* § 143A.007(e).

62. *Id.* § 143A.008(b).

63. *See id.* § 143A.008(a).

64. *Id.* § 143A.008(b).

65. *Id.*

66. *Id.* § 143A.003(a).

courts and arbitrators to not enforce or give effect to any purported waiver of the rights afforded to social media users.⁶⁷ House Bill 20 makes clear that its waiver prohibition “is a public-policy limitation on contractual and other waivers of the highest importance and interest to [Texas,] and [Texas] is exercising and enforcing this limitation to the full extent permitted by the United States Constitution and Texas Constitution.”⁶⁸

2. *Disclosure and Operational Requirements for Social Media Platforms*

House Bill 20 requires each social media platform to “publicly disclose accurate information regarding its content management, data management, and business practices” by publishing “specific information” on a variety of categories.⁶⁹ Social media platforms must publish detailed information on how they “curate and target content to users.”⁷⁰ Social media platforms must detail how they “place and promote[] content, products, and services, including [the social media platform’s] own content, products, and services.”⁷¹ Disclosures must provide detailed information on how the social media platform moderates content.⁷² Search algorithms, ranking algorithms, and any other algorithms or procedures used by the social media platform to determine how results are displayed on the platform must also be disclosed.⁷³ House Bill 20 also mandates that social media platforms must detail how they provide user performance data pertaining to the user’s use of the social media platform and the products and services advertised on the platform.⁷⁴ Ultimately, House Bill 20 dictates that the disclosures provided here by a social media platform must be “sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform.”⁷⁵ These disclosures must be published on a “website that is easily accessible by the public.”⁷⁶

House Bill 20 also compels each social media platform to publish a so-called “acceptable use policy.”⁷⁷ Each “social media platform’s acceptable use policy must reasonably inform users about the types of content allowed

67. *Id.*

68. *Id.* § 143A.003(b).

69. TEX. BUS. & COM. CODE ANN. § 120.051(a) (West 2021).

70. *Id.* § 120.051(a)(1).

71. *Id.* § 120.051(a)(2).

72. *Id.* § 120.051(a)(3).

73. *Id.* § 120.051(a)(4).

74. *Id.* § 120.051(a)(5).

75. *Id.* § 120.051(b).

76. *Id.* § 120.051(c).

77. *Id.* § 120.052.

on the social media platform.”⁷⁸ Each acceptable use policy must also “explain the steps the platform will take to ensure [that user] content complies with the [platform’s] policy.”⁷⁹ The acceptable use policy must explain how users may “notify the social media platform of content that potentially violates the acceptable use policy” or that is otherwise illegal in nature, which includes providing detailed information on the complaint system employed by the social media platform and instructions on complaint intake mechanisms.⁸⁰ The social media platform must “publish [its] acceptable use policy in a location that is easily accessible to a user.”⁸¹

Twice a year, each social media platform must publish a “biannual transparency report” in which the platform outlines its actions to enforce the acceptable use policy within the preceding six-month period.⁸² In each report, the social media platform shall share the total number of instances where the platform received notice of illegal content or activity, or of content that may otherwise violate the social media platform’s policies, through “a user complaint[,] an employee or person contracting with the social media platform[,] or an internal automated detection tool.”⁸³ The biannual transparency report must also detail the “number of instances in which the social media platform took action with respect to illegal content, illegal activity, or potentially policy-violating content known to the platform”; reportable actions here “includ[e]: content removal, content demonetization, the addition of an assessment to content, account suspension, account removal, or any other action taken in accordance with the platform’s acceptable use policy.”⁸⁴ Social media platforms must track the country of each user who provided content subject to platform action, and the biannual transparency report must publicize this nationality information.⁸⁵ House Bill 20 also requires each biannual transparency report to contain detailed information on the number of times a user appealed a decision to remove the user’s content and the percentage of appeals that resulted in the restoration

78. *Id.* § 120.052(b)(1).

79. *Id.* § 120.052(b)(2).

80. *Id.* § 120.052(b)(3).

81. *Id.* § 120.052(a).

82. *Id.* § 120.053(a).

83. *Id.* § 120.053(a)(1).

84. *Id.* § 120.053(a)(2). Reportable actions here must be categorized and organized within the biannual transparency report by “(1) the rule violated, and (2) the source for the alert of illegal content, illegal activity, or potentially policy-violating content . . .” *Id.* § 120.053(b)(1)-(2). Furthermore, alert sources must be organized within the report according to the following categories: (1) “government; [(2)] user; [(3)] internal automated detection tool; [(4)] coordination with other social media platforms; or” (5) employees or contractors of the social media platform. *Id.* § 120.053(b)(2).

85. *See id.* § 120.053(a)(3).

of the removed content.⁸⁶ The biannual transparency report must include specific information “describe[ing] each tool, practice, action, or technique used in enforcing the acceptable use policy.”⁸⁷ Biannual transparency reports must be published “in a location that is easily accessible to users” and must provide “an open license, in a machine-readable and open format.”⁸⁸

III. THE CIRCUIT SPLIT: ARE SOCIAL MEDIA PLATFORMS “COMMON CARRIERS” WITHOUT FIRST AMENDMENT RIGHTS TO ENGAGE IN CONTENT MODERATION?

A. NETCHOICE, LLC V. ATTORNEY GENERAL, FLORIDA

The first of the circuit-splitting cases decided in 2022 was *NetChoice, LLC v. Attorney General, Florida*.⁸⁹ Previewing the novelty of the issues posed by this case, the Eleventh Circuit began its opinion by stating that “[n]ot in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok.”⁹⁰ Nonetheless, the Eleventh Circuit noted here that “whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”⁹¹ The court concluded the introduction to its opinion by advising that the fundamental question to be answered in the case was “whether the Facebooks and Twitters of the world—indisputably ‘private actors’ with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms.”⁹²

One of the primary defenses raised by the state of Florida in defense of Senate Bill 7072 was that the law does not even trigger First Amendment scrutiny because the law “reflects the State’s permissible decision to treat social-media platforms like ‘common carriers.’”⁹³ Here, Florida’s position was that there exist “certain services that society determines people shouldn’t be required to do without,” and social media falls within such a category, and accordingly, social media platforms may be treated and regulated as common

86. *Id.* § 120.053(a)(5)-(6).

87. *Id.* § 120.053(a)(7).

88. *Id.* § 120.053(c).

89. 34 F.4th 1196 (11th Cir. 2022).

90. *Id.* at 1203.

91. *Id.* (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011)).

92. *Id.*

93. *Id.* at 1208 (quoting Oral Argument at 18:37, *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355), <https://www.ca11.uscourts.gov/oral-argument-recordings> (type “21-12355” in Case Number field and click “Search”)).

carriers.⁹⁴ The Eleventh Circuit noted at the outset of its analysis that it is unclear whether Florida “mean[t] to argue (a) that platforms are *already* common carriers, and so possess no (or only minimal) First Amendment rights, or (b) that the State can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights that they currently possess.”⁹⁵ However, regardless of whichever of these two positions the State actually intended to assert, the Eleventh Circuit concluded that the State’s position on social media platforms’ common carrier status must be rejected.⁹⁶

The Eleventh Circuit’s first reason for concluding that social media platforms are not common carriers is that social media platforms have never conducted themselves as common carriers.⁹⁷ The court explained that within the context of communications, common carriers are entities that “make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing” and the entities do not “make individualized decisions, in particular cases, whether and on what terms to deal.”⁹⁸ Although social media companies invite members of the public to join and utilize their services, the platforms require their users, as an explicit condition of access and usage, to accept the social media platform’s terms of service.⁹⁹ Furthermore, social media platforms also require members of the public to abide by the platforms’ community standards if the members wish to become users of the platforms.¹⁰⁰ This means that, for example, “Facebook is open to every individual if, but only if, she agrees not to transmit content that violates the company’s rules.”¹⁰¹ Accordingly, social media users are not able to freely send communications “of their own design and choosing” because social media platforms have always made user-specific, “individualized” decisions about whether or not to publish particular messages or provide access to particular users based upon content and viewpoint.¹⁰²

94. *Id.* at 1219-20.

95. *Id.* at 1220.

96. *Id.*

97. *Id.*

98. *Id.* (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979), *superseded by statute*, Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780, *as recognized in* *Manhattan Comm. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019)).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

The Eleventh Circuit also relied upon United States Supreme Court precedent in deciding that social media platforms are not common carriers.¹⁰³ In *Turner Broadcasting System, Inc. v. FCC*,¹⁰⁴ the Supreme Court stated that modern communications entities should not be grouped alongside power companies, transportation companies, and railroads—business sectors that are subject to traditional economic regulation as common carriers—and instead, modern communications entities should be grouped alongside businesses having strong First Amendment protections such as publishers, pamphleteers, and bookshops.¹⁰⁵ In *Reno v. American Civil Liberties Union*,¹⁰⁶ the Supreme Court distinguished online media from earlier forms of media, “emphasizing that the ‘vast democratic forums of the Internet’ have never been ‘subject to the type of government supervision and regulation’” encountered by earlier forms of media.¹⁰⁷ After reviewing Supreme Court precedent, the Eleventh Circuit concluded that the Court’s precedents demonstrate that social media platforms “should be treated more like cable operators, which retain their First Amendment right to exercise editorial discretion, than traditional common carriers.”¹⁰⁸

In concluding that no tradition exists of regulating social media platforms as common carriers, the Eleventh Circuit noted that Congress has historically distinguished internet companies from common carriers.¹⁰⁹ In 1996, when Congress passed the Telecommunications Act, Congress explicitly differentiated “interactive computer services,” such as social media platforms, from common carriers.¹¹⁰ The Telecommunications Act also protects internet companies’ “ability to restrict access to a plethora of material that they might consider ‘objectionable.’”¹¹¹ Hence, the Telecommunications Act provides protections for social media platforms that are inconsistent with the obligation of indiscriminate service, which is a hallmark of common carriers.¹¹² The Eleventh Circuit concluded its analysis here by opining that Congress’s recognition and protection of social media platforms’ ability to “discriminate among messages—disseminating some

103. *Id.*

104. 512 U.S. 622 (1994).

105. *See NetChoice*, 34 F.4th at 1220; *see also Turner*, 512 U.S. at 637-39.

106. 521 U.S. 844 (1997).

107. *See NetChoice*, 34 F.4th at 1220 (quoting *Reno*, 521 U.S. at 868-69).

108. *NetChoice*, 34 F.4th at 1220.

109. *Id.*

110. *Id.* at 1220-21; *see also* 47 U.S.C. § 223(e)(6) (“Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.”).

111. *NetChoice*, 34 F.4th at 1221 (quoting 47 U.S.C. § 230(c)(2)(A)).

112. *Id.*

but not others—is strong evidence that [social media platforms] are not common carriers with diminished First Amendment rights.”¹¹³

Having rejected the state of Florida’s contentions that social media platforms have historically been regulated as common carriers, the Eleventh Circuit next turned to the State’s only possible argument that even if social media platforms are not common carriers by virtue of their history, the State may force social media platforms to become common carriers through legislation that strips the platforms of the First Amendment rights which they otherwise would enjoy.¹¹⁴ The Eleventh Circuit began its analysis of the State’s argument here by remarking that “[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier.”¹¹⁵ In fact, the Eleventh Circuit noted here that, to the contrary, if social media platforms already enjoy First Amendment protections, “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.”¹¹⁶

The Eleventh Circuit concluded that “because social-media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren’t common carriers, and a state law can’t force them to act as such” in violation of the First Amendment.¹¹⁷ Accordingly, the Eleventh Circuit enjoined the content moderation provisions of Senate Bill 7072 as violating the First Amendment.¹¹⁸

B. NETCHOICE, L.L.C. v. PAXTON

NetChoice, L.L.C. v. Paxton was the second circuit-splitting case decided in 2022.¹¹⁹ At the start of its opinion, the Fifth Circuit agreed with the Texas legislature’s findings that social media platforms are common carriers and may be regulated as such because “the platforms ‘function as common carriers, are affected [by] a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States.’”¹²⁰ Additionally, the Fifth Circuit previewed that it agrees with the Texas legislature’s position that large social media platforms are common

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; see also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

117. *NetChoice*, 34 F.4th at 1222.

118. See *id.* at 1231-32.

119. 49 F.4th 439 (5th Cir. 2022).

120. *Id.* at 445.

carriers “by virtue of their market dominance” and, therefore, may be regulated as common carriers without full First Amendment rights.¹²¹

The Fifth Circuit began its analysis of House Bill 20 by stating that the state of Texas correctly determined that social media platforms are common carriers, which may be subject to nondiscrimination regulations “because the Platforms are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest.”¹²² The court explained that social media platforms offer themselves to the public for individual use, allowing any adult to create a user account after agreeing to each social media platform’s terms of service.¹²³ Accordingly, because social media platforms indicate a “willingness to carry [anyone] on the same terms and conditions,” the platforms are common carriers.¹²⁴

The social media platforms objected to the conclusion here that the platforms hold themselves out to the public while offering to treat and serve everyone equally.¹²⁵ The platforms instead argued that, although it is true they offer the same terms of service to all users, it is also true that the platforms reserve the right to limit or deny user access to the platforms if the users violate those very same terms of service, and this consequently cannot mean that the platforms are indeed holding themselves out to the public for unfettered use.¹²⁶ Stated differently, the social media platforms contended here that they are “only willing to do business with users who agree to their terms of service.”¹²⁷ The Fifth Circuit dismissed the social media platforms’ argument here, explaining that the “relevant inquiry isn’t whether a company *has* terms and conditions; it’s whether it offers the ‘*same* terms and conditions [to] any and all groups.”¹²⁸ The Fifth Circuit further explained that the test is not whether social media platforms make “individualized decisions” about user content after users post their content to their social media accounts, but instead, the test is whether the social media platforms offer the same terms and conditions to all users prospectively or currently.¹²⁹ Accordingly, because social media platforms initially offer the same terms and conditions to all prospective users, the Fifth Circuit concluded the social media platforms must be common carriers that cannot engage in content

121. *See id.*

122. *Id.* at 473.

123. *Id.* at 474.

124. *Id.* (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

125. *Id.*

126. *See id.*

127. *Id.*

128. *Id.* (quoting *Semon*, 279 F.2d at 739).

129. *See id.* (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979), *superseded by statute*, Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780, *as recognized in* *Manhattan Comm. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019)).

moderation regardless of whether those same terms and conditions grant the platforms the right to preclude user content which violates those same terms and conditions.¹³⁰

The court also concluded that social media platforms are common carriers, which may be regulated without full First Amendment protections because they are economically important, commercially widespread, and consequently are “affected with a public interest.”¹³¹ Here, the court observed that many individuals rely upon social media to stay in touch with friends and family, follow the news, and participate in online commerce.¹³² Indeed, the Fifth Circuit likened the popularity of social media platforms to historical town squares and marketplaces.¹³³ The court concluded by announcing that social media platforms’ “entrenched market power thus further supports the reasonableness of Texas’s determination that the Platforms are affected with a public interest” and may accordingly be designated and regulated as common carriers without full First Amendment protections.¹³⁴

Ultimately, the Fifth Circuit found that social media platforms are akin to “ferries and bakeries, to barges and gristmills, to steamboats and stagecoaches, to railroads and grain elevators, to water and gas lines, to telegraph and telephone lines,” which have all been historically categorized and regulated as common carriers.¹³⁵ The Fifth Circuit acknowledged the circuit split that it created with the Eleventh Circuit and summarily dismissed the Eleventh Circuit’s jurisprudence regarding social media common carrier status as being “inconsistent with the common-law history and tradition . . . where common carrier nondiscrimination obligations were extended from ferries to railroads, to telegraphy, to telephony, and so on.”¹³⁶

IV. WHY SOCIAL MEDIA PLATFORMS ARE NOT “COMMON CARRIERS” WITHOUT A FIRST AMENDMENT RIGHT TO ENGAGE IN CONTENT MODERATION

Social media platforms are engaged in the business of selling content to users, as the Fifth Circuit has recognized.¹³⁷ This distinguishes social media platforms from the numerous other industries that have been uncontroversially categorized as “common carriers” and that have enjoyed minimal-at-best First Amendment rights. These industries do not actually

130. *See id.*

131. *See id.* at 475.

132. *Id.*

133. *See id.* at 475-76.

134. *See id.* at 476.

135. *Id.* at 478.

136. *See id.* at 494.

137. *Id.* at 475-76.

engage in the business of selling content, and therefore, the court's analogy to social media platforms is inapplicable.

Ultimately, none of the examples relied upon by the *Paxton* court to explain why social media platforms are common carriers, who must follow nondiscrimination principles regarding content moderation, had anything to do with content moderation or even speech. The *Paxton* court noted that the first common carriers were ferries that transported individuals and cargo across waterways in ancient times and were law-bound to operate and repair ferries for the convenience of customers.¹³⁸ At the time of America's founding, common carrier regulation was expanded to include barges, stagecoaches, wharves, inns, and gristmills.¹³⁹ None of these "ancient" examples of common carriers had anything to do with speech, and they, therefore, do not support the Fifth Circuit's contention that common carrier regulations have prevented content moderation since before America's founding.¹⁴⁰

The *Paxton* court also spent considerable time explaining why the railroad's history of common carrier regulation and nondiscrimination are applicable to modern-day social media platforms and require a finding that social media platforms be prohibited from engaging in content moderation. According to the *Paxton* court, "[r]ail companies became notorious for using rate differentials and exclusive contracts to control industries dependent on cross-country shipping, often structuring contracts to give allies . . . impenetrable monopolies."¹⁴¹ The *Paxton* court cited a handful of railroad nondiscrimination cases in support of its contention that these cases demonstrate social media platforms may not engage in content moderation, but these cases are inapposite because none of them involve a railroad's discrimination against *speech*. Instead, these cases stand for the proposition that common carrier nondiscrimination prevents railroads from charging different fares to different customers for identical transports in an effort to obtain a monopoly or otherwise engage in economic exploitation.¹⁴² Accordingly, the lengthy history of railroad common carriage and nondiscrimination cannot be used to justify common carrier regulation of today's social media platforms.

Additionally, none of the examples from communications industries of common carrier nondiscrimination cited by the *Paxton* court actually have

138. *Id.* at 469.

139. *Id.* at 469-70.

140. *See id.* at 469 (declaring that the nondiscrimination requirements of the common carrier doctrine were established before the founding of the United States).

141. *Id.* at 470.

142. *See* *Messenger v. Pa. R. Co.*, 37 N.J.L. 531, 537 (N.J. 1874); *New Eng. Exp. Co. v. Me. Cent. R. Co.*, 57 Me. 188, 196-97 (Me. 1869); *Fitchburg R. Co. v. Gage*, 78 Mass. (12 Gray) 393, 394-95 (Mass. 1859).

anything to do with content moderation. The *Paxton* court identified the telegraph as the “first communications industry subjected to common carrier laws in the United States.”¹⁴³ The common carrier nondiscrimination doctrine was then applied to telegraph companies to prevent the companies from refusing to transmit telegrams from their competitors and to similarly prevent telegram companies from charging exorbitant rates to transmit the telegrams of competitors.¹⁴⁴ Moving on to the more recent communicative technology of telephony, the *Paxton* court cited a handful of cases where common carrier nondiscrimination was applied to require recalcitrant telephone companies to run phone lines to homes or businesses.¹⁴⁵ However, in none of these cases was the telephone company engaged in content moderation and refusing to provide phone access because of anything that the complainant was saying, and instead, the courts concluded that common carriage simply required that phone companies could not refuse to install phone lines arbitrarily.¹⁴⁶

Ultimately, the *Paxton* court’s reference to and reliance upon old caselaw regarding entities that do not sell content and do not engage in content moderation shows that “[t]he Fifth Circuit simply [does] not understand what platforms do.”¹⁴⁷ The *Paxton* court does not understand that social media platforms “are not merely conduits of user behavior, although they are partly that. Platforms *also* seek to create a particular kind of speech experience that holds the attention of their users.”¹⁴⁸ Consequently, the *Paxton* court failed to grasp that social media platforms are in the business of selling content that is carefully curated through moderation. In doing so, platforms must make moderation choices as they curate the experiences that they provide to users, and in turn, the platforms must “promote some content and demote others. *They must*. Google cannot be indifferent among all of the possible results that it gives you; to be of any use, Google must make some choices among the trillions of possible results on the internet.”¹⁴⁹ Consequently, a “legal requirement of viewpoint neutrality” or of “content neutrality [cannot] translate to platforms. The services would become largely unusable . . . given the galaxies of information on the internet, on social

143. *Paxton*, 49 F.4th at 470.

144. See Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2320-24 (2021).

145. *Paxton*, 49 F.4th at 471.

146. See, e.g., *Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telephone Co.*, 7 A. 809, 810-11 (Md. 1887); *Walls v. Strickland*, 93 S.E. 857, 857-58 (N.C. 1917); *State ex rel. Webster v. Neb. Telephone Co.*, 22 N.W. 237, 237-39 (Neb. 1885).

147. James B. Speta, *The Past’s Lessons for Today: Can Common-Carrier Principles Make for a Better Internet?*, 106 MARQ. L. REV. 741, 755 (2023).

148. *Id.* at 743.

149. *Id.* at 749.

media, and even in most individuals' networks, the platforms must select."¹⁵⁰ Social media platforms are much more akin to "[n]ewspapers, broadcasters, and bookstores" because these businesses "curate the content they offer their customers, and common-carrier rules have *never* applied to them."¹⁵¹

The Fifth Circuit alternatively ruled that social media platforms are common carriers because of their widespread popularity and economic presence.¹⁵² However, even though social media is widely enjoyed by users, the Fifth Circuit never found that social media provides an essential service necessary for the functioning of civil society—a hallmark of true common carriers—such as public transportation, postal services, and telephony.¹⁵³ Moreover, "the Supreme Court has 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 marketplace and hits it big."¹⁵⁴ Accordingly, the Fifth Circuit erred in finding that social media platforms become common carriers and lose First Amendment protections simply because they become widely enjoyed and economically successful.

V. CONCLUSION

Social media platforms are not common carriers, and platforms should not be regulated as if they were common carriers with minimal (or no) First Amendment right to moderate content. Social media platforms have never acted like common carriers, and in fact, they have always explicitly required users to abide by their content moderation terms and conditions as a condition of platform use. When Congress passed laws concerning social media, Congress was precise in articulating that social media platforms are not common carriers. United States Supreme Court precedent also indicates that social media platforms are more akin to bookstores, newspapers, and other purveyors of content that have enjoyed First Amendment protection to curate the content that they provide. Common carrier caselaw, in general, is devoid of examples where nondiscrimination regulations are applied to businesses that are in the precise business of selling content, and accordingly, common carrier caselaw is inapplicable to social media platforms. In the present *NetChoice* litigation, the United States Supreme Court should hold that social

150. *Id.* at 755.

151. *Id.* at 743.

152. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 476 (5th Cir. 2022).

153. *See, e.g., Stella Preston, Comment, How Free Is Your Speech on Social Media? Reconciling the Circuit Split Created by the Eleventh and Fifth Circuit's Decisions on Anti-Censorship Laws Governing Social Media Platforms*, 74 *MERCER L. REV.* 1521, 1543 (2023).

154. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1222 (11th Cir. 2022).

media platforms are not common carriers and that social media platforms enjoy First Amendment protections to moderate the content of their users.