No. 22-277

In the

Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,

Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the Freedom of Speech necessary to participate in our democratic republic. The Center has participated as amicus or counsel for a party in a number of First Amendment cases before this Court including: *303 Creative LLC v. Elenis*, No. 21-476; *Janus v. American Federation of State, County, and Mun. Employees*, 138 S.Ct. 2448 (2018); *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018); and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018), to name a few.

SUMMARY OF ARGUMENT

The Court below noted that the Founders could not have anticipated anything like our social media platforms. Indeed, they could not have anticipated just about anything about how we communicate and share ideas today. Of course, they were familiar with newspapers – which were just as partisan then as they are today. *See* Jerry W. Knudson, JEFFERSON AND THE PRESS at 2-3 (2006) (Thomas Jefferson funded the National Gazette to publicize his political viewpoint and Alexander Hamilton founded the New York Evening

[1] All parties received timely notice of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Post to help publicize his viewpoints). But they would not have anticipated that newspapers would become increasingly irrelevant because of the Internet.

Social media platforms boast tens of millions of registered users, dwarfing all other forms of print or broadcast media. Further, control of these platforms in concentrated in the hands of just a few people. *Biden v. Knight First Amendment Institute at Columbia*, 141 S.Ct. 1220, 1224 (2021) (Thomas, J., concurring). The platforms generally do not publish their own message, but rather provide a forum for others to share news and opinions. A unique feature of these platforms is that a user might broadcast his opinion to followers subscribed to his Twitter feed or Facebook page, and those followers can then rebroadcast that message to their own followers and so on. Views are spread based on their popularity or reader's interest in the viewpoint. No one broadcaster has a monopoly on what can be said. That makes the social media platforms a uniquely powerful form of spreading ideas.

Congress gave these platforms unique benefits to assist their growth. Because the platforms are not in the business of broadcasting their own opinions but rather hosting the broadcasts of others, Congress enacted protections to ensure that the platforms would not be subject to liability as a publisher.

All of this raises "issues of great importance" not yet addressed by this Court. *NetChoice, LLC v. Paxton*, 142 S.Ct. 1715, 1716 (2022) (Alito, J., dissenting from the grant of application to vacate a stay). As Justice Alito noted "It is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies." *Id.*

The Court should grant review to grapple with those issues on which two Circuit Courts of Appeals have already come to conflicting conclusions. *Compare NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022) *with NetChoice v. Attorney General, State of Florida*, 34 F.4th 1196 (11th Cir. 2022).

This Court should also grant review to determine whether the platforms can be regulated as "common carriers," and how any such regulations are limited by the Free Speech Clause. Finally, the Court should grant review to determine whether comments of individual legislators can change an otherwise content-neutral regulation into one that a court will presume discriminates on the basis of content.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Determine How State Regulation of Giant Social Media Companies Fits in to Existing First Amendment Precedents.

The social media platforms are different. *See Biden*, 141 S.Ct. at 1221 (2021) (Thomas, J., concurring). They are not like cable television, since users must subscribe to cable service, but they can access social media platforms through the Internet from a computer (or a cell phone service, which is quickly becoming similar to computer access to the Internet in terms of bandwidth and speed) to access the content of the platforms. Nor are the platforms like newspapers that publish their own views. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257(1974).

Unlike newspapers or programs created for cable broadcast, the platforms serve as a host for publica-

tion by others. The platforms are not curated or edited (at least not where it is visible). Indeed, Congress enacted Section 230 of the Communications Act to ensure that the platforms did not need to curate content. Section 230 grants social media platforms an exemption from liability as a publisher of what the platforms' users post on the platform. 47 U.S.C. § 230(c).

Nor are social media platforms similar to the billing envelope sent out by a public utility. As a general matter, nobody assumes that Twitter, Facebook, YouTube, or Google is endorsing the viewpoint of any of its users, or that these social media giants have a viewpoint at all. *See Pacific Gas and Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 9-11 (1986) (Plurality op.) They exist to gather subscribers by offering to allow those subscribers the opportunity to freely publish their own thoughts, ideas, viewpoints, or news. The companies make money off of advertising by other companies who want access to the platforms' subscribers. It is the number of their subscribers, not the content of what is broadcast by those subscribers, that is the business of the platform.

Because the platforms are not forming a message by the selection of subscribers, they are not like a parade. The message of the parade is the sum total of the units in the parade. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995). The social media platforms, however, are selling viewers (their subscribers) to advertisers, rather than creating a message based on who subscribes.

If the platforms were run by a government entity, there is no question that viewpoint discrimination could be prohibited. *Cf. Biden*, 141 S.Ct. at 1221

(Thomas, J., concurring). However, social media platforms are private actors. That is not to say that the platforms have not benefitted from government assistance. Any communication medium that uses the Internet has benefitted from the Federal Communications Commission's orders promoting broadband Internet access. *Cf. Mozilla Corp. v. Federal Communications Commission*, 940 F.3d 1, 21-22 (D.C.Cir 2019). Most significant is Congress's decision to insulate the large social media platforms from the liability faced by traditional "publishers."

Under section 230 of the Communications Act, social media platforms are not liable for the content posted to their platform by users. 47 U.S.C. § 230(c). The express protection is that the platform cannot be treated as either the publisher or the speaker of content posted by users. *Id*. Congress took this action based on the finding that the platforms grant *users* "a great degree of control over the information that they receive." 47 U.S.C. §230(a)(2). Congress also found that Americans increasingly rely on the platforms for political, educational, and cultural purposes. 47 U.S.C. § 230(a)(5). Congress's policy in enacting Section 230 was to place censorship of content in the hands of users – specifically in the hands of parents to block or limit "access to material that is harmful to minors." 47 U.S.C. § 230(d). Congress did not expect that the social media companies to engage in active censorship. The whole purpose of Section 230 was to keep the social media platforms out of the censorship business.

The regulations at issue in this case promote rather than hinder Congress's purpose in enacting Section 230. The state law does not prohibit the social

media platforms from publishing their own message on their own platform. In no way do the regulations interfere with the platforms' freedom to communicate with their users. Instead, the state law at issue prohibits "deplatforming" a candidate for office and the censorship of messages posted by users. In this sense, the state law resembles the "must-carry regulations for cable television providers that was at issue in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 634 (1994).

Censorship by the social media platforms does not itself appear to be a form of protected speech. The censorship at issue is not always done in a public manner – sometimes only the individual being censored has notice. In any event, the social media companies are not speaking when they censor a user. Instead, they are keeping the user from speaking. Some decisions to deplatform a user have been made public. But even this does not constitute speech. Unlike the parade at issue in *Hurley*, the social media companies do not purport to create a message of their own out of the identity or viewpoints of their subscribers. As noted above, the social media companies are in the business of selling access to their subscribers to advertisers.

As this Court noted in *Turner*, the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict … the free flow of information and ideas." *Turner*, 512 U.S. at 657. And if Congress can impose "must-carry" requirements on cable companies, the regulation of social media platforms should have a lower bar. The cable companies argued that they have limited space for carrying programming. *Id.* at 637. But Justice Thomas has noted that "space constraints on digital

platforms are practically nonexistent" which distinguishes them from cable companies and other forms of communication. *Biden*, 141 S.Ct. at 1226 (Thomas. J. concurring). Because of the lack of space constraints, must-carry regulations (limiting the right to censor or exclude) will not restrict the social media companies from expressing their own opinions should they choose to do so. The regulations do not affect their speech. The Court should grant review in this case to decide whether the analysis applied in *Turner* also applies to social media platforms.

II. The Court Should Grant Review to Determine Whether Giant Social Media Companies Can Be Regulated as Common Carriers.

Justice Thomas has suggested that this Court ought to consider its line of cases upholding regulation of "common carriers" in reviewing regulation of social media platforms. *Biden*, 141 S.Ct. at 1222-25 (Thomas, J., concurring).

Traditionally, a common carrier is "one who undertakes for hire to transport the goods of those who may choose to employ him." *Propeller Niagara v. Cordes*, 62 U.S. 7, 22 (1858). What creates the status of common carrier is holding yourself open for hire, rather than working for one company exclusively. *See Michigan Pub. Utilities Comm'n v. Duke*, 266 U.S. 570, 576 (1925). Status as a common carrier requires the business "to take the goods of all who offer" unless there was no more room for goods to transport on that trip. *Id*. Although the law of common carriers grew up around the use of the roads, it was soon extended to carriers that used the navigable waters (*The Lady Pike*, 88 U.S. 1, 14 (1874)), oil pipelines (*Producers'*

Transp. Co. v. R.R. Comm'n of State of Cal., 251 U.S. 228, 230-31 (1920)), and the railroads (*United States v. Louisiana & P.R. Co.*, 234 U.S. 1, 24 (1914)) for transport of goods.

Congress has declared that communication by telephone and telegraph is also a common carrier activity. *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 474 (1940). (Justice Thomas notes that the Court's treatment of telegraphs as a common carrier has been inconsistent, but that the Court "consistently recognized that telegraphs were at least analogous enough to common carriers to be regulated similarly." *Biden*, 141 S.Ct. at 1223, n.2 (Thomas, J. concurring).) By analogy, a social media platform also qualifies as a common carrier. It does not transport "goods," but it does transmit communication like a telephone or telegraph. The messages posted by users of the platforms are not received by everyone, but rather only those who choose to receive the message. It is very much analogous to direct communication. It differs only in that it can be communicated to more than one person at a time, and that the message can be resent by the recipients, allowing the communication to spread according to the interests of the recipients.

If the social media platforms are common carriers, then content neutral "must-carry" regulations would not offend the First Amendment if they further an important interest unrelated to the suppression of speech." *Turner*, 512 U.S. at 662. If the state interest is to maintain a free flow of information, the state law will meet that standard.

This Court should grant review to determine whether social media platforms can be regulated as common carriers.

III. The Court Should Grant Review to Determine Whether Statements by Individual Lawmakers Are Probative of Whether a Law is Content Neutral.

The Court below found that the challenged regulation was not content neutral in part based on statements by the author of the legislation and statements made by the Governor when he signed the law. There has been ongoing debate by the members of this Court about whether it is appropriate to resort to statements of individual legislators to decide the "purpose" of an enactment. Justice Thomas has noted that only the text of the law should be considered, rather than the statements and motivations of individual legislators. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 130-31 (2015) (Thomas, J., concurring in the judgment).

In some cases, the Court has discounted the opinions of individual legislators and concentrated instead on the text of the law. *See Bd. Of Educ. Of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 248-49 (1990). The Court has also noted that it should not void a statute that is facially constitutional based the statements of a few legislators. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 384.

On the other hand, this Court, arguably in *dicta*, did consider subjective motivations of individual legislators in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993), but as Justice Scalia pointed out in his concurrence, reliance on those statements was unnecessary because the law

was facially discriminatory. *Id*. at 558 (Scalia, J., concurring in part and concurring in the judgment).

If the legal text is facially content neutral, then the statements of individual legislators should not be able to alter the analysis. Statements by individual legislators could not change the application of the law should, for example, Twitter be sold to an investor with different views about censorship and deplatforming than the current managers. The text of the law will apply in the same way no matter who is running the company.

Nonetheless, the Court's conflicting statements about how the views of individual legislators can be used to define the purpose or intent of a law is a matter deserving of this Court's attention. The Court should grant review on this issue as well.

CONCLUSION

Justice Thomas noted that "[t]oday's digital platforms provide avenues for historically unprecedented amounts of speech …. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties." *Biden*, 141 S.Ct. at 1221. This case presents a good vehicle for deciding how states can regulate social media platforms in order to enhance the free flow of speech that these companies are seeking to suppress. The petition for certiorari should be granted.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae