No. 22-277 and 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.*,

Respondents.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH AND FIFTH CIRCUITS

BRIEF *AMICUS CURIAE* OF CHILDREN'S HEALTH DEFENSE IN SUPPORT OF PETITIONERS IN 22-277 AND RESPONDENT IN 22-555

JED RUBENFELD
1031 Forest Road
New Haven, CT 06515

MARY HOLLAND
Counsel of Record
CHILDREN'S HEALTH DEFENSE
853 Franklin Avenue, Suite 511
Franklin Lakes, NJ 07417
(202) 854-1310
mary.holland
@childrenshealthdefense.org

Attorneys for Amicus Curiae

327086

INTEREST OF AMICUS CURIAE[1]

Amicus Children's Health Defense (CHD) is a nonprofit organization dedicated to ensuring that people have access to complete, accurate health information for themselves and their families. CHD has over 70,000 members across the country, most if not all of whom avidly consume online health news—particularly COVID-related news, which has been repeatedly targeted for censorship by the nation's dominant social media platforms. Thus both CHD and its members have strong, constitutionally protected interests in combating viewpoint-based social media censorship. *Cf. Va. State Board of Pharm. v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 (1976) (upholding standing of nonprofit organization to assert consumers' right of access to uncensored health information). In addition, CHD itself—even though it disseminates only accurate information and legitimate opinion—has been a frequent and prominent victim of social media censorship.

SUMMARY OF ARGUMENT

Much of the briefing in this case asks the Court to determine whether America's behemoth social media platforms are or are not "common carriers." The challenged statutes assert that they are, the platforms insist they are not, and the Fifth and

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to fund the preparation or submission of the brief.

Eleventh Circuits split on this question.[2] In essence, the common-carrier view of this case invites the Court to decide if social media platforms are more like telegraph companies or newspapers.

The difficulty with this all-or-nothing view is twofold. First, social media platforms don't really resemble either Western Union or the New York Times. Unlike telegraph (or telephone) companies, the platforms don't merely carry private, person-to-person communications. But unlike newspapers, almost 100% of the content a platform does carry is its customers' speech, not its own.

Second, the truth is that traditional common carrier doctrine developed in blissful ignorance of the First Amendment. In vain do lawyers seek in the old common carrier case law a serious confrontation with the idea that requiring telegraph (or, later, telephone) companies to carry speech they disagree with might violate their own First Amendment rights. Common carrier law preceded the birth of modern First Amendment law and never came to grips with it.

There is another way to decide this case. The Court is not obliged to choose between the zero First Amendment scrutiny evidenced in common carrier law and the maximal First Amendment scrutiny applicable to newspapers. Instead, the Court can decide this case under its cable operator precedents and apply intermediate scrutiny. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (*Turner I*) (holding intermediate scrutiny appropriate

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[2] *Compare NetChoice, LLC v. Paxton*, 49 F.4th 439, 479 (5th Cir. 2022) (platforms are "common carriers"), *with NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1220 (11th Cir. 2022) (platforms are not "common carriers").

for must-carry laws applicable to cable television operators).

The analogy between social media platforms and cable operating companies is straightforward. Consider YouTube. Like cable operators, YouTube hosts numerous independent "channels"; like cable channels, YouTube's channels are owned and operated by third parties, who are solely responsible for their content;[3] and like cable operators, YouTube makes these channels available to millions of consumers.

Or consider the "feeds" available on the major social media platforms. For example, Twitter (now "X") has a "for you" function offering each user a feed of third-party posts recommended on the basis of the customer's individual viewing history. The cable counterpart is again straightforward. Xfinity (a major cable operating company) also has a "for you" function offering each user a feed of third-party programming recommended on the basis of the customer's individual viewing history.

The point is not that social media platforms are "just like" cable operators, but that they are sufficiently similar to make *Turner*, as the Fifth Circuit recognized, "the closest Supreme Court case from the modern era." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 477 (5th Cir. 2022).

Turner did not turn on a common carrier analysis. Rather, it engaged in First Amendment analysis. Under *Turner*, a must-carry law directed at

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[3] *See e.g.*, YouTube, Terms of Service, https://www.youtube.com/t/terms ("You are legally responsible for the Content you submit to the Service.… You retain ownership rights in your Content.").

cable operators is constitutional if it is "content-neutral," "promotes a substantial governmental interest," and "does not burden substantially more speech than is necessary to further that interest." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) (*Turner II*) (upholding federal must-carry laws).

As will be shown below, the Florida and Texas laws at issue pass that test with respect to their provisions barring social media platforms from engaging in viewpoint-based censorship. Thus the Court can uphold these provisions under the *Turner* standard without deciding whether the platforms are common carriers.

ARGUMENT

Laws Barring Viewpoint-Based Censorship On Major Social Media Platforms Are Constitutional Under *Turner* Intermediate Scrutiny

Insofar as they ban viewpoint-based censorship, Florida's and Texas's laws satisfy *Turner* because they are content-neutral, promote substantial governmental interests, and do not burden substantially more speech than is necessary to further those interests.

I. Prohibitions of Content-Based and Viewpoint-Based Discrimination are Content-Neutral.

Laws prohibiting content-based censorship may seem superficially to be content-based themselves. Or at any rate the issue might seem perplexing and tricky. It isn't. Banning content-based

and viewpoint-based censorship is in itself content-neutral.

To illustrate, consider laws banning racial discrimination. Under hornbook Fourteenth Amendment law, race-based measures are subject to strict scrutiny. But anti-discrimination laws are never themselves subjected to strict scrutiny, because a *prohibition* of race-based discrimination is not itself race-classifying or race-based. "A law that prohibits [parties] from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997). If the rule were otherwise, the Equal Protection Clause (which bans most race-based measures) would be unconstitutional under itself.

The same is true of the First Amendment. Laws that prohibit religious discrimination do not themselves discriminate on the basis of religion. And a law that prohibits content-based or viewpoint-based censorship is not itself content-based or viewpoint-based, because it neither favors nor disfavors any particular content or viewpoint. If the rule were otherwise, the First Amendment (which bars viewpoint-based and most content-based discrimination) would be unconstitutional under itself.

The Eleventh Circuit erred on this point, holding for example that Florida's prohibition against social media censorship of a journalistic website "'*based on the content*'" of its posts is "self-evidently content-based." *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1226 (11th Cir. 2022) (quoting Fla. Stat. § 501.2041(2)(j) (emphasis added by the Eleventh

Circuit)). On this faulty reasoning, laws banning race-based discrimination would be "self-evidently [race]-based" and hence subject to strict scrutiny. That is not and could not be the law.

II. The Florida and Texas Prohibitions of Viewpoint-Based Social Media Censorship Promote Substantial Government Interests and Do Not Burden Substantially More Speech Than Necessary.

Banning viewpoint-based censorship of speakers and speech on the country's behemoth social media platforms unquestionably promotes substantial government interests. "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order." *Turner I*, 512 U.S. at 663. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id*. at 657. As this Court held almost eighty years ago, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," and this vital public interest can be threatened not only by the government, but by private companies seeking "to keep others from publishing." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). "[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly;

but we have staked upon it our all." *Id.* at 28 (Frankfurter, J., concurring) (quoting *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

Nor are the challenged measures substantially overbroad. First, they apply only to a handful of behemoth social media platforms with market power in various crucial online communication sectors. Second, more fundamentally, they do not suppress speech at all; rather they will *add* to the speech available in the modern public square. Far from burdening First Amendment interests, they promote the highest First Amendment interest—"the widest possible dissemination of information from diverse and antagonistic sources." *Id*. at 20.

CONCLUSION

For the foregoing reasons, amicus CHD respectfully urges the Court to uphold the challenged statutes insofar as they ban viewpoint-based social media censorship.

DATED: January 23, 2024
Respectfully Submitted,

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Mary Holland
Counsel of Record
Children's Health Defense
853 Franklin Ave, Suite 511
Franklin Lakes, NJ 07417
202-854-1310
mary.holland@childrenshealthdefense.org

Jed Rubenfeld
1031 Forest Road
New Haven, CT 06515