Nos. 22-277, 22-555

In the Supreme Court of the United States

ASHLEY MOODY,
ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioners,
v.
NETCHOICE, LLC, DBA NETCHOICE, ET AL.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Petitioners,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS.

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

BRIEF OF REASON FOUNDATION, COMMITTEE FOR JUSTICE, COMPETITIVE ENTERPRISE INSTITUTE, AND TAXPAYERS PROTECTION ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Social media companies, large or small, offer privately owned and mediated spaces for people to associate and exchange ideas with people of like minds or unlike minds but like sensibilities. Different companies may have different mediation policies—some more lenient as to content, viewpoint, subject matter, or tone, others more restrictive as to any or all those criteria. But whether such policies are permissive, restrictive, or somewhere in between, they each represent the viewpoints and associational values of the companies setting such policies and, necessarily, of the individuals who agree to associate on those terms.

The suggestions by the Fifth Circuit that such companies are solely conduits for the speech of others and engage in no First Amendment protected activity of their own when they adopt and enforce their mediation policies completely misconceives what such companies are doing. Like newspapers curating opinion pieces or letters to the editor, parade organizers curating those invited to participate, or clubs deciding on who can be a member, social media companies are not only expressing their own organizational values, they are engaging in the essence of free association by selecting who they will and will not invite to participate and who they will

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

exclude if they behave in a manner contrary to the organizers' values. Suggesting that such entities do nothing more than pass along the speech of others, without "speaking" themselves when enforcing their mediation policies simply misunderstands what the companies are "saying" and ignores the free association aspect of their choices.

Calling such associational decisions "censorship," as the Fifth Circuit repeatedly does, misuses that word, misunderstands that the decision not to associate with various persons or viewpoints is as fundamental to the First Amendment as the decisions affirmatively speaking or actively associating with others, and is incompatible with the First Amendment. Because the theories of the Fifth Circuit are so fundamentally destructive of First Amendment jurisprudence and principles, this case is of great interest to *Amici*.

Amicus Reason Foundation (Reason) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as *amicus curiae* in cases raising significant issues.

Amicus Committee for Justice (CFJ) is a nonprofit, nonpartisan legal and policy organization founded in 2002 and dedicated to preserving the Constitution's limits on government power and its guarantee of liberty, including the freedom of speech. CFJ works to advance the rule of law, including educating Americans about the importance of basing judicial decisions on the text of our Constitution and statutes, rather than on policy preferences. CFJ is particularly concerned with the preservation of these principles at the intersection of law, technology and innovation. Consistent with its mission, CFJ files *amicus curiae* briefs in key cases.

Amicus Competitive Enterprise Institute (CEI) is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation. One focus of CEI's litigation arm has been criticism of instances, such as those in this case, in which government regulation interferes with the freedom of expressive association.

Amicus Taxpayers Protection Alliance (TPA) is a nonprofit 501(c)(4) Virginia non-stock corporation. TPA was founded as a taxpayer advocacy and education group with a free enterprise, less government, less taxes approach to taxpayer issues. TPA furthers its mission through its website, the preparation and dissemination of articles, analyses, and opinion pieces, and through broadcast television,

radio, social media, and congressional testimony. Allowing American taxpayers to freely exercise their ownership rights in *their* personal property—especially their finances—is a paramount concern for TPA, American taxpayers, and their families. This case presents a stark example of the destruction of basic rights—to free speech, free press, and free association, and the ability of social media entities to use their private property in the exercise of those rights—that cuts to the core of TPA's mission and interest in promoting a free-market agenda for taxpayers.

SUMMARY OF ARGUMENT

Amici agree with the NetChoice parties that the Fifth Circuit decision below misapplies multiple Supreme Court precedents such as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co.* v. *Public Utilities Commission of California*, 475 U.S. 1 (1986); *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) (*Turner I*); *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996); and *Manhattan Community Access Corporation* v. *Halleck*, 139 S. Ct. 1921 (2019). See NetChoice Br. (22-555) 1-2, 13-15, 18-30. They also agree that the Fifth Circuit fundamentally misconceives First Amendment protections for editorial activities of social media platforms as limited or subject to common carrier regulations. NetChoice Br. (22-555) 31-33.

And while the Fifth Circuit opinion presents a target-rich environment of still further error, *Amici* will focus on three particular conceptual errors in that opinion that cripple its premises and conclusions.

First, the Fifth Circuit opinion ignores the associational nature of social media platforms and their content and user moderation policies. The decision who to include or exclude from an expressive association is fundamental to the exercise of First Amendment rights not only of the organizers, but of the people who can choose whether to associate with the platforms and other users pursuant to whatever discretionary expressive parameters the platforms choose to define and refine their associations. Excluding individuals who violate those terms of engagement—even where such terms are content or viewpoint-based—is no different than the exclusion of individuals from numerous other associations based on the content, viewpoint, or manner of their expression.

Second, the Fifth Circuit opinion mistakenly concludes that size or popularity have any bearing on whether an expressive association is a common carrier, public accommodation, or anything of the sort. Cases suggesting as much in other contexts focus on the supposed monopolistic qualities of a private entity making speech or associational decisions, the limited avenues of alternative access, or the governmental property interest in a channel of communication, such as a public forum. And even then, such cases largely reject those supposed qualities as a basis for regulating the speech or association of private entities such as the platforms in this case. Furthermore, those

few cases that might be thought to support a broader sweep to such common-carrier arguments are poorly reasoned, often criticized, and should be limited to their particular facts or rejected wholesale. *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367 (1969) (broadcast television Fairness Doctrine), *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*) (cable television must-carry rules); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980) (private shopping center access for leafleteers).

Narrowing the scope of common-carrier theories has special importance when dealing with expressive associations, as opposed to companies offering limited or constraining physical infrastructure, such as phone companies or internet backbone entities. The media companies here are not at all like such physical and technological pipelines, but rather are merely popular and large-scale versions of what any internet user could do on their own by hosting a website, chatroom, or other interactive service on readily available website hosts or purchased servers. That some social media entities have many users and hence a broad reach does not make them a monopoly given the myriad other paths to send to and receive information from anyone interested. Indeed, they are in a market that is literally teeming with competition. Users and advertisers are not limited to any given company's service but can and do use multiple curated social media forums simultaneously, at low or no cost. And social media organizers can gain and lose non-exclusive market share precisely based on their content moderation choices, which ultimately shape the community of users and scope and tone of content

that better fit the expressive association they are seeking to create.

Third, governmental benefits provided to corporations or interactive media platforms do not alter the First Amendment rights of such platforms and may not be conditioned on the waiver of such rights. The Fifth Circuit's seeming disdain for the notion that corporations are protected by the First Amendment, Pet. App. (22-555) 3a, ignores decades of precedent and ignores that at the end of the day corporations are no more than associations of people coming together for common purposes, including expression. That they do so in order to make money does nothing to distinguish social media platforms from newspapers, magazines, television companies, book publishers, videogame companies, or any other for-profit company that engages in speech and associational activities.

Similarly, the additional benefits provided to interactive computer services and their users by Section 230 do not negate the expressive and associational qualities of the terms and application of content and user moderation policies. Section 230 provides protection beyond that of the First Amendment, but it does not act as a substitute for or negation of First Amendment protection. And even the terms of Section 230 itself distinguish between the speech of individual users of a particular platform and the expressive and associational choices made by the platform itself.

ARGUMENT

Amici agree with the NetChoice parties that the laws regulating social media platforms in these cases interfere with protected editorial discretion and compel dissemination of unwanted third-party speech in violation of the First Amendment.[2] *Amici* offer the following further arguments to provide an additional or alternative framing of some of the main points of contention.

I. Content and Contributor Moderation Are Expressive Associational Activities Protected by the First Amendment.

As the NetChoice parties correctly observe, numerous editorial activities or content curation choices have been recognized as part of the freedom of speech, including the freedom not to speak. See NetChoice Br. (22-555) 19-21; see *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 254-256 (1974) (newspaper's decision regarding what viewpoints to include or exclude); *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (parade organizer's viewpoint-based decision regarding what participants to exclude from parade); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636-637

[2] *Amici* will refer to the First Amendment throughout, though in this case its application to Florida and Texas is via the Fourteenth Amendment. It is not necessary to discuss whether such application operates through the Due Process Clause or the Privileges or Immunities Clause, though the latter is the historically more accurate font of incorporation. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 829-838 (2010) (THOMAS, J., concurring in part and in the judgment) (bill of rights incorporated through the Privileges and Immunities Clause).

(1994) (*Turner I*) (cable operator's decisions regarding what shows to include and exclude from lineup).

The selective inclusion for dissemination of some speech or speakers, and the selective exclusion of other speech or speakers, constitutes the speech of the editor or organizer, not merely the speech of the individual participants contributing to the collective whole. *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 814-815 (1996) (THOMAS, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J. & Scalia, J.).

Indeed, the Copyright Clause and its implementing statute confirm that editors and organizers of third-party writings are themselves "Authors" who create their own "Writings" or, in First Amendment terms, speakers who speak in their own right. Cf. *New York Times Co., Inc.* v. *Tasini*, 533 U.S. 483, 493-494 (2001) (distinguish copyright owned by the "author" of a collective work from copyright in the separate underlying contributions collected from contributing authors); *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.,* 499 U.S. 340, 348-349, 358 (1991) (original and minimally creative selection, coordination, and arrangement of pre-existing material constitutes the copyrightable compilation of an author); 17 U.S.C. § 201(c) ("Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole[.]"); 17 U.S.C. § 101 (defining "collective work"); 17 U.S.C. § 103 ("subject matter of copyright * * * includes compilations" and copyright therein "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed

in the work”). Indeed, given that the discrete creative work of making a compilation is independently copyrightable as the “Writin[g]” of an “Autho[r],” U.S. Const. art. I, § 8, cl. 8, it seems plain that the distinct activity of compiling, curating, and moderating the collective work of others is likewise speech or press entitled to First Amendment protection (which contains no requirement of originality and hence reaches a broader range of expression than does the copyright clause). Copyright gives an author protection for his or her “expression,” even though it does not give them rights (absent agreement) to the expression of others in a collective work. The notion that a collective work independently constitutes the “expression” of the organizing “author” even though it also transmits the separately protected expression of the contributors would seem to fully dispose of the Fifth Circuit’s notion that social media platforms “merely” transmit the speech of others but do not themselves speak via their moderation and organizational decisions.

Furthermore, the First Amendment “freedom of speech” readily encompasses the choice *not* to say something as much as it encompasses the choice to say something else. NetChoice Br. (22-555) 19, 28, 46, 53; see *Riley* v. *National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-801 (1988) (rejecting compelled informational disclosures during charitable solicitations); *Wooley* v. *Maynard,* 430 U.S. 705, 714 (1977) (Burger, C.J.) (freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.”); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (rejecting compelled

pledge of allegiance in public schools); *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.,* 138 S. Ct. 2448, 2464, 2478, 2486 (2018) (rejecting compelled financial support by non-members for union speech). Every decision to say anything equally includes the decision not to say something else.

The Fifth Circuit, however, rejected the application of these cases by repeatedly mischaracterizing the freedom of platforms to speak or not as they choose as a claimed right to "*muzzle* speech" or to "censor what people say" and by claiming that the Texas statute "does not chill speech," but rather "chills censorship" and protects "*other people's* speech." Pet. App. (22-555) 2a, 3a, 9a; see also *id*. at 15a-16a, 19a, 25a (repeatedly reframing the freedom of private companies to not transmit or associate with the speech of others with "censorship" of the supposed rights of others to use private platforms to transmit their unwanted speech).[3]

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[3] The Fifth Circuit's suggestion, Pet. App. (22-555) 26a, 30a-31a & n.7, 40a, that the cases involving the right not to convey the speech of others only apply in situations of scarcity such that carrying some speech would crowd out other speech is wrong in general and wrong as applied to the laws here. *West Virginia State Board of Education* v. *Barnette* 319 U.S. 624 (1943), did not create an either/or situation, and the students choosing not to say the pledge were not otherwise at liberty to say something else with that time.

And in this case, the Texas law does not allow even the differential prioritization of disfavored or compelled speech, compelling companies to use the scarce resources of top level posting on the compelled speech rather than the speech they would otherwise prioritize. Tex. Civ. Prac. & Rem. Code § 143A.001(1) (defining "censor" to include the denial of "equal access or visibility to, or otherwise discriminate against

One means of avoiding any mistaken confusion about whether curation is itself "speech" by the curator is to frame the issue as involving freedom of expressive association, apart from or in addition to whether curation constitutes its own "speech" as opposed to the speech of others. By recognizing the Fifth Circuit's improperly cramped focus on the right to affirmatively "speak" without prior restraint, and by understanding social media websites as private associations organized by the platforms to allow mediated expression and conversation subject to parameters that suit the organizers and participants, the Court need not worry about *whose* speech is at issue. Rather, it can recognize that the organizers of the platforms have chosen to associate with some speakers but not others, and some content and viewpoints but not others.

That is not to say the platforms have adopted those speakers and viewpoints as their own, just that they have set the parameters of their association to provide a general diversity of views while still managing outliers and information overload. Such associational choices are easily encompassed within the "freedom of speech" and other portions of the First Amendment.

For example, the freedom of association, whether viewed as an aspect of speech or assembly, plainly encompasses numerous associational choices.

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expression" and decisions to "de-boost" or "restrict" content). Even in the theoretically unlimited virtual space of the internet, people's time and attention remain limited resources not to be abused or squandered. In newspaper terms, Texas removes the ability of platforms even to decide what goes "above the fold" and what gets relegated to the last pages of the "Metro" section.

Americans for Prosperity Found. v. *Bonta*, 141 S. Ct. 2373, 2382 (2021) (citing *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984)) ("the freedom of association may be violated where a group is required to take in members it does not want"); *Hurley*, 515 U.S. at 580-581 (comparing parade to a private club that could exclude members based on their expression of views contrary to the views of the club and its other members, even if the club also provided non-expressive benefits); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) (applying strict scrutiny to compelled disclosure of association members).

And it includes not only the positive decision of whom to associate with, but also the negative decision of whom not to associate with. *Janus*, 138 S. Ct. at 2463 ("The right to eschew association for expressive purposes is likewise protected"); *Roberts*, 468 U.S. at 623 ("Freedom of association * * * plainly presupposes a freedom not to associate"); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 644, 647-648, 655-656 (2000) (forced acceptance of persons into an expressive association violates First Amendment, even where association excludes based on some views but takes no position on others).

Burdens on such associational freedoms are reviewed with at least heightened scrutiny and, where content based, as here, should be reviewed with strict scrutiny. See *Bonta*, 141 S. Ct. at 2383 (applying "exacting scrutiny"); *id.* at 2390-2391 (THOMAS, J., concurring in part) (arguing that strict scrutiny should apply to disclosure burdens on freedom of association); *Roberts*, 468 U.S. at 623 ("Infringements on that right

[of expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); see also NetChoice Br. (22-555) 35-41 (strict scrutiny should apply to content, viewpoint, and speaker-based restrictions here).

Other parts of the First Amendment also support strong protection for such associational freedoms. For example, the freedom of the press encompasses the many and varied editorial choices that go into running a newspaper, a TV news show, a magazine, or a publishing company, or any other effort to distribute curated information to an audience. One need not quibble about whether an article written by a reporter or freelancer, or a guest editorial expressing a view contrary to that of the paper's own editors, is nonetheless the speech of the paper itself. The freedom of the press covers more than the freedom to speak in one's own voice or to convey a specific message through print. It easily is understood to encompass the freedom to associate with, and hence print, those authors and pieces the editors select, and to exclude those they disfavor, regardless of the reason for such choices. Nobody, for example, would have suggested that Federalist printers could have been compelled to print Anti-Federalist critiques of the proposed Constitution without violating the freedom of the press, even if they had the excess capacity to do so. The "freedom" protected by the First Amendment is the ability to make such expressive associational choices without

government interference, not merely the freedom to affirmatively print one's own views.

Modern social media platforms are merely an extension of such activities on a larger scale. And while they are generally less restrictive than their forebears, that does not consequently oblige them to remove all editorial restrictions. See *Hurley*, 515 U.S. at 574 (selection of expressive units to include in parade protected even though it "may not produce a particularized message"; excluding a message organizer does not like "is enough to invoke its right as a private speaker" regardless of lack of detailed consideration of what remains included); *Dale*, 530 U.S. at 655 ("First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"). Indeed, such an approach would lead to absurd consequences and would require greater restrictions on speech in order to keep First Amendment rights.[4]

[4] Oddly enough, the Fifth Circuit fell squarely into this absurdity when it simultaneously argued that the original understanding of the First Amendment primarily forbade only the prior restraint of speech but that curation decisions are not protected forms of editorial discretion because they often occur *after* the speech is published and hence supposedly censor such speech. Compare Pet. App. (22-555) 21a-22a (discussing prior restraints as core target of original understanding of First Amendment) with *id*. at 46a-47a (expressing disdain for platforms' supposed failure to engage in *ex ante* editorial curation of content rather than *ex post* removal). On that reasoning, a private prior restraint is required to fall within the protection of the First Amendment, but a governmental prior restraint is forbidden censorship. This oddity nicely illustrates the error of

The Free Exercise Clause similarly supports protection for associational choices, not merely individualized expression. Not only is individual prayer a protected form of free exercise, so too is collective prayer, membership decisions in religious institutions, the dissemination of religious tracts that include or exclude such views as the religious organization selects, and numerous other associational choices. See*, e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion * * * are forms of speech and association protected by the First Amendment"); *Wisconsin* v. *Yoder*, 406 U.S. 205, 219, 234-235 (1972) (upholding free exercise claim by Amish parents against compulsory attendance at public schools beyond 8th grade—functionally a freedom of (dis)association claim); cf. *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2607 (2020) (ALITO, J., dissenting from denial of application for injunctive relief, joined by THOMAS and KAVANAUGH, JJ.) (highlighting parallels between freedom of speech and free exercise when noting that "under the Free Speech Clause[,] * * * and under our cases religion counts as a viewpoint.") (citations omitted).[5] If the free exercise of religion includes religious association (and disassociation), and the freedom of the press includes

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trying to equate private editorial and associations choices with governmental censorship.

[5] *Legacy Church, Inc.* v. *Kunkel*, 472 F. Supp. 3d 926, 1020 (D.N.M. 2020) ("Expressive association is the 'right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.'" (quoting *Schalk* v. *Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-618 (1984))).

similar association choices, the long-recognized freedom of expressive association understood to be part of the freedom of speech makes perfect sense.

In this case, the content moderation policies of social media platforms reflect the choice whether to associate with or dissociate from certain persons, content, and viewpoints. Those choices are made each and every day by individuals and groups large and small. Nobody can be forced to invite the Nazi or the Klansman to dinner or to their book club, or to publish their rantings, whether in print, on the web, or on a cake. Yet under Texas law, the social media organizations are obliged to invite them to the virtual gathering and sit them near the head of the table.

Under a proper conception of the freedom of association, Republicans can have closed forums for discussions, as can Democrats, Libertarians, and anyone else (even the aforesaid Nazis and Klansmen) having a particular viewpoint or preference of who to include in a discussion. That some platforms are more pluralistic than most, and tolerate a considerable diversity of persons and viewpoints, does not mean they must tolerate *all* persons and viewpoints, or that they cannot prioritize and organize the discussions in their forums as they see fit. That is the essence of the "freedom" protected by the First Amendment and the associational choices that fall within such freedom.

II. Social Media Platforms Are Not Common Carriers, Public Utilities or Public Accommodations, Regardless of their Size or Popularity.

The Fifth Circuit also incorrectly treated large social media platforms as common carriers subject to regulation, much like telephone companies. Again, *Amici* agree with the NetChoice parties that the analogy is deeply flawed. See NetChoice Br. (222-555) 31-33. *Amici* would add that much of the Fifth Circuit's reasoning is predicated on the supposed monopoly power large platforms are claimed to have, or their function as supposedly essential facilities. Pet. App. (22-555) 61a-63a. That framing is not only wrong on its face, it attempts to revive or extend old regulatory cases that were implausible in their own time and make absolutely no sense in the context of the ubiquitous access to the internet in myriad forms.

As for the old cases relying on supposed scarcity or chokepoints, they were questionable even from the start. *Red Lion*, for example, turned on the early claimed scarcity of broadcast frequencies for television, as well as the notion that the airwaves were public property to which access could be conditioned upon rules requiring fairness in content. 395 U.S. at 388-391, 394. But that decision was questionable from the start and was widely criticized both then and since. See *Denver Area Educ. Telecomms. Consortium,* 518 U.S. at 813-815 (THOMAS, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J. & Scalia, J.) (noting the "dubious" distinctions between print and broadcast media drawn in *Red Lion* the impropriety of extending it to cable).

And it was soundly rejected by the time cable and satellite television expanded the channels of video communication. See *id.* at 818 n.3 (noting expanding communication opportunities negate any monopoly or bottleneck justifications for infringing on First Amendment rights of cable operators); see also *Time Warner Entm't Co., LP* v. *FCC*, 105 F.3d 723, 724-726 & n.2 (D.C. Cir. 1997) (Williams, J., dissent from denial of rehearing *en banc*, joined by Edwards, C.J. & Silberman, Ginsburg, Sentelle, JJ.) (criticizing *Red Lion*'s scarcity theory as applied to direct broadcast satellite, noting the "intense criticism" of the case from the outset). That it would retain any secondary viability in the internet age, where information flows in torrents, is absurd.

Even if we gave some passing consideration to scarcity or chokepoint-based regulation of speech in general, the nature of the scarcity and the tightness of the chokepoint would need to be far worse than is supposedly present with social media platforms. Countless newspapers—the New York Times, the Miami Herald, any number of small-market papers—all had temporary dominance in their markets. And like here, it was claimed that persons deprived of direct access to the readers of those papers might as well be crying in the wilderness. The argument, whatever kernel of truth it contained, did not carry the day as to newspapers. *Miami Herald*, 418 U.S. at 249-254.

Similarly with cable television, it was claimed that because each household generally only could or would subscribe to a single cable provider (given both physical and cost constraints), those providers

controlled a chokepoint of information access that supposedly justified imposing must-carry requirements. Once again, the argument was not sufficient to avoid First Amendment scrutiny, even if some limited carry requirements were eventually (and questionably) held to survive such scrutiny. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 815-818 (THOMAS, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J. & Scalia, J.) (discussing evolution away from *Red Lion* paradigm and elimination of bottleneck problems). Again, the primary problem with the choke-point reasoning was the availability of numerous competing sources of information that made the cable providers less like the owners of the only train tracks coming into and out of a region and more like an automobile manufacturer who, while having a "monopoly" on their own brand, faced competition from other manufacturers.

Here, the transitory dominance of the more popular social media platforms is not even remotely a roadblock to competing platforms or even individual speech. And the shifting choices and politics of different platforms creates a constant churn that makes arguments based on market dominance, essential facilities, or other antitrust analogies largely absurd. Twitter has transformed into X, with different views on content moderation, and new social media platforms come and go, with something for everyone, whether it is the proliferation of Reddit subgroups, Truth Social, Instagram, Threads, Tumbler, or even

4chan for those who prefer the wild, wild west of social media.[6]

There is literally no barrier to individuals seeking to express themselves in a manner accessible to hundreds of millions of people. There is no choke point, websites can be had for pennies or for free, and one can find a social media platform that caters to almost any viewpoint, even viewpoints widely considered vile or hateful. Indeed, one of the many consequences of the democratization of communications via "cheap speech" is that consumers have more choices and may look to trusted intermediaries to curate the flood of speakers and information available to them. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1806-1807 (1995) ("new information technologies * * * will dramatically reduce the costs of distributing speech; and, therefore * * * the new media order that these technologies will bring will be much more democratic and diverse than the environment we see now. Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all."); *id.* at 1829-1830 (discussing greater information overload from cheap speech and the availability of

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[6] That the Texas law excludes platforms with fewer than 50 million users and excludes platforms of any size that allow user interaction as an adjunct to other speech or association, highlights the absurdity (and the state-driven speaker discrimination) of the scheme. Platforms with 49 million users, or that allow users to comment on news items, sports, or other conversation starters, are no different in their exercise of editorial or associational rights, are no less "dominant" as to those who elect to use those platforms, and reflect no other differences that are material to First Amendment analysis.

different screening strategies, including services that can provide customized variety). Such editorial curation or moderation, and the selection of who to turn to for such assistance, is not a structural barrier in the antitrust or essential facilities sense, but rather an associational choice that necessarily excludes some speakers and viewpoints from the association and elevates others. Speakers or listeners who do not like the choices made on one platform are free to form or join another platform with different views on what expression warrants making it past the filter.

The problem for speakers that sometimes get tossed from large platforms is not a monopoly on access or a bottleneck in the pipeline, but rather that such speakers and viewpoints are sufficiently unpopular or unpleasant that potential listeners simply do not seek them out and are often happy to see them go. But speakers have no right to force their speech upon unwilling or uninterested listeners. They may have the right to speak into the air or the electronic ether and hope someone comes to listen, but that is a far cry from having a right to force others to retransmit their speech to a particular audience or worse still, to prioritize it equally with speech more interesting to and valued by a platform and its users.

The notion that a platform's popularity, derived in part, perhaps, from sensible moderation decisions, suddenly causes it to lose control over those choices is absurd.

That far fewer people may be interested in listening to certain speakers or viewpoints is no more relevant than the fact that few people listen to the

rantings of a particular speaker on a soapbox in a public park. The lack of success by the unpopular or privately shunned speaker does not create a right of access to more popular private venues such as the top TV or radio talk shows or similar private forums.

III. Corporate or Other Statutory Benefits May Not Be Conditioned upon, and Do Not Imply, the Waiver of First Amendment Protections.

The Fifth Circuit's opening trope rejecting the notion that "corporations" have a First Amendment right to censor what "people" say, Pet. App. (22-555) 3a, and its direct arguments that Section 230 somehow converts social media platforms into common carriers by exempting them from liability based on the information content of others, *id*. at 48a-55a, both misconceive the nature of the First Amendment rights at stake and the operation and implications of Section 230.

A. Speech and association through the corporate form does not undermine the First Amendment's limits on government conduct.

Starting with the opening framing, to the extent the Fifth Circuit is suggesting that speech restrictions directed at corporations are not covered by the First Amendment, that conflicts with both extensive precedent and First Amendment fundamentals. Numerous Supreme Court cases recognize that restrictions on corporate speech are constrained by the First Amendment. See*, e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 342 (2010) ("First

Amendment protection extends to corporations") (citing numerous cases); *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 776 (1978) (proper question "is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does."); *Bellotti*, 435 U.S. at 781 (rejecting claim that First Amendment does not protect expression by corporations, citing numerous cases).

And as a fundamental First Amendment matter, the cases applying the First Amendment to restrictions on corporate speech are correct. The suggestion that the First Amendment protects the right of individuals to commandeer corporate speech channels ignores the text of the First Amendment, which restrains the power of *government* against speech. It does not embody some broad egalitarian bulwark against the power of any and all big, "bad" collective entities that might be used against the little individual. It is, after all, "the freedom of speech" and "of the press" that is protected, not merely the freedom "of individuals to speak."

Corporations plainly engage in speech on matters of public importance, and, at a minimum, citizens have the right to hear from such corporate speakers. The freedom of corporate speakers to speak, and the freedom of individuals to receive such speech, fall comfortably within the constitutional text forbidding restrictions on "the freedom of speech." Any effort to look to history to narrow that textual coverage would require a substantial showing with the burden of proof

on those who would restrict corporate speech. Cf., *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 25, 33-34 (2022) (burden on government to prove that activity is historically outside the protections of the text of the First and Second Amendments).

Furthermore, even if the First Amendment were thought to only protect the rights of natural persons, corporations are no more that *associations* of persons (or associations of associations, etc., if there is corporate ownership of shares). That such persons are organized under corporate structures as opposed to using unincorporated associations, has nothing to do with whether they are engaged in collective speech or other First Amendment activities. *Citizens United*, 558 U.S. at 343 ("*Corporations and other associations*, like individuals, contribute to" activities protected by the First Amendment; "The Court has thus rejected the argument that political speech of *corporations or other associations* should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" (emphasis added) (citations omitted)).

And as discussed in Part I, *supra*, there is ample precedent and principle supporting the protection of collective expressive association as included in the freedom of speech.[7]

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[7] The alternative would be such a narrow reading of the First Amendment that individuals would only have protection for their efforts to stand upon a soapbox in the town square, but not for their efforts to organize a march, a protest, to share expenses for printing or advertising even political speech, etc.

Finally, the notion that the corporate form confers benefits or advantages that somehow justify or may be conditioned upon a forfeiture of First Amendment protections ignores the long line of cases rejecting unconstitutional conditions. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 489 (1996) (plurality op.); *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972). Whatever benefits the corporate form may provide for the individuals associating via that form, those benefits cannot be conditioned on restricting constitutional rights any more than can ordinary public employment, contracting, benefits, or the other "advantages" provided by the ever-expanding role of government in the lives of citizens. The benefit of the corporate form is not different in any material way from other benefits conferred by the government that may not be conditioned on abandonment of constitutional protections.

B. The added protections of Section 230 are fully consistent with the First Amendment's protection of the speech and associational decisions of social media platforms and may not be conditioned on the abandonment of such protection.

As *Amicus* Reason noted in its previous brief to this Court in *Gonzalez* v. *Google LLC*, 598 U.S. 617 (2023) (No. 21-1333) (Reason *Google* Br.), https://tinyurl.com /txhdypkv, there is no inconsistency between the protections of Section 230 and the protections of the First Amendment for social media platforms.

As an initial matter, while the protections of Section 230 are not required by the First Amendment, those protections cannot be conditioned on the sacrifice of First Amendment protections. Congress, for its own quite good reasons, adopted Section 230 to limit the litigation risk of social media platforms *and users* that transmit "information content" produced by others. It could, but ought not, rescind those protections if it were inclined to wreak havoc on the internet and the economy. Reason *Google* Br. at 9-23. But the fact that some of the consequences of the editorial and publishing decisions of social media platforms have been mitigated cannot possibly change the scope of the First Amendment, as even the Fifth Circuit seems to have conceded. Pet. App. (22-555) 55a. And the congressional command that social media companies (and their users) not be treated as "publishers" of some of the transmitted "information content" of others for liability purposes does not mean they are not still speakers, publishers, editors, organizers, or authors for constitutional purposes.

Second, far from treating interactive computer services as mere unmoderated conduits for the speech of others, Section 230 both recognizes and, in some instances, facilitates private content moderation that could not be mandated by the government consistent with the First Amendment. For example, Section 230 specifically allows and seemingly encourages content moderation of other "objectionable" content, "whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2). Sexually explicit material, hate speech, and many other categories that might be "objectionable" to some can be moderated and

excluded with the express blessing of Section 230 and without risk of losing the protections as to the speech of others. Indeed, the Fifth Circuit acknowledges such editorial discretion contemplated by Section 230, but incorrectly treats it as covering only illegal expression, ignoring that much "objectionable" expression may also be expression protected by the First Amendment from government restriction. Recognition that platforms can, do, and are encouraged to moderate even protected speech to enhance the appeal of their private forums is fatal to any notion that Section 230 treats or makes social media platforms into common carriers forbidden from exercising discretion over who may participate or the scope of discussion permitted in such forums.

Furthermore, even the scope of protection provided by Section 230 reflects the view that platforms can be speakers, editors, and associational organizers in their own right. Liability protection only extends to suits based on the information content of "others," and not to the information content of the platforms themselves, or other choices the platforms make. As *Amicus* Reason noted in its *Google* brief, Section 230 bars liability for "the consequences of having presented or organized the 'information provided by another,' rather than for creating and publishing Google's *own* information content." Reason *Google* Br. at 6 (quoting 47 U.S.C. § 230(c)(1). As with copyright for collective works, which views the editor as the "author" only with respect to the organizational content and not the underlying works (or facts) themselves, so it is with social media platforms. They neither own nor are the authors of the "information

provided by" another, but they are the author of the organized whole and are indeed responsible for the "information" provided by such organizational choices themselves. Those choices and that "information" can be viewed as speech, association, or editorial expression, but they are protected by the First Amendment regardless of whose speech is being compiled or excluded. *Id.* at 7 ("where an algorithm or other organizational action or policy itself might create some information content (appending a warning label for example), a user or provider may only be held responsible for that information alone, and not the underlying information 'provided by another.'").

The fundamental point of Section 230 is that platforms do not *adopt* the speech of others merely by transmitting it to others, not that they are engaged in no First Amendment-protected activity at all. Certainly, by excluding some content or users, the platform is saying *something* about what is allowed to remain. But what they are saying may be "this is interesting," "you might want to see this," or "this is acceptably tolerable" rather than "this is right" or "I agree."

And even apart from "saying" something, platforms are affirmatively choosing to associate or disassociate with content, which is expressive activity regardless whether it is characterized as the platforms "speaking" in a literal sense. That the platforms are willing to tolerate association with a range of views that may not be their own, but not other views that they find cross the line, does not change the expressive nature of those associational choices; it just changes

the *content* of such expression. Disassociating from a small number of speakers or content says those persons and ideas go too far to be associated with in the judgment of the platform "editors."[8] And the limited nature of such removals says, at most, that the remaining expressions are minimally acceptable, not that they are right, or good, or the particularized statements of the platform itself. That such speech remains the speech of others, rather than of the platforms themselves (absent specific adoption or endorsement) is a far cry from suggesting that the moderating decisions of the platforms are not themselves speech, or that they are not associational choices just like membership criteria in clubs, selection of which letters-to-the-editor or outside opinion pieces to publish, or any of the myriad selections made by First Amendment actors in virtually every situation involving more than a single speaker on a soapbox.

Nothing in Section 230 or in the platforms' broad claims to be lenient and pro-speech in their moderating decisions negates the fundamental reality

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[8] If a platform, for example, banned users advocating for a repeal of the Civil War Amendments, a return to slavery, or the completion of Hitler's final solution, they would plainly be discriminating against people based on their constitutionally protected viewpoint and just as plainly have every right to dissociate from such fine folk. That they also choose to dissociate from people with less inflammatory views does not change the underlying point or principal. It is the association and its organizers who have the "freedom" to set the expressive parameters of the group, not the States of Florida or Texas. Such a line drawing between favored and disfavored expression is emphatically not for the government.

that platforms speak, associate, and make numerous other expressive choices in the context of a nearly purely expressive activity. Expressive associations do not have to be highly restrictive or focused on particular viewpoints to be protected by the First Amendment. They just have to be expressive. That Section 230 extends protection beyond the First Amendment does not mean it operates in lieu of that Amendment, and does not justify treating the platforms as unprotected non-expressive actors.

CONCLUSION

The editorial decisions and content moderation policies of social media platforms, large or small, are exercises of the freedom of speech, the freedom of the press, and the freedom of association protected by the First Amendment. Efforts to force such companies to convey or associate with viewpoints or persons with which or whom they disagree or otherwise choose to disassociate from thus violate the First Amendment.

That such private choices to disassociate may deny the person so rejected the benefits of such association with a popular platform and its users does not convert the platforms into common carriers, public accommodations, or anything else that can justify restrictions on their First Amendment rights. Popular speakers, television hosts, newspapers, or interactive media organizers do not lose their First Amendment associational rights merely because they reach a bigger audience than alternative speakers, organizers, or online communities. That a rejected speaker cannot persuade a sufficient audience to listen to them is a flaw in the speaker, not the channels of

communication. Listeners make and can remake their own choices and overwhelmingly favor interactive speech platforms with content moderation policies that best match their own preferences.

Finally, whatever benefits the government may provide to corporations generally or to interactive media platforms specifically, none of those change the protected nature of the expressive and associational choices made by those companies.

For the foregoing reasons and the reasons discussed in the NetChoice party briefs, the decision of the Fifth Circuit should be reversed, the decision of the Eleventh Circuit should be affirmed, and both the Florida and Texas statutes should be held to violate the First Amendment.

Respectfully submitted,

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