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 Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit**

BRIEF FOR DONALD J. TRUMP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JOHN P. COALE
Counsel of Record
2901 Fessenden St. NW
Washington, D.C. 20008
johnpcoale@aol.com
(202) 255-2096

RICHARD POLK LAWSON
JESSICA HART STEINMANN
PATRICIA NATION
JASE PANEBIANCO
AMERICA FIRST
POLICY INSTITUTE
1001 Pennsylvania Ave. NW
Suite 530
Washington D.C. 20004

Counsel for Amicus Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED

Whether a Florida statute requiring social media platforms to apply their "censorship, deplatforming, and shadow banning standards in a consistent manner" (Fla. Stat. § 501.2041(2)(b)) complies with the First Amendment.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Donald J. Trump, 45th President of the United States, is the lead plaintiff in class action lawsuits filed against Twitter, Inc.,[2] Meta Platforms, Inc.,[3] and YouTube, LLC.[4] Among the causes of action[5] alleged in these cases is a violation of Ch. 2021-32, Laws of Florida (S.B. 7072).[6] Specifically, *Amicus* Trump has asserted that these social media platforms violated S.B. 7072, codified at Fla. Stat. § 501.2041(2)(b) ("Section (2)(b)" or "(2)(b)")[7] by failing

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[1] No parties other than the *Amicus* and his counsel have provided funds for this brief; no counsel for any party to this action have authored any portion of this brief.

[2] *Trump et al. v. Twitter, Inc., et al.*, 21-cv-8378 (CA N.D.) (currently before the Ninth Circuit Court of Appeals, *Donald Trump, et al. v. Twitter Inc., et al.*, case no. 22-15961; oral argument has been concluded in the appeal but no decision has been issued).

[3] *Trump et al. v. Meta Platforms, Inc.*, *et al.*, 21-cv-9044 (CA N.D.)

[4] *Trump et al. v. YouTube, LLC*, *et al.*, 21-cv-9008 (CA N.D.)

[5] In addition to the S.B. 7072 causes of action, there are claims under the First Amendment, the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*, and an action to determine the constitutionality of Section 230.

[6] Fla. Stat. § 501.2041 *et seq.* (2022)

[7] Section (2)(b) reads as follows: "A social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform."

to consistently apply their censorship,[8] deplatforming,[9] and shadow banning standards[10] (together, "Censorship Standards").

The Eleventh Circuit in *NetChoice, LLC v. AG, Florida*, 34 F.4th 1196 (11th Cir. 2022) ("*Moody*") held that Section (2)(b)'s consistency provision likely violated the First Amendment by impairing the platforms' free speech interests. In a parallel development a few months later, the Fifth Circuit Court of Appeals in *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) ("*Paxton*"), upheld a Texas law ("H.B. 20"), which also affected the operations of social media platforms.

This Court accepted review of the *Moody* and *Paxton* but limited the scope to the first and second questions presented by the Solicitor General's *amicus curiae* brief. *Amicus* Trump's brief is limited exclusively to the Solicitor General's first question, the First Amendment implications of S.B. 7072's content moderation provisions. Further, this *amicus* brief is limited to the discrete question of the validity of Section (2)(b)'s consistency provision. As Section 6

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[8] Florida Statutes § 501.2041(1)(b) defines "Censor" to include a social media platform deleting, regulating, or restricting content posted by a user.

[9] Florida Statutes § 501.2041(1)(b) defines "Deplatform" to include an act by a social media platform to permanently or temporarily delete or ban a user for more than 14 days."

[10] Florida Statutes § 501.2041(1)(b) defines "Shadow ban" to include an action by a social media platform to limit the exposure of a user or content.

of S.B. 7072 contains a severability provision[11], the Court's decision as to Section (2)(b) will neither affect nor be affected by its decision on the balance of S.B. 7072. The same holds true for Texas' H.B. 20 as it has no directly comparable provision to Section (2)(b).

Amicus Trump respectfully submits that Section (2)(b) is supported by long-standing common-law principles prohibiting unfair discrimination by common carriers and, regardless of how the Court may rule as to the other sections of S.B. 7072 or H.B. 20, the Court should uphold this consistency provision.

SUMMARY OF THE ARGUMENT

A platform's decision to discriminate against a user unfairly is not protected by either the First Amendment or Section 230 of the Communications Decency Act ("Section 230").[12]

The Eleventh Circuit erroneously concluded that social media platforms "have a First Amendment right to be 'unfair' – which is to say, a right to have and express their own points of view." *Moody*, 34 F.4th at 1228. The Eleventh Circuit's error rests on a

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[11] S.B. 7072 Section 6 reads as follows: "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable."

[12] 47 U.S.C. § 230 ("Section 230" or "§ 230").

sweeping and incorrect conclusion that when platforms deliver a user's content, the platforms are themselves engaged in speech rather than acting like telephone or telegraph operators.

Contrariwise, *Paxton* correctly determined that when platforms host and distribute content protected by Section 230, the platforms are not engaged in speech. *Paxton*, 49 F.4th at 448 ("Our decision . . . is reinforced by 47 U.S.C. § 230, which reflects Congress's judgment that the Platforms are not "speaking" when they host other people's speech."). Section 230 immunity only applies when the content at issue is "provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). Section 230 defines "information content provider" as a party "responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). Put simply, a party engaged in speech is an "information content provider" and is, *per se,* unprotected by Section 230.

Section (2)(b) requires platforms to apply their Censorship Standards to user content in a way that is consistent with their user agreements. Much of this content is protected by Section 230 and not the platform's speech, but even if the consistent application of Censorship Standards affected a platform's speech, there is no reading of the First Amendment that grants an industry the unilateral right to ignore the terms of their consumer contracts. Moreover, Section (2)(b)'s consistency provision falls within the long-standing prohibition against unfair discrimination by common carriers.

Platforms hosting third-party content act like airlines carrying passengers, telegraph companies transmitting messages, or railroads carrying freight. Like these traditional common carriers, the largest platforms offer their services to one and all on a take-it-or-leave-it basis without any bespoke modification. Like other carriers, platforms have full authority to determine what and how they will carry content, but once set, they must honor their statements.

Section 230 was enacted to promote more content, not less; Congress created this immunity to further "the policy of the United States" to "promote the continued development of the internet . . . and other interactive media." 47 U.S.C. § 230(b)(1).

Section 230 was designed to promote a "forum for a true diversity of political discourse . . . opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3).

The importance of Section 230 cannot be overstated: without its immunity, social media would not exist. Michael Beckerman, the former president of the industry trade group the Internet Association, stated that Section 230 is "the one line of federal code that has created more economic value in this country than any other."[13]

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[13] Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google is About to Change*, National Public Radio (March 21, 2018).

Given the industry's indebtedness to Section 230 and Congress' rationale for immunity, when platforms act under the special privilege of Section 230 immunity they are engaged in public work, established by public authority, and intended for public use and benefit. This is the very definition of a common carrier. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 553-54 (Harlan, J., dissenting) ("That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed," citing *Inhabitants of Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564, "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement.").

The special privilege of Section 230 immunity is much like the special privileges bestowed on railroads in the 1800s through land grants and eminent domain powers. Where the government sought to further the 19th-century policy of developing a transcontinental rail network, Section 230 furthers a 21st-century policy of developing a digital network. Just as the grant of special privileges to the railroads brought them within the ambit of the common carrier obligations, so too has Section 230 brought the platforms within the realm of common carrier responsibilities. Foremost among these obligations is a prohibition against unfair discrimination. Viewed from its proper historical

setting, Section (2)(b)'s consistency provision is nothing other than one of the law's oldest forms of consumer protection, updated for the digital age.

ARGUMENT

Introduction

The conflict between *Moody* and *Paxton* is a result of their analyzing two separate and distinct acts performed by platforms: hosting and curating, or "feeding," third-party content. As it focused on platforms' *feeding* functions, *Moody* overlooked the platforms' representations to their users and thereby failed to recognize the basic consumer protection function of Section (2)(b). *Moody*, 34 F.4th at 1216. By contrast, *Paxton* studied the platforms' *hosting* functions and correctly concluded that such activity is, *per se*, not speech and that H.B. 20 is a valid consumer protection statute. *Paxton*, 49 F.4th at 461.

Adding to the confusion is the fact that each act—*hosting* and *feeding*—is undertaken by the platforms simultaneously. A typical platform will "host" third-party content on a webpage specifically devoted to that user's content, and this content is subject to minimal review by the platforms. *Id.* (". . . the Platforms permit any user who agrees to their boilerplate terms of service to communicate on any topic, at any time, and for any reason. And . . . virtually none of this content is meaningfully reviewed or edited in any way"). The volume of data processed by platforms is almost incomprehensible: every *minute,* 500 hours of video are uploaded to YouTube, 510,000 comments are posted to Facebook,

and 347,000 tweets are posted on X (formerly Twitter). Brief for Respondent State of Florida, p. 23. These platforms then provide this content in a feed, which is delivered or "fed" to other users on the platform. *Paxton,* 49 F.4th at 460. Rejecting the Eleventh Circuit's analysis, *Paxton* held that a "social media feed is 'curated' in the same sense that his mail is curated because the postal service has . . . [screened] out hazardous materials." *Paxton*, 49 F.4th at 492.

To give an example of the inconsistent application of Censorship Standards as well as illustrate the difference between hosting and feeding content, it is helpful to examine an episode from 2018 when the *New York Times* announced it hired reporter Sarah Jeong. At the time, Twitter (now known as X) stated that it is ". . . committed to combating abuse motivated by hatred, prejudice or intolerance."[14] Nevertheless, when Jeong was hired by the *Times,* Ms. Jeong's prior posts—still hosted by Twitter—surfaced, including but not limited to the following:

1. White men are bullshit;
2. [White people are] like dogs pissing on fire hydrants; and
3. #CancelWhitePeople; and,
4. "Are white people genetically disposed to burn faster in the sun, thus logically being only fit to live

[14] Twitter, *Hateful Conduct*, Twitter Terms of Service (April 2023), https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy

> underground like groveling goblins."[15]

Twitter might have once *fed* those tweets to other users, but when this attracted national attention, the tweets were simply being *hosted* on the platform and visible to users. In response to the news about Ms. Jeong's tweets, conservative commentator Candace Owens, herself an African American woman, attempted to highlight their provocative nature by posting the following to her "hosted" profile on Twitter:

> "Jewish people are bull—t … like dogs pissing on fire hydrants #cancelJewishpeople Are Jewish people genetically predisposed to burn faster in the sun? The above statements are from @nytimes editor @SarahJeong. I simply swapped out the word 'white' for 'Jewish.'"[16]

Unlike its continued *hosting* of Ms. Jeong's tweets, Twitter censored Ms. Owens for 12 hours in response to her ostensible violation of Twitter's policies regarding hateful conduct.

The Jeong/Owens episode demonstrates the consumer protection interest in the consistency provision of Section (2)(b). Under *Moody*, The First

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[15] Andrew Sullivan, "When Racism is Fit to Print," *New York Magazine*, Aug. 3, 2018.

[16] https://www.washingtontimes.com/news/2018/aug/5/candace-owens-mimics-sarah-jeong-gets-suspended-tw/

Amendment would protect Twitter's decision to censor Owens' tweets despite continuing to host Jeong's. Drawing on common-law traditions, Section (2)(b) specifically addresses this type of unfair discrimination. Housed within Florida Statutes Chapter 501, Part II, prohibiting deceptive and unfair trade practices, Section (2)(b) claims are not so much based on a platform's failure to honor its user agreement as the fact that it *deceived* users as to the platform's policies.

Fundamentally, however, there is no plausible reading of the First Amendment that would allow a party, much less one acting under a special privilege like Section 230 immunity, to unilaterally breach a consumer contract by unfairly discriminating against users through the biased application of its *own* Censorship Standards.

A Platform's Protected Speech is Unprotected by Section 230

A platform's speech is, by definition, unprotected by Section 230. Section 230 states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and an "information content provider" is defined to include anyone who is responsible, in whole or in part, for the creation or development of information provided through the internet. 47 U.S.C. §§ 230(c)(1), 230(f)(3). As noted in *Paxton*, the industry has repeatedly asserted that when *hosting* or *feeding* content, the platforms are protected by Section 230:

> Thus the Platforms, unlike newspapers, are primarily "conduit[s] for news, comment, and advertising." *Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831. And that's why the Supreme Court has described them as "the modern public square." *Packingham*, 137 S. Ct. at 1737; *see also Biden v. Knight First Amend. Inst.*, —— U.S. ——, 141 S. Ct. 1220, 1224, 209 L.Ed.2d 519 (2021) (Thomas, J., concurring) (noting Platforms are also "unlike newspapers" in that they "hold themselves out as organizations that focus on distributing the speech of the broader public").
>
> The Platforms' own representations confirm this. They've told their users: "We try to explicitly view ourselves as not editors.... We don't want to have editorial judgment over the content that's in your feed." They've told the public that they "may not monitor," "do not endorse," and "cannot take responsibility for" the content on their Platforms. They've told Congress that their "goal is to offer a platform for all ideas." And they've told courts—over and over again—that they simply "serv[e] as conduits for other parties' speech."

49 F.4th at 460. Even if the *Moody* court knows better than the platforms as to when they are speaking,

Moody still erred by blessing their ability to deceive consumers as to the platforms' terms of service:

> Even if a platform wants to retain or remove content in an *inconsistent* manner—for instance, to steer discourse in a particular direction—it may not do so . . . These provisions [Section (2)(b) and the 30 day notice requirement] thus burden platforms' right to make editorial judgments on a case-by-case basis or to change the types of content they'll disseminate—and, hence, the messages they express.

Moody, 34 F.4th at 1222 (emphasis in original). That the *Moody* court would even entertain the idea that platforms can "remove content in an *inconsistent* manner" (emphasis in original) demonstrates that it gave no consideration at all to the platforms' statements in their terms of service. The *Moody* court ignored the fact that the consistency requirement is not measured by a platform's speech interests but by the platforms' *own* Censorship Standards set forth in their *own* take-it-or-leave-it user agreements.

Rather than impeding a platform's protected speech interests, Section (2)(b) simply requires that platforms honor their Censorship Standards. Not only does the First Amendment not affect this contractual obligation, to the degree a platform enjoys Section 230 protection for this content, it is *per se* not the platform's protected speech. Furthermore, statutory prohibitions against unfair discrimination have a long lineage in the law.

Common Carrier Principles Support Section (2)(b)

The Fifth Circuit succinctly detailed the history of the common carrier obligation to treat all users fairly. *Paxton*, 49 F.4th at 469-71. Originating in the 1400s with an obligation that ferry operators run their services for the "convenience of the common people," by the 1600s, the principle was extended to private parties who owned the only wharf in a port. *Id.* Such parties were deemed to be "affected with a public interest" and thereby prohibited from "arbitrary and excessive duties" for their services. *Id.*

These same principles were broadly applied by courts and legislatures addressing the rapid industrialization of the country in the years after the Civil War. This Court cited the common-law tradition in *Munn v. Illinois* when it upheld an Illinois statute governing granary rates for storing farmers' harvests; noting the essential role of granaries, the Court held they were common carriers who, "exercise a sort of public office, and have duties to perform in which the public is interested." *Munn v. Illinois*, 94 U.S. 113, 126, 130 (1877).

Judicial Application of Common Carrier Doctrines to Railroads

Nowhere was this Gilded Age reliance on common-law common carrier principles greater than when it came to litigation over railroad practices. The railroads' common carrier status did not come as a result of a royal license like a ferry operator or an economic chokehold like a wharf owner but as a

product of the special privileges bestowed by the government to aid their construction.

Rather than a simple free market success story, America's rail network is the product of an elaborate government program involving massive land grants and the delegation of eminent domain powers to private companies. The public did not grant these special privileges simply to speed up an inevitable private sector action but to serve a vital interest: binding the Nation with a reliable and speedy transcontinental communication network.

Much as Caesar once described Gaul,[17] the United States is naturally divided into three parts: the east, with rivers draining from the Appalachians to the Atlantic; the middle, whose rivers start in the Appalachians and Rockies, flow into the Mississippi, and empty into the Gulf of Mexico; and the west, where the rivers head to the Pacific. In an era where water was invariably the speediest form of communication, there was no way to traverse the continent without, at some point, having to disembark and engage in slow and costly land travel. Even assuming no regional antagonisms, the logistical burden of governing a continent-wide nation without the railroads would at the very least be Herculean and, more likely, Sisyphean.

The idea that the railroad could solve this communication problem with help from Congress had been circulating since at least the 1840s. In 1845,

[17] Julius Caesar, *The Gallic War*, "All Gaul is divided into three parts . . .," Loeb Classical Library, Harvard University Press, 2023, P. 1.

businessman Asa Whitney proposed to Congress that it grant him a stretch of public land sixty miles wide, running from Lake Michigan to the Pacific; in return, he would sell the land, using the funds to construct a transcontinental railroad. *The Annals of America*, Encyclopedia Britannica, 1976, Vol. 7, page 272. In his proposal, he stated that he:

> . . . can see no way or means by which this great and important work can be accomplished, for ages to come, except by a grant of sufficient quantity of the public domain; your memorialist believes that from the proceeds of such a grant he will be enabled to complete said road within a reasonable period of time . . . thus, in a comparatively short space of time, accomplishing what will otherwise require ages . . .

Id. at 273. If the means of construction rested with the grant of public lands, the end of an integrated nationwide transcontinental railroad was understood by all parties as a national necessity. Whitney's appeal noted that "this road will unite them [the Pacific territories] to us, enabling them to receive the protecting care of our government." *Id.* at 275. In an anonymous article published in the *Western Journal* in 1850, the author advocated for the use of public land grants for a transcontinental railroad, warning that without railroad lines of communication: "it will become the interest, and may become the inclination of the states and territories on the Pacific slope, to form a separate government." *The Annals of America*, Encyclopedia Britannica, 1976, Vol. 8, page 71, 74.

While Congress agreed in 1853 that it should assist in the construction of a transcontinental railroad, the growing animosity of the Antebellum era precluded agreement as to the route. *The Annals of America*, Vol. 7 at 272.

Once concerns over disunion had passed from theory to reality, Congress took action. With Southern opposition removed the debates over the route were rendered moot, and in the summer of 1862 Congress enacted legislation adopting the use of land grants to fund the construction of a transcontinental railroad. In the decade running from 1862 to 1872, Congress gave 131,230,358 acres to the railroads—if its own state, it would be exceeded in size only by Alaska and Texas. Richard White, *The Republic for Which It Stands,* Oxford, 2019, pp. 117-119. Additionally, the states gave 44,224,175 acres (about the size of Missouri) to the railroads. *Id.* These legislative gifts were not without their return: the proceeds from the sale of these lands funded 29,589 miles of track between 1868 and 1873, with the "Golden Spike" driven in at Promontory, Utah, in 1869. *Id.* p. 217. The long-term effect of this land grant program cannot be overstated. Writing in the 1920s, H.G. Wells remarked that:

> The growth of the United States is a process that has no precedent in the world's history; it is a new kind of occurrence. Such a community could not have come into existence before, and if it had, without railways it would certainly have dropped to pieces long before now . . . The United States is

> being woven by railway, by telegraph, more and more into one vast unity, speaking, thinking and acting harmoniously with itself.

H.G. Wells, *A Short History of the World*, The MacMillan & Company, New York, 1922, page 382.

This then was the context in which the courts of the post-war era examined railroads: despite being private enterprises, their construction was almost entirely dependent on special privileges granted by the public. When confronted with a railroad abusing these special privileges, courts relied on the railroads' indebtedness to the public to prohibit them from engaging in unfair discrimination.

One of the earliest cases that recognized the government's unique role in the industry's development came from Kansas in 1872. Addressing a railroad's liability for a lost shipment of cattle, the court noted that common carriers unequivocally faced exposure for such losses. *Kansas Pac. Ry. Co. v. Nichols, Kennedy & Co.*, 9 Kan 235, 248 (KS 1872). Turning then to the issue of whether railroads were, in fact, common carriers, the court held that:

> In Kansas they [railroads] are endowed with a kind of *quasi* public as well as private character. In Kansas they are so far public that the sovereign power of eminent domain may be exercised for their benefit, and they are so far public, that other public aid may be extended to them. It is believed that no railroad

> has yet been built in Kansas that has not been *aided both by the exercise of the power of eminent domain*, and by other public aid, such as *lands and county or municipal bonds*.

Id. at 250 (emphasis added). Six years later, the Supreme Court of Florida similarly relied on the public's role in railroad construction to deem railroads common carriers. Rather than lost cattle, Florida was confronted with an allegation that a railroad had engaged in unfair price discrimination against a shipper. *Johnson v. Pensacola & P.R. Co.*, 16 Fla. 623 (1878). Relying on *Munn*, the Florida court acknowledged that common carriers are prohibited from engaging in unfair price discrimination. *Id.* at 663 ("It cannot be questioned that the reason why a common carrier is restricted to reasonable rates is the same that causes the limitation at common-law upon the rates to be charged by a wharfinger licensed under a statute. (*Munn vs. Illinois*, 4 Otto 113, 129.)"). Turning then to the all-important question of whether the railroads are, in fact, common carriers, the Florida court followed Kansas and held that:

> In reference to a railroad company it may be truly said that it exercises a *quasi* public employment. While railroads are managed for private benefit and the profits resulting from their operation go to individuals, yet they are treated as merely a public convenience and agency in the matter of State and inter-State commercial intercourse. *It is the public character*

> *attached to them which, under certain circumstances, authorizes taxation for their construction, as a tax for a private purpose is unconstitutional*; and it is the like *public nature of their functions which enables them to become the objects of a legislative grant to take the property of an individual* for their use, paying a reasonable compensation therefor.

Id. at 663 (emphasis added). In a string of cases through the 1880s, the railroads' receipt of these special privileges was time and again used to hold them bound by common carrier obligations.[18]

There was perhaps no greater example of the abuse of these special privileges than Rockefeller's exploitation of unfair price discrimination to benefit the Standard Oil Company. In her *History of the Standard Oil Company*, Ida Tarbell laid out how the

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[18] *See, e.g., Dinsmore*, 2 F. at 468 (Cir. Ct., D. KY, 1880) ("Railroads are quasi-public institutions" and "their construction has been encouraged by liberal grants of power, and aided by private and public contributions"); *Taylor v. Philadelphia & Reading R.R.*, 7 F. 386 (Cir. Ct., E.D. Pa. 1881) ("quasi public corporations, such as railroads . . . are invested with important public and governmental functions") ; *Southern Express Co. v. Memphis, Etc., R.R,*, 8 F. 799 (Cir. Ct., E.D. Ark. 1881) ("a railroad is a quasi public corporation, and bound by the law regulating the powers and duties of common carriers"); *McCory v. Cincinnati, Indianapolis, St. Louis & Chicago R.R.*, 13 F. 3 (Cir. Ct., S.D. Ohio 1882) ("railroad corporations are quasi public corporations dedicated to public use . . . [i]t is upon this idea that they have been invested with the power of eminent domain").

railroads worked around their published prices for hauling freight by offering "rebates" on shipments for Standard Oil and how Standard Oil lobbied against every effort to codify prohibitions on price discrimination until the Interstate Commerce Act ("ICA") was finally passed in 1887. Ida M. Tarbell, *The History of the Standard Oil Company*, New York, 1904, Vol. II, p. 290. It is important to note that Standard Oil's competitors were injured by this unfair discrimination even without any contractual relationship between the competitor and the railroad; because of the railroad's deceptive practices, a shipper who was deterred from transporting his oil because of the railroad's published price did not know that Rockefeller enjoyed a more affordable rate. This Court would eventually call Standard Oil to account for this pre-ICA "rebate" activity. *Standard Oil Co. v. United States*, 221 U.S. 1, 32-33 (1911) (". . . [the United States] alleged that the combination . . . obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and . . . many . . . competitors were forced either to become members of the combination or were driven out of business . . .").

As noted above by Justice Harlan in his dissent in *Plessy*, by the turn of the century the once novel issue of common carrier obligations applying to railroads was simply unquestioned: the special privileges of eminent domain and land grants bound the railroads to these common carrier obligations.

Social Media's Indebtedness to Special Privileges is no Less Than the Railroads'

While it is conceivable private enterprise could have constructed a transcontinental railroad, it is impossible that social media platforms as they are today would exist without the special privilege of Section 230. Mark Zuckerberg has acknowledged that "Section 230 made it possible for every major internet service to be built."[19] The workhorse of Section 230 immunity resides in the provision immunizing platforms from liability for defamation and other torts when publishing third-party content. 47 U.S.C. § 230(c)(1).

The sweep of this immunity is essentially without precedent in the Western legal tradition. Defamation claims were provided for in the Roman Laws of the Twelve Tables of c. 450 B.C, [20] recognized in the common-law since at least the 1500s,[21] and applicable to publishers for more than two centuries.[22]

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[19] Statement of Mark Zuckerberg, CEO of Facebook, Inc., *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020).

[20] The Roman Laws of the Twelve Tables stated that "[i]f anyone sings or composes an incantation that can cause dishonor or disgrace to another … he shall suffer a capital penalty." Yale Law School, *The Avalon Project* (last visited October 12, 2022): https://avalon.law.yale.edu/ancient/twelve_tables.asp

[21] *Palmer v. Thorpe*, 4 Coke's Reporter 20a (1583).

Social media's rise is no simple free-market success story. Legal commentators have noted that "[i]mmunity from tort liability is what also helped the major platforms become so big, powerful, and capable of influencing public debate—thus helping create the problems to which common carrier status might be a solution." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 457 (2021). Jack Dorsey, the founder of Twitter (now known as X), testified before Congress that "Section 230 is the Internet's most important law for free speech and safety"[23] and that Section 230 "has created so much goodness and innovation [if] we didn't have those protections when we started Twitter 14 years ago, we could not start."[24] In 2017, the Internet Association conducted a study that placed the combined value of the protections from Section 230 and the Digital Millennium Copyright Act as being worth $40 billion annually.[25] Twitter (prior to being taken private by Elon Musk in 2022),[26]

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[22] 4 William Blackstone, Commentaries *150-53.

[23] United States Senate Committee on Commerce, Science, and Transportation, October 28, 2020, https://www.commerce.senate.gov/services/files/7A232503-B194-4865-A86B-708465B2E5E2

[24] Kate Conger, et al., *Zuckerberg and Dorsey Face Harsh Questioning from Lawmakers*, *New York Times*, November 17, 2020, https://www.nytimes.com/live/2020/11/17/technology/twitter-facebook-hearings

[25] *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA, June 5, 2017, P. 2

[26] Twitter, Inc., Annual Report (Form 10-K) (Feb. 16, 2022) ("various Executive and Congressional efforts to restrict the

Alphabet (parent company of YouTube),[27] and Meta (parent company of Facebook)[28] disclosed in filings with the Securities and Exchange Commission that changes to Section 230 would have serious and negative effects on their businesses.

Unencumbered by the cost of responsible editorial oversight, social media platforms have, unsurprisingly, blossomed.

Fulfilling Congress' declaration of United States policy to promote the internet[29] and encourage its use for political, educational, and cultural purposes,[30] Americans have flocked to digital technologies since the enactment of Section 230. Research from 2023 shows that roughly 85% of

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scope of the protection from legal liability . . . under Section 230 . . . [could] result[] in increased liability for content moderation decisions and third-party content posted on our platform and higher litigation costs.").

[27] Alphabet Inc., Annual Report (Form 10-K) (Feb. 16, 2022) ("[w]e rely on statutory harbors, as set forth in . . . Section 230 . . .against liability for various linking, caching, and *hosting* activities. Any legislation or court rulings affecting these safe harbors may adversely affect us.") (emphasis added).

[28] Meta Platforms, Inc., Annual Report (Form 10-K) (Feb. 2, 2022) ("[i]n the United States, changes to Section 230 . . . may increase our costs or require significant changes to our product, business practices or operations, which could adversely affect user growth and engagement.").

[29] 47 U.S.C. § 230(b)(1)

[30] 47 U.S.C. § 230(a)(5)

Americans frequently get their news from a digital device, with nearly 60% stating they prefer to get their news from digital devices over television (27%), radio (6%), or print (5%).[31] Breaking this down further, 71% of Americans will sometimes get their news from search engines, 65% of Americans have gotten their news from dedicated news websites and apps, 49% from social media, and 30% from podcasts.[32]

Digital's popularity has been devastating for the print industry. With Section 230 immunity limited to those who publish in the digital world's binary code of zeros and ones, traditional ink and paper publishers remain subject to the *ancien regime* and face liability for what they publish. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Palin v. N.Y. Times Co.,* 2022 WL 599271 (S.D. NY 2022) (defamation lawsuit by Sarah Palin against the *New York Times*); *Sandmann v. WP Company, LLC*, 401 F. Supp. 3d 781 (E.D. KY 2019) (defamation lawsuit brought by Covington Catholic High School student Nicholas Sandmann against the *Washington Post*). Section 230's impact is particularly visible in journalism. Between 2008 and 2020, digital newsroom employment rose from 7,000 to 18,000,

[31] *News Platform Fact Sheet,* Pew Research Center, November, 2023 https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/

[32] *Id.*

while employment in print journalism cratered from roughly 71,000 to 31,000.[33]

Our 21st-century digital network is as indebted to special privileges as was our 19th-century rail network. And just as the railroads' indebtedness to the public caused courts to prohibit them from engaging in unfair discrimination, so too should this Court view Section (2)(b)'s consistency provision as nothing other than a perfectly valid prohibition against unfair discrimination.

Common Carrier Principles Apply to Telecommunications

The common-law common carrier principles applied to English ferries in the 1400s, British ports in the 1600s, and Gilded Age railroads form the very foundation of today's regulations affecting modern telecommunications. *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 58 (2d Cir. 2006). While the Interstate Commerce Act of 1887 codified the common-law prohibitions against unfair discrimination, it was at first only applicable to railroads; it was expanded to cover telephones in 1910, and telephones were then transferred to the Federal Communications Commission in 1934, where they remain to this day. *Id.* at 57. The common-law's application to digital technologies is explicitly noted in Chapter 5 of the Telecommunications Act (which also contains Section 230), which states that nothing in the Act "shall in any way abridge or alter the remedies now existing at

[33] Mason Walker, *U.S. Newsroom Employment has Fallen 26% since 2008*, Pew Research Center (July 13, 2021).

common-law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414 ("Section 414"). Furthermore, entities that do not make individualized determinations as to who may use their services are generally considered common carriers. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). Platforms with hundreds of millions of daily users, who hold themselves out as admitting all comers, easily meet this standard.[34]

Accordingly, the legal regime governing social media platforms, including Section 230, runs straight back to the common-law principles applied to ferries, wharf owners, and railroads.

Moody relied on 47 U.S.C. § 223(e)(6) ("Section 223") to exempt the industry from common-law common carrier obligations. *Moody,* 34 F.4th at 1220-21. However, Section 223 addresses obscene or harassing telephone calls; it does not relate to the special privileges of Section 230. There is no reason to believe Congress intended to use Section 223 to pre-empt the common-law provisions of Section 414. Had Congress wanted to give platforms the ability to discriminate against their users unfairly, it would have done so expressly in Section 230 rather than impliedly through Section 223.

In addition to examining Section 223, *Moody* also drew on Section 230(c)(2)(A) and stated that:

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[34] Social media platforms such as Facebook, Twitter, YouTube and Tik Tok have billions of users. *NetChoice*, 34 F.4th at 1204.

> [Section 230(c)(2)(a)] goes on to provide protections for internet companies that are inconsistent with the traditional common carrier obligation of indiscriminate service. In particular, it explicitly protects internet companies' ability to restrict access to a plethora of material that they might consider "objectionable."

Moody, 34 F.4th at 1221. However, Section 230 does not give platforms free rein to exclude all content they "might consider 'objectionable.'" The full text of 47 U.S.C § 230(c)(2)(A) reads as follows:

> **(2)** Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in ***good faith*** to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or ***otherwise objectionable***, whether or not such material is constitutionally protected;

47 U.S.C § 230(c)(2)(A) (emphasis added). Thus, Congress has limited a Platform's immunity to "good faith" efforts. No mere surplus language, courts have applied this "good faith" standard to support claims alleging anti-competitive behavior. *See, e.g., Enigma*

Software Group USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1052 (9th Cir. 2019); *E-Ventures Worldwide, LLC v. Google, Inc.,* 2017 WL 2210029 *3 (M.D. FL 2017). Accordingly, Section 230 does not offer a blank check for platforms to honor their user contracts at their caprice and whim.

Moody also rejected the common carrier designation based on this Court's decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-69 (1997), wherein the Court stated that the "vast democratic forums of the Internet" are not "subject to the type of government supervision and regulation that has attended the broadcast industry." *Moody*, 34 F.4th at 1220. Section (2)(b), however, does not impose anything close to the "type of government supervision and regulation that has attended the broadcast industry." Consistent with common-law traditions—which under Section 414 are unaffected by Section 230—Section (2)(b) prohibits platforms from violating their user agreements. Nothing in *Reno* supports the idea that platforms are allowed to discriminate against their users unfairly.

Moody also rejected the common carrier theory on the ground that, while platforms are open to anyone, users are not allowed to post anything they please as they are bound by the terms of the service. *Moody*, 34 F.4th at 1220. By this logic, an airline whose ticket agreements contain a "no shirt, no shoes, no service" provision is no longer a common carrier the instant it applies this general standard to an individual passenger. There is simply no support for the conclusion that an entity is no longer a common carrier the moment it engages in the individualized

application of its policies. For example, telegraph companies were still deemed common carriers despite enjoying the ability to screen out obscene messages. *See, e.g., O'Brien v. Western Union Tel. Co.,* 113 F.2d 539, 542 (1st Cir. 1940); *Restatement (Second) of Torts* §§ 581, 612 (1977) (holding that telegraph companies remain common carriers even though they retain the authority to refuse obscene content); 1 Bruce Wyman, *The Special Law Governing Public Service Corporations, and All Others Engaged in Public Employment* § 633 (1911) ("Telegraph companies likewise need not accept obscene, blasphemous, profane, or indecent messages, although there is a case which holds that the telegraph company refuses an equivocal message at its peril.").

The principle that the individualized application of terms of service does not impact a business's designation as a common carrier is demonstrated in the recent case of *Conservation Force v. Delta Air Lines, Inc.*, 190 F. Supp. 3d 606 (N.D. Tex. 2016); *aff'd* 682 Fed. Appx. 310 (5th Cir. 2017) (mem.). In *Conservation Force,* a passenger claimed that Delta had unfairly discriminated against him by refusing to transport his big-game trophy. *Id.* Deeming Delta Air Lines to be a common carrier, the court drew upon this Court's decision in *Missouri Pacific Railroad Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 620 (1909), wherein the Court held that "a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so." *Conservation Force,* 190 F. Supp. 3d at 610. The District Court held that common carriers are free to set their carriage policies however

they see fit, subject to the one condition that they apply them equally to all customers; as such, the ban on big game trophies was valid, provided it was applied equally to all shippers. *Id.* at 610. Had it adopted *Moody*'s rationale on the individualized application of terms of service, the *Conservation Force* court would not have wasted time applying a century-old railroad precedent to 21st-century air travel because Delta would not be deemed a common carrier.

Similar to Delta's ability to prohibit the carriage of big game trophies if it so chooses, under S.B. 7072, platforms remain free to define the parameters of their own Censorship Standards. However, just as with Delta's trophy policy, platforms are required to apply these terms consistently to all users. To that end, Section (2)(b) is nothing other than a codification of the common-law principles courts applied to the railroads in the 1800s and the *Conservation Force* court applied to the airlines over a century later.

The First Amendment is not Carte Blanche *to Break Contracts*

Moody dismissed the consistency provision of Section (2)(b) by turning the First Amendment into a one-sided veto by which platforms, and *only* platforms, can ignore the terms they placed in their *own* user agreements. The *Moody* court incredulously asked if there is "any interest that would justify a state forcing, for instance, a parade organizer to apply its criteria for participation in a manner that the state deems 'consistent'?" *Moody* 34 F.4th at 1229. *Amicus*

Trump respectfully submits that the state has precisely such an interest: the proper and effective enforcement of consumer contracts.

By analogizing to parade organizers, the *Moody* court was drawing upon this Court's decision in *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley,* this Court stated that a state public accommodation law infringed on the free speech rights of parade organizers. *Hurley*, 515 U.S. at 564. The organizers denied homosexual organizations the ability to participate in a St. Patrick's Day parade, and this Court held that the application of the law would force the organizers to disseminate views with which they might disagree. *Id.* at 586.

Contrary to the reading of the *Moody* court, *Hurley* supports the validity of Section (2)(b). Consider the perspective of participants who entered the parade specifically relying on the organizers' representation of homosexual groups. Had the organizers nevertheless allowed such groups to participate, this would have contradicted the representations they made to the other entrants. Under the *Moody* reading of *Hurley,* even if these participants executed binding contracts with the organizers, the First Amendment would act as a complete defense to the organizer's false representations. The First Amendment has never been interpreted as a refuge for parties to make deceptive statements to consumers. *See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

In addition to *Hurley*, *Moody* also relied on this Court's decisions in *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), and *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994). These cases similarly fail to support an argument that the First Amendment trumps the contractual agreements of private parties. In *Tornillo,* the Court held that a law requiring newspapers to carry a politician's response to a critical story unfairly impaired the newspaper's free speech rights. In *Pacific Gas,* this Court held that a utility company could not be forced to include messages with which it disagreed in mailings to customers. Finally, in *Turner*, the Court held that cable companies had a protected speech interest in the channels carried on their systems. *Moody* held that these cases establish that a platform's "decisions about whether, to what extent, and in what manner to disseminate third party-created content to the public are editorial judgments protected by the First Amendment." *Moody*, 34 F.4th at 1212. While this quartet of cases protects a platform's decisions about what to cover in their *own* Censorship Standards, they do not stand for the position that the First Amendment is a "get out of deceptive statements free" provision, allowing platforms to discriminate against their users unfairly. Section (2)(b) is not a "must carry" provision—it is a non-expressive provision, imposing no conditions on what a platform may censor, only demanding that *if* platforms set Censorship Standards, they honor and consistently apply them.

CONCLUSION

Section (2)(b)'s consistency provision impacts neither the First Amendment nor Section 230, and should be upheld by this Court. As Section (2)(b) is independent of the rest of S.B. 7072 and has no comparable provision within Texas' H.B. 20, upholding Section (2)(b) will not impact the Court's ruling on other provisions of either law.

No reading of the First Amendment allows platforms to make deceptive statements to consumers. Moreover, activity immunized by Section 230 is, by definition, *not* a platform's speech. As Section 230 immunity clothes platforms with the same public purpose that courts found applicable to the railroads, so too must their acceptance of this special privilege carry with it the prohibition against unfair discrimination. No less than our transcontinental rail network, our modern digital communications network is completely indebted to public beneficence for its creation and maintenance. Accordingly, the platforms are common carriers bound to refrain from unfairly discriminating against their users, and Section (2)(b) is a lawful codification of this ancient common-law principle.

Respectfully submitted,

JOHN P. COALE
Counsel of Record
2901 Fessenden St. NW
Washington, D.C. 20008
johnpcoale@aol.com
(202) 255-2096

RICHARD POLK LAWSON
JESSICA HART STEINMANN
PATRICIA NATION
JASE PANEBIANCO
AMERICA FIRST
POLICY INSTITUTE
1001 Pennsylvania Ave. NW
Suite 530
Washington D.C. 20004

Counsel for Amicus Curiae