No. 21-12355

In the United States Court of Appeals
for the Eleventh Circuit

NETCHOICE LLC, et al.,

Plaintiffs-Appellees,

vs.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF APPELLEES AND AFFIRMANCE

On Appeal from the United States District Court for the Northern District of Florida, No. 4:21-cv-220

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae TechFreedom certifies under Fed. R. App. P. 26.1, that it has no parent company, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

TechFreedom states, in accord with Circuit Rule 26.1-1, that it believes the Certificates of Interested Persons in the Briefs of Defendants-Appellants and Plaintiffs-Appellees are complete.

/s/ Corbin K. Barthold

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has closely studied recent state laws that attempt to regulate social media. Its experts have written and spoken extensively on those laws' constitutional infirmities, as well as on why those infirmities cannot be fixed by a "common carriage" theory. See, e.g., Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*, Lawfare, https://bit.ly/3iBFk0h (Mar. 12, 2021) (cited in this action's complaint, Dkt 1 at 19 n.26); Corbin K. Barthold, *Social Media and Common Carriage: Lessons From the Litigation Over Florida's SB 7072*, WLF Legal Backgrounder, https://bit.ly/3FmvYzl (Sept. 24, 2021); UCLA School of Law, *A Space for Everyone? Debating Online Platforms and Common Carriage Rules*, YouTube, https://bit.ly/3Dfa3Ir (June 4, 2021) (debate between TechFreedom President Berin Szóka and

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

Professor Eugene Volokh); Berin Szóka & Corbin K. Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, Lawfare, https://bit.ly/2YxGxPo (Apr. 14, 2021); Berin Szóka & Ari Cohn, *It is Not the Government's Job to Promote 'Fairness' Online*, Salt Lake Tribune, https://bit.ly/3FjCjeR (Apr. 9, 2021); Corbin K. Barthold & Berin Szóka, *Florida's History of Challenging the First Amendment Shows DeSantis' 'Tech Transparency' Bill is Doomed*, Miami Herald, http://hrld.us/2ZPzqCf (Mar. 25, 2021).

TechFreedom submits this brief to assist the Court in understanding the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment.

SUMMARY OF ARGUMENT

Promoting SB 7072 on Twitter last May, Governor Ron DeSantis announced that "Florida's Big Tech Bill" will "level the playing field … on social media." Ron DeSantis (@GovRonDeSantis), Twitter (May 24, 2021), 8:45 AM, https://bit.ly/2ZW30qe. A month later, in the decision below, District Judge Hinkle offered the perfect response: "[L]eveling the

playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest." Dkt 13 at 27.

Under the First Amendment, "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This is, at bottom, a right to "editorial control and judgment" over the speech one hosts and disseminates. *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). See Appellees' Response Brief (ARB) 22-25 (discussing *Hurley* and *Miami Herald* in greater detail). With its carriage mandates for political candidates and "journalistic enterprises," its (impossible) "consistency" requirement, its notice and reporting rules, and more, SB 7072 roundly violates this right.

SB 7072 is, in short, a First Amendment train wreck. Hence Florida's attempt to insulate its new law from First Amendment scrutiny under the guise of "common carriage." SB 7072 §1(6); Appellants' Opening Brief (AOB) 34-39. But slapping the label "common carrier" on something doesn't make it so. And even if it did, common carriers retain their First Amendment rights, and they have much broader discretion to refuse service than SB 7072 allows for.

This brief addresses Florida's "common carrier" theory as follows:

I. Social media websites—even large ones—are nothing like common carriers. Common carriage is about (1) *carriage*, i.e., transportation, (2) of uniform *things*, i.e., people, commodities, or parcels of private information, (3) in a manner that is *common*, i.e., indiscriminate. When regulating telecommunications common carriers, the FCC has adhered to these points. Social media, meanwhile, depart from them in all pertinent respects. Social media are (1) a diverse array of differentiated media products (microblogs, videochats, photo streams, and so on), (2) typically shared as a *public*-facing *expressive* activity, (3) that are subject to extensive terms of service.

II. Contrary to Florida's claims, large social media websites display none of the indicia of traditional common carriage:

- Such sites do not serve the public "indiscriminately." Rather, they serve the public *subject* to various rules of conduct—rules that reflect the sites' normative judgments about what expression they wish to foster or are willing to tolerate.
- Even if the sites were "clothed" with a "public interest" (whatever that might mean), the Supreme Court—and at least one of the common carrier theory's most notable proponents—don't think a "public interest" test is useful for determining who can be treated as a common carrier.

- Social media websites do not possess "bottleneck" control over speech. In fact, the social media market remains highly fluid and competitive. And in any event, the concept of market power is not useful. Even an entity with substantial market power retains its First Amendment rights.
- Social media websites have not enjoyed governmental support in any special or unique sense. They certainly have not received anything akin to the public easements that gave railroads and telegraph companies *de facto* geographic monopolies.

III. Three Supreme Court cases—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)—have been cited as support for the common carrier theory. These cases show, at most, that an entity can sometimes be required to host another's speech if doing so does not "interfer[e]" with the host speaker's "desired message." *Rumsfeld*, 547 U.S. at 64. The whole point of SB 7072, by contrast, *is* to "interfere" with social media websites' "desired message." What's more, unlike the entities regulated in *PruneYard*, *Rumsfeld*, and *Turner*, social media websites function as editors, constantly making decisions about whether and how to allow, block, promote, demote,

remove, label, or otherwise respond to content. Curation and editing of expression are antithetical to the concept of common carriage.

IV. Even if social media websites *were* similar to common carriers, most, if not all, of SB 7072 would remain unconstitutional. In addition to the fact that common carriers are not stripped of their First Amendment rights, no common carrier has ever had to serve customers without regard to their behavior. Common carriers have always been entitled to refuse service, or bar entry, to anyone who misbehaves, disrupts the service, harasses other patrons, and so on. Because SB 7072 tries to force websites to serve *even* such people, it is not itself a proper common carriage regulation.

Florida's attempt to treat social media websites like common carriers is a dead end.

ARGUMENT

I. Social Media and Common Carriage Are Irreconcilable Concepts

"A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." *McCoy v. Pac. Spruce Corp.*,

1 F.2d 853, 855 (9th Cir. 1924). As its name suggests, in other words, "common carriage" is about offering, to the *public at large* and on *indiscriminate* terms, to carry generic *stuff* from point A to point B. Social media websites fulfill none of these elements.

A. Social Media Are Not "Carriage": They Are Diverse and Evolving Products

Lumber is lumber. Once it has arrived at a construction site, one two-by-four is generally as good as another. How the wood got to the site is, for purposes of the construction itself, irrelevant. Putting common carriage in its proper historical context begins with this fundamental point. The "business of common carriers" is, at its core, "the transportation of property." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406 (1914); see Interstate Commerce Act, 24 Stat. 379, 379-80 (1887) (prohibiting a "common carrier" in "the transportation of *passengers or property*" from discriminating, by price, among its similarly situated customers) (emphasis added).

True, the "transmission of intelligence" has sometimes been treated as "of cognate character" to traditional common carriage. *German Alliance*, 233 U.S. at 406-07. But that "cognate character" arose in fields, such as telegraphy and telephony, where information was treated as a commodity product to be purveyed through some sort of (typically scarce)

public thoroughfare. See *id.* at 426-27 (Lamar, J., dissenting). The key is that, like traditional common carriage, "they all ha[d] direct relation to the business or facilities of *transportation*" itself. *Id.* at 426 (emphasis added). Although it doubtless contains a message, a telegram is best thought of as a widget of private information conveyed along "public ways," *id.*, by a commodity carrier, see Mann-Elkins Act, 36 Stat. 539, 544-45 (1910) (applying the Interstate Commerce Act to telegraph and telephone companies).

Social media websites are nothing like this. They are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not transportation at all. What the platforms offer is a wide array of differentiated—and rapidly evolving—forms of public-facing communication. Twitter's main product is a microblog. Instagram is primarily a photo-sharing service. TikTok is centered around short videos. Snapchat's main feature is the evanescence of posts. Clubhouse focuses on providing oral chatrooms. Facebook embraces several of these other forms, and also fosters group pages. Far from simply transporting information from point A to point B, moreover, each of these services deploys proprietary algorithms to customize the order in which content appears on any given user's feed. When it comes to social media, Marshall McLuhan was right: the medium is the message.

It is not true, as Florida claims (AOB 36), that SB 7072 fits an established "template" for "legislative designation" of certain "internet companies" as common carriers. To the contrary, the FCC has long confirmed that "data *transport*" is the essence of telecommunications common carrier service, whereas "any offering over the telecommunications network which is more than a basic transmission service" is not. *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11513, ¶ 25 (1998) (emphasis added). Indeed, because the bar for qualifying as "more than a basic transmission service" is low, even some services that, unlike social media, really do closely resemble pure information "transport" are, nonetheless, not common carriers. Although telephony, which connects users without any intervention by the carrier, is common carriage, even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not. See *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd. 12075 (2018).

The social media market is diverse and fast-moving. Social media websites constantly create new forms of content. They compete in a market for differentiated media products. What they do *not* do is passively act as "carriers" of information.

B. Social Media Are Not "Carriage": They Are Fundamentally Expressive

Again, common carriage involves the transportation of people and commodities. Telegraphy and telephony press the boundaries of that core, transportational conception of common carriage. One message, after all, is not interchangeable with another. There is, however, a key sense in which a telegram or a telephone call is indeed just a widget of information: such communications are usually private. And being private, they are usually treated as strictly between the individual sender and recipient. Cf. 18 U.S.C. § 2511 (criminal penalties for intercepting a wire or secretly recording a call). This means that a carrier may transmit a telegram or a call while remaining indifferent to its content.

Once a "telephone company becomes a medium for public rather than private communication," however, "the fit of traditional common carrier law becomes much less snug." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987). While transmitting a private call or message can be thought of as carrying an information widget, transmitting a public-facing call or message is clearly about *broadcasting* ideas and viewpoints. *Id.* It is a mode of expression, not only by the direct speaker, but also by the purveyor of the speech. "Mass-media speech," in short, "implicates a broader range of free

speech values" than does "person-to-person" speech. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010).

This is not to say that all private communications are common carriage. As we saw above, text messaging is not. Nor would an Internet-based messaging service such as WhatsApp be. What is true, though, is that *public* communication is, virtually by definition, not common carriage. Indeed, Congress considered, and rejected, proposals to make broadcasting common carriage in the Radio Act of 1927, and it explicitly declared that broadcasting is *not* common carriage in the Communications Act of 1934. *Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 105 (1973); see 47 U.S.C. § 153(h).

As the appellees explain (ARB 22-25), two of the key precedents governing this case are *Miami Herald*, 418 U.S. 241, and *Hurley*, 515 U.S. 557. *Miami Herald* strikes down a Florida law that required a newspaper to print a political candidate's reply to the newspaper's unfavorable coverage. *Hurley* holds that a private parade may exclude some groups from participating. Like a newspaper (*Miami Herald*) or a parade (*Hurley*), a social media website presents a collection of messages to a wide audience. This public-facing expression is incompatible with—indeed, contradictory to—the concept of common carriage. Calling the

websites "common carriers" anyway doesn't make it so. The Florida legislature could not overturn *Miami Herald* or *Hurley* simply by declaring that newspapers or parades are "common carriers." The same holds true here.

"[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's [First Amendment] right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. That is the overriding principle that SB 7072 flouts. "Common carriage" is not a magic label that can make this First Amendment violation go away.

C. Social Media Are Not "Common": They Are Not Offered Indiscriminately

An edited product is, inherently, not common carriage. Although the FCC has waffled over whether most Internet service providers are common carriers, for instance, what's clear is that if an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing *en banc*). So long as it's up front about what it's doing, a provider that wants to engage in "editorial intervention"—and, thus, not common carriage—is free to do so. *Id.*

All prominent social media websites engage in such intervention. Twitter, for example, has rules that seek to "ensure all people can participate in the public conversation freely and safely." Twitter, *The Twitter Rules*, https://bit.ly/3cpc75S (last accessed Nov. 9, 2021). "Violence, harassment and other similar types of behavior discourage" such conversation, and are therefore barred by Twitter's rules. *Id*. Not surprisingly, bans on things like harassment and hate speech are common among online platforms. See Dkt 12 Ex. A ¶¶ 12-13 & n.27, Ex. C ¶ 11, Ex. D ¶¶ 8-12.

What's more, such bans have always been common. "You agree not to use the Web site," Facebook's terms of service said in 2005, to post "any content that we deem to be harmful, threatening, abusive, harassing, vulgar, obscene, hateful, or racially, ethnically or otherwise objectionable." Wayback Machine, *Facebook Terms of Use*, https://bit.ly/3w1gYC5 (Nov. 26, 2005). Indeed, one can go back much farther than that. As early as 1990, Prodigy, one of the first social networks, made its curation function a central part of its marketing strategy. "'We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve,'" it declared. *Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995). "'Certainly no responsible newspaper does less when it

chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.'" *Id*.

That social media websites engage in curation and editing should come as no surprise, given that curation and editing are a fundamental aspect of the service those platforms exist to provide. Without intermediaries, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries enable users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day." Yoo, *supra*, 78 Geo. Wash. L. Rev. at 701. Indeed, "social media" could not exist if intermediaries did not play this role. It is only because a platform engages in curation and editing that a mass of "social" media becomes navigable by the average user. More than that, such curation and editing is necessary to make social media a pleasant experience worth navigating. "[T]he editorial discretion that intermediaries exercise" enables users to avoid "unwanted speech" and "identify and access desired content." *Id*.

Florida contends (AOB 29-32) that such light editorial intervention doesn't trigger full First Amendment protection; that websites must offer a "unified speech product" to avoid state interference with its editorial discretion. Wrong. Such a rule would be perverse, rewarding websites if they engage in more of the so-called "censorship" that Florida claims to

oppose. In any case, *Hurley* granted full First Amendment protection to a parade that combined "multifarious voices" and conveyed no "particularized" message. 515 U.S. at 569-70.

Not only do platforms refuse to host content indiscriminately; they are widely expected not to do so. Although Florida won't admit it (AOB 25-26), everyone from advertisers to civil rights groups to the media holds the platforms responsible for the content they amplify, or even just host. See, e.g., Tom Maxwell, *Twitch Streamers Demand the Platform 'Do Better' at Moderating Hate Speech*, Input, https://bit.ly/ 37wIbSo (Aug. 10, 2021); Analis Bailey, *Premier League, English Soccer Announce Social Media Boycott in Response to Racist Abuse*, USA Today, https://bit.ly/3xIpfdT (Apr. 24, 2021). An underlying assumption in the current furor over the *Wall Street Journal*'s "Facebook Files" coverage is that Facebook can, and should, intervene, extensively, in its own product to ensure that it is free, so far as possible, of toxic content. See *The Facebook Files*, Wall St. J., https://on.wsj.com/3GPgzYX (last accessed Nov. 2, 2021).

II. Social Media Bear None of the Indicia of Common Carriage

Florida argues that large social media websites meet some criteria widely exhibited by common carriers of the past, such as railroad and

telegraph companies. Even if these criteria had more than limited relevance to the rights of expressive entities (they don't), social media websites meet none of the criteria at hand.

A. "Serve the Public Indiscriminately"

Common carriers, Florida correctly notes, hold themselves out as "serv[ing] the public indiscriminately." AOB 35. "The businesses regulated" by SB 7072, the state then adds—now going astray—"hold themselves out as platforms that all the world may join." *Id*. Although it might indeed be said that the websites welcome "all the world" to *join*, whether one gets to *stay* is contingent on one's complying with the sites' terms of service. Social media websites are not "indiscriminate" about hosting users who promote violence, engage in harassment, or spew hate speech. See Sec. I.C., *supra*.

Even if the websites did hold themselves out as serving the public indiscriminately (they don't), the "holding out" theory of common carriage is conspicuously hollow. A "holding out" standard is easy to evade. See Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. of Free Speech Law 463, 475 (2021). Say SB 7072 went into effect, and the websites responded by tightening their terms of service further, thereby

making even clearer that they do not serve the public at large. What then? Rather than admit how badly its law had backfired in its attempt to force the websites to host unwanted speech, Florida would probably declare that the websites are common carriers because the state has *ordered* them to serve the public at large. Such a declaration would confirm that the "holding out" theory is empty at best, and circular at worst.

B. "Clothed" With a "Public Interest"

Florida suggests that social media websites may be treated as common carriers because they are "clothed" with "a *jus publicum*." AOB 35. Unsurprisingly, it doesn't press the point. The Supreme Court has said that whether a business serves a "public interest" is "an unsatisfactory test of the constitutionality of legislation directed at [the business's] practices or prices." *Nebbia v. New York*, 291 U.S. 502, 536 (1934). Even Justice Thomas—perhaps the common carrier theory's most prominent champion—concedes that a "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'" *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

C. "Market Power"

Florida claims that large social media websites can be treated as common carriers because of their (purported) market power and (supposed) ability to control others' speech. AOB 36-38. The first problem on this front is the brute legal fact that an entity does not forfeit its constitutional rights by succeeding in the market. The Supreme Court accepted that *The Miami Herald* enjoyed near-monopoly control over local news; yet the newspaper retained its First Amendment right to exercise editorial control and judgment as it saw fit. 418 U.S. at 250-52, 256-58.

This is not to say that media firms, social or otherwise, are above the antitrust laws. A newspaper that uses its market power to inflict *economic* pain on a rival—one that, say, convinces advertisers to boycott, and thereby bankrupt, a local radio station—is inviting antitrust liability for its business practices. See *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). It *is* to say, however, that the right to reject speech for *expressive* reasons travels with a company, like a shell on a turtle, wherever the company goes—even if the company, like Yertle, is king of the pond. Cf. Dr. Seuss, *Yertle the Turtle and Other Stories* (1958).

In reality, however, the social media market is as lively as ever. It continues to offer many avenues of expression and communication. If

you're convinced (as Gov. DeSantis and SB 7072's other supporters explicitly are) that "Big Tech" is "out to get" Republicans, you can blog on Substack, post on Parler, Gettr, or Gab, message on Telegram or Discord, and watch and share videos on Rumble. And anyone who claims that network effects will ultimately thwart this competition must grapple with the astonishing rise of TikTok.

As for the major players' alleged "control" over speech, Facebook and Twitter are not, as Florida would have it, "like telegraph and telephone lines of the past." AOB 37. The Internet is not "a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Even the largest social media websites are just a piece of that "relatively unlimited" world of "communication." As one (conservative) commentator recently put it, social media websites are "equivalent not to the telegraph line," but to a few "of the telegraph line's many customers." Charles C.W. Cooke, *No, Big Tech Firms Are Not Common Carriers*, National Review Online, https://bit.ly/3hQMYDQ (Aug. 2, 2021). They are just a handful of "website[s] among billions." *Id*.

Consider an ongoing antitrust case against Facebook. Dismissing the FTC's complaint, Judge Boasberg refused "to simply nod to the conventional wisdom that Facebook is a monopolist." *FTC v. Facebook*,

1:20-cv-3590, Dkt 73 at 31 (D.D.C., June 28, 2021). The agency, the judge observed, had presented "almost nothing concrete on the key question of how much market power Facebook actually had, and still has, in a properly defined antitrust product market." *Id*. In an amended pleading, moreover, the FTC now stands its case on an utterly implausible claim that Facebook's only real competitor is Snapchat. *Id*. Dkt 82. The litigation is ongoing, and its outcome cannot be predicted. But if the FTC struggles to define a proper social-networking market (never mind show Facebook's power within that market), all the greater is the task before anyone who, like Florida, makes the even bolder claim that large social media websites wield bottleneck control over online speech.

D. "Recipients" of a "Publicly Conferred Benefit"

"Section 230 helped clear the path for the development of [social media]," Florida claims, "as the government did generations ago when it used eminent domain to help establish railroads and telegraphs." AOB 38. True enough, businesses that employ property acquired through eminent domain have sometimes had to operate as common carriers. It does not follow that Section 230, which broadly protects *all* websites for hosting speech that originates with others, creates a similar *quid pro quo* obligation. There are several problems with the comparison:

- Section 230 was not a gift to a few large social media websites (none of which existed when Section 230 was passed). It applies to every Internet website and service. See 47 U.S.C. §§ 230(c)(1), (c)(2). If Section 230 doesn't turn a blog, or Yelp, or a newspaper's comments sections, or an individual social media account, into a common carrier, it's unclear why it should turn Facebook, YouTube, or TikTok into one.
- Section 230 simply ensures that the *initial speaker* is the one liable for speech that causes legally actionable harm. See *id.* § 230(c)(1). It is not a "privilege" akin to when the government hands real property to one firm, to the exclusion of all potential competitors, for use as a railroad or a telegraph line.
- Far from being a sign that the government wants social media websites to act as common carriers, Section 230 is a sign that it wants them to act as discerning editors. Section 230 ensures that a website can "exercise" a "publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content"—without (in most cases) worrying that doing so will trigger liability. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230 does not curtail websites' First Amendment rights; it *endorses* them.

And if the *federally* enacted Section 230 is the *quid*, why should a *state* government get to impose the *quo*? The history of common carriage in the United States, going back to the Interstate Commerce Act of 1887, is one of aiding *interstate* commerce by setting and enforcing *national* standards. Precisely because they were regulated as common carriers, telegraph companies were not subject to regulation by the states. *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919). Even if Section 230 could serve as the basis for common carriage rules, it couldn't serve as the basis for common carriage rules imposed *by Florida*.

III. Supreme Court Case Law Does Not Save Florida's Common Carrier Theory

Three Supreme Court cases are sometimes cited as support for the notion that social media websites are "analogous" to common carriers. None of the three is pertinent.

A. *PruneYard Shopping Center v. Robins*

At issue in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), was whether a shopping mall could be forced, under the California Constitution, to let students protest on its private property. Yes, *PruneYard* says, it could. In so saying, however, *PruneYard* distinguishes *Miami Herald*. That case involved "an intrusion into the function of

editors," *PruneYard* notes—a "concern" that "obviously" was "not present" for the mall. *Id*. at 88. Here, by contrast, that concern obviously *is* present, as explained above. "Intru[ding]" into social media websites' "function" as "editors" is what SB 7072 is all about.

What's more, *PruneYard* announces that "the views expressed by members of the public" on the mall's property would "not likely be identified with that of the owner." *Id*. at 87. Even if that evidence-free declaration was true, at the time, of the mall (we have our doubts), it is certainly not true today of social media websites. Florida's claims to the contrary (AOB 27-29) notwithstanding, those sites *are* "identified" with the speech they host. A platform that hosts a certain speaker is widely considered to have deemed that speaker "worthy of presentation," and "quite possibly of support as well." *Hurley*, 515 U.S. at 575.

The mall also challenged the speech-hosting obligation under the Takings Clause. On its way to rejecting that challenge, *PruneYard* makes further findings pertinent to this case. The students, *PruneYard* notes, "were orderly," and the mall remained free to impose "time, place, and manner regulations" on others' speech that would "minimize any interference with its commercial functions." 447 U.S. at 83-84. This makes *PruneYard* nothing like the case here, in which Florida seeks to make websites host hostile, abusive, highly disruptive speech. In effect,

SB 7072 requires the websites to host *disorderly* conduct, and it *bars* them from imposing reasonable time, place, and manner regulations.

B. *Rumsfeld v. FAIR*

In protest of the military's "Don't ask, don't tell" policy, various law schools stopped allowing military recruiters on their campuses. Let the recruiters in, Congress responded, in a law known as the Solomon Amendment, or lose government funding. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), rejects an association's contention that the Solomon Amendment violates the First Amendment.

Distinguishing *Miami Herald* and *Hurley*, *FAIR* concludes that "accommodating the military's message d[id] not affect the law schools' speech." *Id*. at 63-64. Unlike "a parade, a newsletter, or the editorial page of a newspaper," *FAIR* explains, "a law school's decision to allow recruiters on campus is not inherently expressive." *Id*. at 64. The pertinent distinction between job-recruitment meetings, on the one hand, and parades, newsletters, and newspapers, on the other, is—even though Florida, when discussing *FAIR*, ignores it (AOB 22-23)—not hard to divine. One-on-one recruitment meetings are akin to telegraphic or telephonic communication—the passage of private information widgets—

and not at all like the public-facing expression of views undertaken by a parade, a publication, or a website.

SB 7072 requires social media to platform various speakers, and to spread and amplify, far and wide, almost anything those speakers wish to say. It thus looks nothing like the law at issue in *FAIR*, a case about direct communication between a recruiter willing to talk and a law student willing to listen. For *FAIR* to resemble this case, Congress would have had to pass a law altogether different from the Solomon Amendment. Picture a law requiring law schools to let neo-Nazis maraud their halls toting signs and bullhorns. *That* is the equivalent of what SB 7072 requires of select social media websites.

C. *Turner Broadcasting System v. FCC*

In the 1992 Cable Act, Congress imposed "so-called must-carry provisions" that "require[d] cable operators to carry the signals of a specified number of local broadcast television stations." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 630 (1994). While concluding that cable operators engage in speech protected by the First Amendment, *id.* at 636, *Turner* subjects the must-carry provisions merely to intermediate, rather than to strict, scrutiny. *Turner* is brimming, however, with distinctions that render it inapplicable to social media websites.

First, like traditional common carriers, see *German Alliance*, 233 U.S. at 426-27 (Lamar, J., dissenting), cable systems use "physical infrastructure"—"cable or optical fibers"—that require "public rights-of-way and easements." *Id.* at 627-28. This setup "gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656. This means that "a cable operator, *unlike speakers in other media*," can "silence the voice of competing speakers with a mere flick of the switch." *Id.* (emphasis added). On precisely this ground, *Turner* distinguishes *Miami Herald*, notwithstanding the fact that a "daily newspaper" may "enjoy monopoly status in a given locale." *Id.* "A daily newspaper," after all, "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications." *Id.* Just the same can be said of social media websites. Whatever the level of their market control—it's not much, in our view, as we have explained—they do not, when "assert[ing] exclusive control over [their] own … copy," thereby "prevent other[s]" from "distribut[ing]" competing products "to willing recipients." *Id.*

Second, "cable personnel" generally "do not review any of the material provided by cable networks," and "cable systems have no conscious control over program services provided by others." *Id.* at 629

(quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988)). Cable operators are thus, "in essence," simply "conduit[s] for the speech of others." *Id.* They generally transmit speech "on a continuous and unedited basis to subscribers." *Id.* This makes sense, given that most broadcast television content is comparatively sanitized and, certainly when compared to the worst online speech, uncontroversial. *Turner* concludes, therefore—again while distinguishing *Miami Herald*—that "no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that 'the safe course is to avoid controversy,' and by so doing diminish the free flow of information and ideas." *Id.* at 656 (quoting *Miami Herald*, 418 U.S. at 257). This is the precise opposite of the situation with social media websites. The websites are not simply "conduits"; they are provided on a curated and edited basis, and they do sometimes take "the safe course" and "avoid controversy." Witness, for instance, Twitter's decision to stop hosting political advertisements. See *Wash. Post v. McManus*, 944 F.3d 506, 517 n.4 (4th Cir. 2019).

Third, and relatedly, *Turner* declares—again while distinguishing *Miami Herald* (and it could have added *Hurley* to boot)—that there was "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable

operator." *Id*. at 655. This, again, because of the cable operators' "long history of serving" merely "as a conduit for broadcast signals." *Id*. The cable operators did not even contest this point; they did "not suggest" that "must-carry" would "force" them "to alter their own messages to respond to the broadcast programming they [we]re required to carry." *Id*. As we've explained, the "long history" behind social media could not be more different. Naturally, given that history, the platforms vigorously contend that they would have to "respond" to certain messages they might be required "to carry."

Fourth, the central issue in *Turner* was whether the must-carry provisions were content neutral. "Broadcasters, which transmit over the airwaves, are favored," *Turner* acknowledges, "while cable programmers, which do not, are disfavored." *Id*. at 645. But this distinction, *Turner* concludes, did not make the must-carry provisions a content-based law subject to strict scrutiny. According to *Turner*, "Congress' overriding objective … was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free [broadcast] television programming." *Id*. at 646. In other words, the law was purely about "economic incentive[s]." *Id*. at 646. The cable operators, for their part, did little to argue otherwise, raising only "speculati[ve]" "hypothes[es]" about "a content-based purpose" for the law. *Id*. at 652.

Here, by contrast, SB 7072 "is riddled with [content-based] distinctions." Eric Goldman, *Florida Hits a New Censorial Low in Internet Regulation (Comments on SB 7072)*, Technology & Marketing Law Blog, https://bit.ly/2T8R5BC (June 3, 2021) (analyzing SB 7072's "many discriminatory classifications").

IV. The Burdens Imposed by SB 7072 Go Far Beyond Common Carriage

Florida's law effectively compels large social media services to host all users, however obnoxious their behavior. This is not what common carriage meant at common law. "An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons[.]" *Lombard v. Louisiana*, 373 U.S. 267, 280 (1963) (Douglas, J., concurring) (citing Bruce Wyman, *Public Service Corporations* (1911), available at https://bit.ly/3wb5c84). "It is not the mere intoxication that disables the person from requiring service; it is the fact that he may be obnoxious to the others." Wyman, *supra*, § 632. "Telegraph companies likewise need not accept obscene, blasphemous, profane or indecent messages." *Id.* § 633.

In short, common carriers enjoyed broad discretion to "restrain" and "prevent" "profaneness, indecency, [and] other breaches of decorum in speech or behavior." *Id.* § 644. They were not even "bound to wait until

some act of violence, profaneness or other misconduct had been committed" before expelling those whom they suspected to be "evil-disposed persons." *Id*.

True, there were limits. A telegraph company that refused to carry an "equivocal message"—one whose offensiveness was debatable—did so "at its peril." *Id*. § 632. Although a telephone service could "cut off" a "habitually profane" subscriber, it had to show some tolerance to someone who "desisted from objectionable language upon complaint being made to him." *Id*. And regulators could (and in some areas still can) assess whether certain of a common carrier's rules and prohibitions are "just and reasonable." See, e.g., 47 U.S.C. §§ 201(b), 202(a). But in general, the "principle of nondiscrimination does not preclude distinctions based on reasonable business classifications." *Carlin*, 827 F.2d at 1293. Thus, a telephone company could refuse to carry all price advertising in its yellow pages directory (a common carrier service) even though this was an "explicit content-based restriction." *Id*.

Florida's tactic of "labeling" SB 7072 a "common carrier scheme" has "no real First Amendment consequences." ARB 42 (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part)). But although a common carrier's First Amendment rights exist apart

from its common-law powers over patrons' behavior, it still bears noting that, under those common-law rules, SB 7072 cannot qualify as a proper common-carriage law. Above all, a valid common-carriage regulation would not bar social media from setting reasonable rules governing "indecent messages." Wyman, *supra*, § 633.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,342 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Eleventh Circuit through the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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