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The Revolution Will Not Be Moderated: Examining Florida and Texas's Attempts to Prohibit Social Media Content Moderation

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THE REVOLUTION WILL NOT BE MODERATED: EXAMINING FLORIDA AND TEXAS’S ATTEMPTS TO PROHIBIT SOCIAL MEDIA CONTENT MODERATION

CAROLINE JONES*

I. Introduction.....	210
II. Background.....	213
A. The Telecommunications Act.....	213
2. Section 230.....	214
B. First Amendment Editorial Protections.....	216
1. Miami Herald v. Tornillo.....	216
2. Reno v. American Civil Liberties Union.....	217
C. Common Carrier Doctrine.....	218
D. Attempts to Prohibit Social Media Content Moderation.....	221
1. Florida.....	221
2. Texas.....	222
III. Analysis.....	223
A. The Fifth Circuit Erred in Holding that the Texas Statute Does Not Violate the First Amendment’s Right to Freedom of Speech and Expression.....	223
B. The Fifth Circuit Erred in Holding that Social Media Sites Were Correctly Classified as Common Carriers.....	231
IV. Policy Recommendation.....	236
V. Conclusion.....	240

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I. INTRODUCTION

Today, around seventy percent of American citizens actively use social media for news content, entertainment, and social engagement.¹ Since 2005, the number of Americans using social media in some capacity has increased 13 fold from five to sixty-five percent.² Despite numerous studies demonstrating a correlation between social media rhetoric and real-world violence against women, racial and ethnic minority communities, and the LGBTQIA community, both Florida and Texas passed bills limiting the ways in which social media sites can moderate the content and users on their platforms in 2021.³ Florida's Senate Bill 7072 requires social media platforms to allow political candidates to have a presence on their platforms during campaigning.⁴ In Texas, House Bill 20 prohibits social media platforms from moderating or removing any content or users that are legal but might be contrary to the platform's guidelines.⁵

There have been numerous studies showing that although social media rhetoric does not change attitudes, it emboldens individuals to act on their preexisting prejudiced and discriminatory views.⁶ However, the Fifth

1. See *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

2. See *id.* (stating that in 2005, just five percent of American adults used at least one social media platform).

3. See Rachel Harrison & Kathleen Hamilton, *Hate Speech on Twitter Predicts Frequency of Real-life Hate Crimes*, N.Y.U. (Jun. 24, 2019), <https://www.nyu.edu/about/news-publications/news/2019/june/hate-speech-on-twitter-predicts-frequency-of-real-life-hate-crim.html> (stating that NYU researchers noted cities with a higher incidence of racist tweets reported more actual hate crimes related to race in their study); Khandis R. Blake et al., *Misogynistic Tweets Correlate with Violence Against Women*, 32 PSYCH. SCI. 315, 324 (2021); See S.B. 7072, 123rd Leg., Reg. Sess. (Fla. 2021) (prohibiting social media platforms from deplatforming any political candidates and prohibiting prioritizing or deprioritizing content); see also H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021) (prohibiting social media platforms from censoring users or a user's expressions based on the viewpoint expressed in the content).

4. See Fla. S.B. 7072. (establishing a violation for social media deplatforming of a political candidate and requiring a social media platform to meet certain requirements when it restricts speech by users).

5. See Tex. H.B. 20 (requiring social media platforms to host all users and third-party content so long as it does not violate federal law).

6. See generally Benjamin Newman et al., *The Trump Effect: An Experimental Investigation of the Emboldening Effect of Racially Inflammatory Elite Communication*, 51 BRIT. J. POL. SCI. 1138, 1150 (2021). See also Mochamad Iqbal Jatmiko et al., *Covid-19, Harassment, and Social Media: A Study of Gender-Based Violence Facilitated by Technology During the Pandemic*, 4 J. SOC'Y & MEDIA 319, 324-25(2020).

Circuit stated that social media platforms' desire to moderate pro-Nazi speech, terrorist propaganda, misogyny, and Holocaust denials are "extreme hypothesized applications of the law," and what is actually at stake is the potential suppression of political, religious, and scientific dissent.⁷ Former President Trump's anti-Muslim statements shifted tolerable norms, making it more acceptable to openly denigrate and attack other marginalized groups.⁸ Marginalized communities are most negatively affected when social media sites are unable to moderate their own content in a manner that follows their user guidelines and removes discriminatory rhetoric.⁹ Given the connection between social media and real-world violence, content moderation is an important tool these sites can use in an attempt to curb the growing hateful rhetoric against vulnerable communities.¹⁰

The Eleventh and Fifth Circuit courts came to contrasting conclusions when determining whether the state laws violated social media platforms' free speech.¹¹ In the Eleventh Circuit, NetChoice sued the Attorney General of Florida on the grounds that the Florida content moderation statute violated the First Amendment right to free speech, the Fourteenth Amendment right to equal protection, the Commerce Clause, and the Communications Decency Act ("CDA").¹² The Eleventh Circuit upheld a preliminary injunction stopping the enforcement of the Florida law on the basis that social media platforms are private actors entitled to editorialize content and moderate users who violate their guidelines.¹³ Meanwhile, in the Fifth Circuit, NetChoice sued to stop the Texas content moderation statute using

7. See *NetChoice, LLC v. Paxton*, 49 F.4th 394, 452 (5th Cir. 2022) (arguing that the purpose of the state law is to protect Texas citizens from censorship at the hands of the social media platforms).

8. See Newman et al., *supra* note 6 (highlighting the data tracking an increase in bias-related violence after former President Trump won the 2016 election).

9. See *id.* at 1155 (concluding that the study lends empirical support to anecdotal claims of increasing racial rhetoric and dehumanizing language, particularly toward the Latino community).

10. See *id.* at 1156-57 (noting the connection between Trump's anti-immigrant online rhetoric and the dehumanization of targeted minority groups).

11. Compare *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022), with *NetChoice, LLC v. Paxton*, 49 F.4th 439, 447-48 (5th Cir. 2002).

12. See *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (holding that the Florida Statute violated the First Amendment rights of the social media platforms).

13. See *id.* (stating that the compilation of speech by third-party users and moderation decisions of social media platforms constitutes editorial activity).

the same arguments.¹⁴ Contrasting the Eleventh Circuit, the Fifth Circuit held that the Texas statute did not violate the First Amendment because the law does not restrict social media platforms' ability to express their own views.¹⁵ Instead, the law restricts the platforms' ability to restrict others' speech.¹⁶

This Comment argues that social media content moderation decisions are editorial judgments protected by the First Amendment and the Florida and Texas laws are thus unconstitutional. Part II presents the history of First Amendment editorial protections, the Communications Decency Act, and the Common Carrier Doctrine within the Telecommunications Act.¹⁷ Part III asserts that the Fifth Circuit erred in holding that the Texas statute did not violate the First Amendment and that social media sites are common carriers.¹⁸ Part IV recommends that other courts follow the holding in the Eleventh Circuit.¹⁹ Part V concludes by reiterating the danger of prohibiting social media platforms from moderating content and users given the correlation between online rhetoric and real-world violence against marginalized communities.²⁰ Part V also revisits the editorial role that content moderation plays in social media engagement and the Eleventh Circuit holding that asserts First Amendment protections for these platforms.²¹

14. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 447-48 (5th Cir. 2002) (holding that the Texas Statute protected Texans from censorship by the platforms rather than infringed on any First Amendment protections of the social media platforms because they are common carriers susceptible to government regulation).

15. See *id.* at 445 (holding that social media content moderation of material that is otherwise legal is censorship that violates Texans' First Amendment right to speech).

16. See *id.*

17. See *infra* Part II (giving background on case precedent for editorial protections, common carrier doctrine, and section 230).

18. See *infra* Part III (arguing that social media sites are entitled to First Amendment protections).

19. See *infra* Part IV (stating that other jurisdictions should follow the Eleventh Circuit and find state content moderation restrictions unconstitutional).

20. See *infra* Part V (concluding that content moderation is a crucial tool for social media sites to combat hate speech and discrimination online).

21. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445-46 (5th Cir. 2022). (reaffirming that content moderation is an editorial judgment).

II. BACKGROUND

A. *The Telecommunications Act*

1. *Communications Decency Act of 1996*

The Texas and Florida social media moderation laws have roots in Title V of the Telecommunications Act of 1996 (Communications Decency Act or “CDA”).²² The Communications Decency Act was Congress’s first attempt at regulating obscenity and pornography on the internet.²³ The CDA imposed criminal sanctions on anyone who knowingly sent content depicting or describing, in terms determined to be offensive as measured by community standards, “sexual or excretory activities or organs” to a specific person or persons under the age of 18.²⁴ It also criminalized the transmission of obscene or indecent materials to minors as measured by contemporary community standards.²⁵

Groups who opposed the CDA argued it violated First Amendment protections and would have a chilling effect on the accessibility of medical information and content online.²⁶ After judges in Philadelphia and New York struck down parts of the CDA for infringing upon free speech rights and for being too broad, the Supreme Court held that the indecency

22. See Communications Decency Act of 1996, 8, 1996), codified at 47 U.S.C. §§ 223, 230 (1996) (signed into law by President Clinton as an overhaul of existing telecommunications law to include the internet).

23. See Sara L. Zeigler & Deborah Fisher, *Communications Decency and Section 230*, THE FIRST AMEND. ENCYCLOPEDIA, MIDDLE TENN. STATE UNIV. (2009), <https://www.mtsu.edu/first-amendment/article/1070/communications-decency-act-of-1996> (stating that Congress enacted the CDA to prevent minors from having access to sexually explicit content).

24. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, tit. VI, sec. 603, 117 Stat. 650 (2003) (showing the previous language of section 223); see also Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996, DEP’T OF JUST., <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> (last accessed Jan. 20, 2023) (highlighting the Department of Justice’s recommendations for reform of section 230 and possible methods to give victims an avenue for both civil and criminal recourse).

25. See 47 U.S.C. §§ 223, 230 (prohibiting the knowing dissemination of content deemed to be obscene based on community standards regarding minors).

26. See Zeigler & Fisher, *supra* note 23 (noting that the CDA’s language prohibited any image or other content that depicted or described sexual or excretory organs, which could include medical and anatomical information).

provisions of the CDA were unconstitutional.²⁷ The Court held that the provisions of the CDA did not allow parents to decide for themselves what online content was appropriate for their children, and that it did not define indecent or offensive narrowly enough.²⁸ The other major impact of the CDA was through section 230, an addition to the original legislation, which added protections for online service providers and users against actions brought based on third-party content.²⁹

2. Section 230

Section 230 of the CDA provides immunity for online service providers with respect to the actions of third-party users and third-party content.³⁰ Section 230 of the CDA seeks to regulate indecency and obscenity online by allowing online platforms to moderate third-party content.³¹ Congress drafted this section after *Stratton Oakmont, Inc. v. Prodigy*, a New York case that held that online platforms were liable as publishers for the harmful content of their third-party users.³² The New York trial court found that Prodigy started to exercise editorial control over the content posted on its platform, akin to a newspaper with publisher liability, and was therefore liable for the harmful content its users posted.³³

In response to *Stratton*, Congress enacted section 230 to provide immunity for online platforms for their content moderation decisions.³⁴ Section 230(c)(2)(A) states that “no online platform will be held liable on account of

27. See *id.* (stating that the Court ruled the CDA was unconstitutional because it suppressed a significant amount of adult speech in the process of protecting minors).

28. See *Am. Civ. Liberty Union v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (holding that the CDA was unconstitutionally vague); see also *Am. Rep. v. Reno*, 930 F. Supp. 916, 950 (S.D.N.Y. 1996), *aff'd sub nom. Reno v. Shea*, 521 U.S. 1113 (1997) (finding that the CDA defined indecency and was not void for vagueness).

29. See 47 U.S.C. § 230(c)(1) (1996) (stating that no provider of a computer service shall be treated as the publisher or speaker of any third-party content).

30. See *id.* (stating that section 230 grants internet service providers broad immunity from liability for content published by third parties on their platforms).

31. See *id.*

32. See No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (holding the online content hosting cite, Prodigy, is a publisher of defamatory material and that internet service providers can be liable for the speech of their users).

33. See *id.* at *2 (arguing that Prodigy’s conscious choice to exercise editorial control opened it to greater liability than previous online service providers who did not exercise editorial control).

34. See 47 U.S.C. §§ 223, 230 (providing immunity from liability for ISPs that publish information provided by third parties).

any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene . . . or otherwise objectionable, whether or not such material is constitutionally protected.”³⁵ This Good Samaritan provision protects online platforms from liability for the good faith removal or moderation of material that it deems to be objectionable.³⁶

Courts and members of Congress are divided on the role section 230 should play in liability protections for content moderation choices and what should be considered within a social media platform’s moderation discretion.³⁷ Subsection 230(c)(2) provides protection from liability for internet companies to create and apply their own standards for what it wants to allow on their sites; however, this protection has been criticized by members of Congress and misrepresented in media representations.³⁸ In the aftermath of a 2019 shooting in El Paso, Texas, the New York Times and the Wall Street Journal were criticized for suggesting that section 230 protected hate speech.³⁹ The online criticisms regarding section 230’s supposed

35. 47 U.S.C. § 230(c) (2) (a) (2018) (granting immunity for online platforms to remove content they deem objectionable).

36. See generally Josh Slovin, *Section 230 of the Communications Decency Act: The “Good Samaritan” Law which Grants Immunity to “Bad Samaritans,”* 73 MERCER L. REV. 635, 636, 647 (2022).

37. See Jessica Guynn, *Hate Speech, Censorship, Capitol Riot, Section 230: Lawmakers Slam Facebook, Google, and Twitter, Warn of Regulation*, USA TODAY (March 26, 2021, 9:00 PM), <https://www.usatoday.com/story/tech/2021/03/25/facebook-google-youtube-twitter-dorsey-zuckerberg-pichai-section-230-hearing/6990173002/> (quoting Ohio Rep. Bob Latta saying if social media companies use the section 230 shield to moderate political viewpoints they disagree with it would be “highly concerning”).

38. See § 230(c)(2)(a) (2018); see also Guynn, *supra* note 37 (stating that Republican Representative Jeff Duncan (S.Ca.) “lit into the tech companies for removing former president Donald Trump but allowing ‘state sponsors of terror’ from Iran and Syria to remain on their platforms”).

39. See generally Daisuke Wakabayashi, *Legal Shield for Websites Rattles Under Onslaught of Hate Speech*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html>; see also Dennis Prager, *Don’t Let Google Get Away With Censorship*, WALL ST. J. (Jan. 15, 2021), <https://www.wsj.com/articles/dont-let-google-get-away-with-censorship-11565132175>; see also Felix Gillette, *Section 230 Was Supposed to Make the Internet a Better Place. It Failed*, BLOOMBERG BUSINESSWEEK (Aug. 7, 2019), <https://www.bloomberg.com/news/features/2019-08-07/section-230-was-supposed-to-make-the-internet-a-better-place-it-failed>; see also Berin Szóka and Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFARE INST. (Feb. 3, 2021), <https://www.lawfaremedia.org/article/wall-street-journal-misreads-section-230->

protection of hate speech arose after the perpetrator in the El Paso shooting, as well as perpetrators in shootings in Christchurch, New Zealand and San Diego, California, posted hate speech to online message boards such as 8chan.⁴⁰ However, hate speech is protected speech under the First Amendment.⁴¹ Section 230 allows online sites to moderate content how it sees fit and in a manner that aligns with their user guidelines without fear of liability for removing or not removing objectionable content posted on their platforms.⁴²

B. First Amendment Editorial Protections

1. *Miami Herald v. Tornillo*

The Supreme Court considered the duty of newspapers and concepts of compelled speech and editorial discretion in *Miami Herald Publishing Co. v. Tornillo*.⁴³ This case concerned the Miami Herald's publication of two editorials that criticized Pat Tornillo, a candidate for the Florida House of Representatives.⁴⁴ Tornillo wanted the newspaper to publish his responses to the editorials and the Miami Herald refused, raising the issue of whether newspapers had a duty to provide equal space for political candidates to reply

and-first-amendment; see also Matthew Feeney, *WSJ, WaPo, NYT Spread False Internet Claims*, CATO INSTITUTE (Aug. 7, 2019), <https://www.cato.org/blog/newspapers-are-spreading-section-230-misinformation>.

40. See Drew Harwell, *Three Mass Shootings This Year Began With a Hateful Screech on 8chan. Its Founder Calls it a Terrorist Refuge in Plain Sight.*, WASH. POST (Aug. 4, 2019), <https://www.washingtonpost.com/technology/2019/08/04/three-mass-shootings-this-year-began-with-hateful-screed-chan-its-founder-calls-it-terrorist-refuge-plain-sight/> (stating that the ties message boards like 8chan have to mass violence fuel worries over how to combat a “[w]eb-fueled wave of racist bloodshed”).

41. See *Hate Speech and Hate Crime*, AM. LIBERTY ASS'N, <https://www.ala.org/advocacy/intfreedom/hate> (last visited Jan. 25, 2023) (stating that hate speech can only be criminalized when it directly incites imminent criminal activity or contains specific threats of violence).

42. See *Section 230*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/cda230> (last accessed Jan. 25, 2023) (stating section 230 allows for web operators to moderate user speech and content as they see fit and offering different approaches to moderating users' speech).

43. See 418 U.S. 241, 258 (1974) (holding that newspapers exercise editorial discretion when making decisions regarding what to publish and right to reply rules violated their First Amendment rights).

44. See *id.* at 243-44 (publishing two articles that were critical of Tornillo's candidacy and stated he led a Classroom Teachers Association (“CTA”) strike that was against public interest).

to any criticisms.⁴⁵ The Supreme Court held that the state statute requiring equal space for political candidates to reply to any attacks on their political record violated the First Amendment's freedom of the press and that the newspapers had editorial discretion free from government interference in what they published.⁴⁶ The Supreme Court expressed concern about diminishing competition amongst newspapers and media outlets and the First Amendment interest in providing information to the public.⁴⁷ However, the Court ultimately held that there was no way for the law to impose a duty to facilitate a marketplace of ideas.⁴⁸

2. *Reno v. American Civil Liberties Union*

The Supreme Court further clarified its stance on First Amendment protections for the media in *Reno v. American Civil Liberties Union*, the first major Supreme Court ruling on the regulation of content on the internet.⁴⁹ The CDA included a provision, which prohibited the knowing transmission of obscene or indecent material to any user under the age of eighteen.⁵⁰ The American Civil Liberties Union ("ACLU") filed a lawsuit against the Attorney General of the United States, arguing that this provision of the CDA violated the First Amendment's protection for the freedom of speech.⁵¹ The Supreme Court affirmed the district court's holding that the CDA was unconstitutional.⁵² The Supreme Court highlighted the specific nuances between internet content, internet speech, and previous methods for

45. See *id.* at 244-45 (stating that Tornillo demanded that Miami Herald print his verbatim replies to the critiques).

46. See *id.* at 258 (holding that the Florida statute failed to clear the barriers of the First Amendment because of the interference into the function of editors).

47. See *id.* at 252 (explaining that forcing newspapers to publish news or commentary within the reach of right-of-access laws might lead editors to conclude that the best course is to avoid controversy, thereby chilling speech and expression).

48. See *id.* at 257 (stating that the government-enforced right of access "inescapably 'dampens the vigor and limits the variety of public debate'").

49. See *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 879 (1997) (holding anti-indecency provisions in the 1996 CDA violated First Amendment freedom of speech).

50. See 47 U.S.C. § 223(a) (1) (B) (ii) (making it a Federal offense for any person in interstate or foreign communications, by means of a telecommunication device, to make, create, solicit, or initiate the transmission of any communication considered obscene, lewd, or indecent).

51. See *Reno*, 51 U.S. at 861 (stating that immediately after the President signed the statute, 20 plaintiffs filed suit against the Attorney General).

52. See *id.* at 869 (stating that the District Court specifically found that internet communications do not invade homes or appear on computer screens unsolicited in contrast to the more invasive nature of radio or television).

communication from its previous rulings.⁵³

In its holding, the Court held that the government did not have a compelling purpose to regulate the internet, reasoning that the internet, unlike radio, is unintrusive.⁵⁴ The Supreme Court previously held radio stations were subject to greater regulations than other media because radio, unlike print media or content on the internet, is an intrusive medium as listeners do not know what they will be hearing before tuning into a channel and because radio is easily accessible to children.⁵⁵

This case established the same First Amendment protections for speech on the internet, which print media and newspapers already enjoyed.⁵⁶ The Supreme Court stated that moderation tools, such as parental controls, were mechanisms for online platforms to moderate the material users and their children viewed online and that the government interference created by the CDA was unconstitutional.⁵⁷

C. *Common Carrier Doctrine*

Traditionally, the definition of a common carrier is a person or company that offers transport services for passengers or goods, for a fee, to the general public.⁵⁸ In 2015, the Federal Communications Commission (“FCC”) classified internet service providers (“ISPs”) as common carriers, an action that the Trump Administration reversed in 2017, and later reinstated in 2018

53. *See id.* (stating that the factors present in previous cases regarding media and communication regulation are not found in cyberspace).

54. *See id.* at 870-72 (holding that, in contrast to *FCC v. Pacifica*, regulating radio broadcasts, the internet does not have a comparable history of regulation); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978) (holding that the FCC had the power to regulate broadcast media because of the uniquely pervasive nature of radio broadcasts in the home and the accessibility of these broadcasts to children).

55. *See Pacifica*, 438 U.S. at 732 (noting that the ease with which children may obtain access to radio broadcasts is what justified special treatment of indecent broadcasting); *see also Reno*, 521 U.S. at 869 (referring to radio as an intrusive medium because communications via radio “invade” the home whereas internet users “seldom encounter content ‘by accident’” or without intention).

56. *See Reno*, 521 U.S. at 887 (stating that the governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than protect anything).

57. *See id.* at 865 (stating that the parents of children protected by the statute have a claim to authority in their own household).

58. *See* Legal Info. Inst., *Common Carrier*, CORNELL L. SCH. (Jun. 2021), https://www.law.cornell.edu/wex/common_carrier (stating that offering services for a fee to the public indiscriminately are key factors for common carriers).

by a Senate resolution.⁵⁹ Government agencies treat common carriers like public utilities and conduits that carry information for the public interest.⁶⁰ As common carriers, telephone companies or internet service providers are barred from engaging in any unjust or unreasonable discrimination when providing services.⁶¹

Justice Clarence Thomas supported the call to classify online platforms and social media sites as common carriers or public utilities in his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*.⁶² Justice Thomas opined that the wide control platforms like Facebook and Google hold in the market gives Big Tech companies significant control over the speech of their users.⁶³ Proponents for classifying Big Tech platforms as common carriers, such as the Fifth Circuit, argue these platforms have become so ubiquitous in the lives of Americans that they should be regulated as common carriers and subjected to non-discrimination regulations.⁶⁴ The opposition argues that content moderation of social media sites and online platforms is a form of editorial discretion protected under the First Amendment.⁶⁵

The landmark case regarding the First Amendment, common carriers, and must-carry rules is *Turner Broadcasting v. FCC (I)*. Must-carry rules require

59. See generally Brian Fung, *Net Neutrality Takes Effect Today. Here's How it Affects You*, WASH. POST (Jun. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/06/12/net-neutrality-takes-effect-today-heres-how-it-affects-you/> (announcing the classification by the Obama Administration); Brian Fung, *Senate Approves Bipartisan Resolution to Restore FCC Net Neutrality Rules*, WASH. POST (May 16, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/05/16/net-neutrality-is-getting-a-big-vote-in-the-senate-today-heres-what-to-expect/> (announcing the restoration of the classification in 2018).

60. See 47 U.S.C. § 202(a) (2018) (prohibiting designated common carriers from giving any undue preference or advantage in favor of one person over another).

61. See *id.* (stating that common carriers are subject to government regulations that prevent discriminatory practices).

62. See *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223-24 (2021) (Thomas, J., concurring) (arguing that online platforms hold themselves out to resemble traditional common carriers by carrying information from one user to another).

63. See *id.* at 1224-25 (arguing that some social media platforms, like Twitter, have a dominant market share in the business that may create substantial barriers to entry).

64. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 475 (5th Cir. 2022) (arguing that the Court's modern public square label reflects the fact that in-person social interactions, cultural experiences, and economic undertakings are being replaced by online interactions).

65. See *Moody v. NetChoice, LLC*, 34 F.4th 1196, 1221-22 (11th Cir. 2022) (arguing that social media platforms do not serve the public indiscriminately but rather exercise editorial judgment to curate the content they display).

cable companies to carry local broadcast stations.⁶⁶ In *Turner (I)*, Turner Broadcasting System filed suit against the FCC on the grounds that the Cable Television Consumer Protection and Competition Act (“Cable Television Act”) regulations restricted their First Amendment rights.⁶⁷ The Court held that cable television providers are akin to publishers and bookstore owners and protected by the First Amendment.⁶⁸ In *U.S. Telecommunications Association v. FCC*, Supreme Court Justice Kavanaugh, then Judge Kavanaugh, utilized the language of the *Turner (I)* holding in his dissent.⁶⁹ Based on Supreme Court precedent, Justice Kavanaugh questioned whether “the Government [could] really force Facebook and Google and all those other entities to operate as common carriers” and whether the Government could “really impose forced-carriage or equal-access obligations on YouTube or Twitter?”⁷⁰ Justice Kavanaugh concluded in his dissent that Supreme Court precedent established First Amendment rights to internet service providers to exercise editorial control over whether and to what extent they carry content to their users.⁷¹

66. See Cable Carriage of Broadcast Stations, FCC (Sept. 27, 2021), <https://www.fcc.gov/media/cable-carriage-broadcast-stations>.

67. See *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2451 (1996) (questioning whether sections 4 and 5 of the Cable Television Act, which require cable television systems to devote a portion of their channels to local broadcast stations, restrict their right to freedom of speech).

68. See *id.* at 2449 (stating that must-carry rules impose burdens without reference to the content of the speech).

69. See *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (arguing that the *Turner* Court considered the cable operator’s decision of what content to transmit to be an editorial discretion).

70. *Id.* at 433 (demonstrating that, in 2017, Justice Kavanaugh was skeptical that laws such as the Texas and Florida statute would be constitutional).

71. See *id.* at 435 (stating that the Government must not intervene in the editorial control of ISPs unless it can compellingly show market power).

D. Attempts to Prohibit Social Media Content Moderation

1. Florida

Many states have considered enacting laws that regulate social media platforms and their content.⁷² Texas and Florida, however, have already passed such laws and been met with challenges from free speech advocates.⁷³ In Florida, Senate Bill 7072 (“S.B. 7072”) governs the way social media platforms must host political candidates.⁷⁴ S.B. 7072 prevents social media platforms from knowingly blocking or banning political candidates and allows the Florida Elections Commission to fine private companies for violating this statute.⁷⁵ NetChoice and the Computer and Communications Industry Association (“CCIA”) sued the state of Florida, claiming that the Florida social media content moderation statute violated First Amendment rights of private companies, Fourteenth Amendment Equal Protection rights, the Commerce Clause, and the CDA.⁷⁶ The plaintiffs in both Texas and Florida cases, NetChoice and the CCIA, are trade associations that represent internet and social media companies with the mission to make the internet safe for free speech and free expression.⁷⁷

The U.S. District Court for the Northern District of Florida issued a preliminary injunction against the statute, holding that it was too broad of an effort to rein in social media platforms, and that balancing the ideological exchange of content among private speakers is not a legitimate governmental

72. See *Moody v. NetChoice*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV., <https://knightcolumbia.org/cases/moody-v-netchoice> (last accessed Jan. 26, 2023) (stating many U.S. states are considering laws that regulate social media platforms).

73. See *id.* (stating that two trade organizations challenged the Texas and Florida laws and Federal district courts enjoined each law before the cases were appealed to their respective circuit courts).

74. See S.B. 7072, 123rd Leg., Reg. Sess. (Fla. 2021) (requiring that social media platforms allow political candidates to have a presence on their platforms during campaigning).

75. See *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, OFF. OF THE FLA. GOVERNOR (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/>. (stating S.B. 7072 prohibits platforms from deplatforming candidates under any circumstances and from prioritizing or deprioritizing any posts or messages based on content).

76. See *Moody v. NetChoice, LLC*, 34 F.4th 1196, 1201 (11th Cir. 2022) (arguing the statute violated the First Amendment right to speech as well as equal protection).

77. See *id.* at 1207 (stating NetChoice is a trade association representing the companies like Facebook, Twitter, and Google); see also *About Us*, NETCHOICE, <https://netchoice.org/about/> (last accessed Mar. 31, 2023) (stating the mission of the trade association is to “make the internet safe for free enterprise and free expression”).

interest.⁷⁸ The Eleventh Circuit upheld the preliminary injunction on the grounds that social media platforms are private actors entitled to engage in editorial activities for content and users who violate their guidelines.⁷⁹

2. Texas

Like Florida, Texas also passed a law attempting to limit the powers of social media companies to moderate speech on their platforms.⁸⁰ House Bill 20 (“H.B. 20”) prohibits social media platforms from moderating content or deplatforming users that are contrary to the platform’s guidelines.⁸¹ The law aims to prevent social media companies from permanently removing or demonetizing users based on views that they expressed on the platforms and to require transparency disclosures regarding how the companies moderate content.⁸² NetChoice sued Texas for violating the First and Fourteenth Amendments, Commerce Clause, and Full Faith and Credit Clause and for being preempted under the Supremacy Clause of the CDA.⁸³

The U.S. District Court for the Western District of Texas granted NetChoice’s motion for preliminary injunction.⁸⁴ In contrast with the Eleventh Circuit, the Fifth Circuit reversed the lower court’s decision and held the Texas statute did not violate the First Amendment because it did not restrict the social media platforms’ ability to express their own views.⁸⁵ NetChoice appealed the Fifth Circuit’s decision directly to the Supreme Court and sought an emergency injunction.⁸⁶ In May of 2022, the Supreme

78. See *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (holding the Florida statute violated the social media companies First Amendment rights).

79. See *id.*

80. See H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021) (prohibiting social media platforms from censoring users or a user’s expressions based on the viewpoint expressed in the content).

81. See *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021), *vacated and remanded sub nom. NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (stating that House Bill 20 prohibits censorship based on the viewpoint of the user or the content).

82. See 573 F. Supp. 3d at 1100 (requiring disclosures regarding how social media platforms moderate and promote content and publish acceptable use policies).

83. See *id.* at 1101 (arguing that the Texas statute violates First Amendment and Equal Protection rights).

84. See *id.* at 1110 (holding that section 7 of the Texas statute is facially unconstitutional by violating the social media platforms’ First Amendment rights).

85. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445, 448, 455 (5th Cir. 2022) (stating that the law restricts the platform’s ability to restrict others’ speech, not the platform’s speech).

86. See *generally NetChoice, LLC v. Paxton*, 142 S.Ct. 1715, 1715 (2022).

Court vacated the Fifth Circuit's decision to stay the district court's preliminary injunction.⁸⁷

III. ANALYSIS

A. The Fifth Circuit Erred in Holding that the Texas Statute Does Not Violate the First Amendment's Right to Freedom of Speech and Expression.

The Fifth Circuit incorrectly applied Supreme Court precedent regarding First Amendment editorial protections in its holding that social media platforms do not engage in editorial judgments.⁸⁸ The Florida and Texas laws prohibit private social media companies from moderating the content on its platforms unless said content is speech or material already deemed illegal under Federal law.⁸⁹ The classification of social media companies as common carriers and the finding that section 230 of the CDA does not identify content moderation as an editorial judgment are the two main points of division between the Eleventh and Fifth Circuits.⁹⁰ Big Tech, social media companies, and free speech advocates argue that platforms are akin to newspapers and content curation and moderation is an editorial discretion protected under the First Amendment.⁹¹

The Fifth Circuit opined that the language of section 230 of the CDA did not classify content moderation as editorial judgment.⁹² The Fourth Circuit defined editorial functions as “deciding whether to publish, withdraw, postpone, or alter content.”⁹³ Social media platforms such as Facebook or Twitter utilize algorithms and moderation tools to do exactly that: decide

87. *See id.* (granting the application to vacate the stay on the preliminary injunction).

88. *See id.* (stating that content moderation is not an editorial judgment).

89. *Compare* S.B. 7072, 123rd Leg., Reg. Sess. (Fla. 2021) (prohibiting the removal or banning of any political candidates from social media platforms while campaigning), *with* H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021) (prohibiting the blocking or banning of any user content or profiles for content that is not illegal).

90. *See* Tex. H.B. 20 (holding that social media platforms are common carriers); *see generally* NetChoice, LLC v. Paxton, 49 F.4th at 493-94 (rejecting the Eleventh Circuit's decision that the presence of editorial discretion automatically generates a First Amendment right to censor); NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1203 (11th Cir. 2022) (holding that content moderation constitutes protected exercises of editorial discretion).

91. *See* NetChoice, LLC v. Paxton, 49 F.4th at 455 (noting the platforms' contention that the act of hosting or rejecting a user's speech is the platform's own protected speech).

92. *See id.* at 459 (holding that social media site content moderation is a passive act that does not equate to the level of actively curating content for the public like that of a newspaper choosing what to publish).

93. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

whether to publish, withdraw, postpone, or alter content.⁹⁴ Therefore, the procedures social media platforms employ to maintain their community standards, such as deciding whether to allow certain content on their platforms or altering content by adding disclaimers for lack of support or misinformation, fit within the definition of editorial functions.⁹⁵ The Eleventh Circuit correctly held that platforms exercise editorial judgments in two key ways: removing posts that violate the platform's terms of service or community standards and choosing how to prioritize and display posts for each individual users' experience.⁹⁶

Additionally, the Fifth Circuit held that the social media providers' censoring of user's speech was not a protected action and the Texas statute did not violate providers' First Amendment right to editorial discretion.⁹⁷ The Fifth Circuit also held that the statute advanced the state's governmental interest in protecting the free exchange of ideas because the proposed statute would affect the speech of Texans and that social media platforms did not engage in their own speech.⁹⁸

To support its holding, the Fifth Circuit relied on two Supreme Court decisions, *PruneYard Shopping Center v. Robins* and *Rumsfeld v. Forum for Academic and Institutional Rights* ("FAIR"), to assert that social media platforms may be constitutionally compelled to host third-party speech.⁹⁹

94. See *Facebook Cmty. Standards*, META, <https://transparency.fb.com/policies/community-standards> (last visited Feb. 7, 2023) (stating that Facebook may "remove content that uses ambiguous or implicit language when additional context allows [Meta] to reasonably understand that the content goes against [their] standards").

95. See Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 103 (2021) (stating that the decision on what content to highlight in users' feeds and what content to deemphasize is an editorial decision).

96. See *NetChoice v. Att'y Gen.*, 34 F.4th at 1204 (11th Cir. 2022) (holding social media platforms are not just simple pipes transmitting data from point A to point B without any intervening action).

97. See *NetChoice, LLC v. Paxton*, 49 F.4th at 445, 448, 462-65, 492-94 (11th Cir. 2022) (critiquing the Eleventh Circuit's holding that because Platforms use content moderation to further "amorphous goals," the Platforms have similar editorial discretion to newspapers, creating a First Amendment right to censor).

98. See *id.* at 440 (arguing that Texas had an interest in preventing the censorship of Texas citizens' speech online); see also *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (holding that social media sites have cemented themselves as the modern public square by serving as the main source for current events, entertainment, communication, and employment).

99. See generally *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 75 (1980) (holding that individuals may express their right to free speech in private shopping

However, both of these previous holdings are readily distinguishable from the facts of the current cases and are not controlling decisions.¹⁰⁰ The Eleventh Circuit noted that in *Pruneyard*, the shopping center owner never asserted infringement of his own right to speak nor hindrance of his own freedom of expression.¹⁰¹ The shopping center had a policy prohibiting anyone from engaging in expressive activity “not directly related to the center’s commercial purposes,” including passing out pamphlets and requesting signatures as the high school students did when a PruneYard security guard told them to leave.¹⁰² In Justice Powell’s concurrence, he stated that although the government may not force a private individual to provide a platform for beliefs they do not hold, there was no risk of the other patrons of the shopping center attributing the students’ statements to that of the owner of the shopping center.¹⁰³ These facts are distinguishable from the current cases because, in both lawsuits, NetChoice argues that the state laws infringe upon the social media platforms’ own free speech rights by forcing them to carry messages against their community standards.¹⁰⁴ *FAIR* is also distinguishable from the current cases because the Court in *FAIR* held that recruiting activities were not speech in the way that editorial pages or newspapers are, and forcing law schools to allow military recruiting activities on campus did not interfere with the schools’ speech.¹⁰⁵ Therefore, *FAIR* is also inapplicable to the current facts because both S.B. 7072 and H.B. 20 interfere with the social media platforms’ own speech within the

centers regularly held open to the public); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 50 (2006) (hereinafter *FAIR*) (holding that a federal law requiring law schools receiving federal funding to allow military recruitment on campus does not violate the First Amendment).

100. See *NetChoice v. Att’y Gen.*, 34 F.4th 1196, 1215-16 (11th Cir. 2022) (stating that *Pruneyard* and *FAIR* are not controlling cases because social media platforms warrant First Amendment protection).

101. See *id.* at 1215 (stating that the principle of speaker’s autonomy was not at risk in *Pruneyard*).

102. *PruneYard Shopping Ctr.*, 447 U.S. at 75.

103. See *id.* at 99 (stating that free speech interests are affected when listeners are likely to identify opinions expressed by members of the public in a specific establishment as the views of the owner of that establishment).

104. See *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1215 (highlighting that *Pruneyard* is inapplicable to the cases at issue).

105. See *id.* at 1216 (stating that the *FAIR* Court distinguished that case from *Miami Herald* because requirements to accommodate military recruiters did not affect the message of the complaining speakers).

meaning of the First Amendment.¹⁰⁶ The two primary supporting decisions utilized by the Fifth Circuit fail to apply to the facts of the statutes at issue.¹⁰⁷

In finding that the statute protected Texans' speech, the Fifth Circuit specifically focused on two sections of H.B. 20 to address the moderation and censorship of users' posts.¹⁰⁸ The first section that the court analyzed was section 7 of the Texas Statute.¹⁰⁹ Section 7 states that:

A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:

- (1) The viewpoint of the user or another person;
- (2) The viewpoint represented in the user's expression or another person's expression; or
- (3) A user's geographic location in this state or any part of this state.¹¹⁰

The court found section 7 of the Texas statute still allowed platforms to moderate any material or expression that violates federal law, such as the sexual exploitation of children and the harassment of survivors of sexual abuse.¹¹¹

According to the Fifth Circuit, the advantages of compelling social media platforms to accommodate all users and content that abides by federal law are greater than the disadvantages of permitting uncontrolled and widespread expression that defames or fuels hatred toward marginalized communities.¹¹² The court did not consider how hate speech factors into the provisions of the Texas statute within these regulations.¹¹³ Hate speech is considered any form of expression in which the speaker intends to "vilify, humiliate, or incite hatred against a group or a class of persons on the basis of race, religion, skin

106. *See id.* (highlighting the difference between social media platforms and law school recruiting services, who were at the center of the FAIR argument, by stating that social media services are in the business of disseminating curated collections of speech).

107. *See id.* (stating that the Florida statute specifically interfered with the complainant's speech, differentiating the facts from those in *FAIR* and *Pruneyard*).

108. *See NetChoice, LLC v. Paxton*, 49 F.4th 439, 445-46 (5th Cir. 2022) (stating that sections 7 and 2 are the relevant sections of the statute for this suit).

109. *See id.* at 445 (addressing viewpoint based censorship of user's speech).

110. TEX. CIV. PRAC. & REM. CODE § 143A.002 (a).

111. *See NetChoice, LLC v. Paxton*, 49 F.4th at 446 (emphasizing that social media platforms could still remove illegal or unlawful material from their platforms, just not awful but lawful content).

112. *See id.* at 452 (stating that platforms may not use "borderline hypotheticals involving vile expression to permit consideration" when what is actually at stake is "the suppression of domestic political, religious, and scientific dissent.>").

113. *See id.* (arguing that concerns regarding speech directed to vilify or incite hatred toward a group or class of persons are extreme and hypothetical worries).

color, sexual identity, gender identity, ethnicity, disability, or national origin.”¹¹⁴ The Fifth Circuit stated the social media platforms’ desire to moderate hate speech was an unreasonable theoretical use of the law.¹¹⁵

The Fifth Circuit stated the court applied Supreme Court precedent in holding that section 7 of the Texas statute did not regulate the private platforms’ speech.¹¹⁶ The Fifth Circuit further stated that the Texas statute actually protected the speech of Texans and regulated the platforms’ content, while citing to section 230 of the CDA to support the claim that platforms are not speaking when hosting third-party users’ speech.¹¹⁷ The court held the First Amendment does not apply, and social media content moderation is an act of censorship against their users’ speech rather than an exercise of editorial discretion.¹¹⁸

The key case regarding editorial decisions and forced speech is *Miami Herald Publishing Co. v. Tornillo*.¹¹⁹ Florida’s right to reply statute allowed Tornillo to demand that the newspaper offer him space to print his replies to the paper’s previous publications.¹²⁰ The newspapers claimed the Florida statute violated the First Amendment because it compelled the newspapers to print content against their choice, thereby restricting their freedom of speech and freedom of the press.¹²¹ *Miami Herald Publishing Co.* supports the argument that forcing social media platforms to publish content and host users against their choice violates the platforms’ freedom of speech.¹²²

114. *Hate Speech and Hate Crime*, AM. LIBERTY ASS’N, <https://www.ala.org/advocacy/intfreedom/hate> (last accessed Jan. 25, 2023).

115. See *NetChoice, LLC v. Paxton*, 49 F.4th at 452 (arguing that the real people at risk of harm are the Texans whose speech is at risk of social media platform moderation).

116. See *id.* at 450 (arguing that section 7 of the Texas statute protected Texans’ First Amendment rights rather than infringing upon the rights of social media companies).

117. See *id.* at 448, 460, 467 (stating that social media platforms act more like a telephone company by just providing a conduit for third party speech, rather than exercising editorial control like a newspaper selecting articles for print).

118. See *id.* at 450, 464 (arguing that the key distinction is whose speech is censored through the Texas statute and who has First Amendment rights).

119. See 418 U.S. 241, 243 (1974) (serving as a critical precedent in later cases disputing the role of the government and the attempts to control the activities of newspapers and the press).

120. See *id.* at 244 (stating that Florida citizens had a right to defend themselves against public criticism in the same location as publication of such criticism).

121. See *id.* at 258 (arguing that the decision of what to print in the newspaper is considered protected editorial discretion).

122. See *NetChoice, LLC v. Att’y Gen.* 34 F.4th 1196, 1210 (11th Cir. 2022) (noting that the Supreme Court held that the First Amendment barred Florida’s intrusion into the function of the editors and their discretion).

Miami Herald established the precedent that a private entity's decisions about what to post and how to disseminate third-party generated content are editorial judgments protected by the First Amendment.¹²³ The Supreme Court held that the choice of what to publish and the ability to determine how to treat news and political candidates are exercises of editorial control and discretions that are protected under the First Amendment.¹²⁴ Therefore, following the Supreme Court's holding in *Miami Herald*, the Texas and Florida statutes violate the First Amendment because the laws infringe upon a private entity's discretion on how and to what extent it wants to disseminate third-party generated content.¹²⁵

When discussing *Miami Herald*, the Fifth Circuit argued that social media platforms are unlike newspapers.¹²⁶ The court stated that the platforms exercise little editorial control by using algorithms to filter out obscenity and spam-related content while practically all other content is posted to the platforms with zero editorial intervention, unlike a newspaper that chooses what content to include and print.¹²⁷ If social media platforms allowed content to be posted on their sites with zero editorial control or intervention, there would be no governmental interest justifying the Texas and Florida laws because no citizen's speech would be intentionally censored.¹²⁸ However, the state legislators in Florida and Texas argued that the social media content moderation statutes were needed to level the playing field and protect Texans and Floridians from Big Tech's liberal bias pushing conservative censorship.¹²⁹ Arguing there is liberal bias in the way social

123. See *id.* at 1212 (stating that social media content moderation decisions constitute the same sort of editorial judgments and, therefore, trigger First Amendment scrutiny).

124. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257-58 (holding that requiring newspapers to afford free space for candidates to reply is a violation of First Amendment freedom of the press). *But see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370, 373-74 (1969) (holding that a right to reply is allowed in broadcast media).

125. See *NetChoice, LLC v. Att'y Gen.*, 34 F.4th at 1222 (holding the provisions of the Florida statute that prohibit deplatforming and censoring content force platforms to disseminate messages they find objectionable, restricting their editorial abilities).

126. See *NetChoice, LLC v. Paxton*, 49 F.4th at 459 (distinguishing social media platforms as passive information conduits).

127. See *id.* (distinguishing algorithms and prioritization as different from the active role newspapers take in publication).

128. See *id.* at 448 (arguing that the statute advanced the state of Texas's governmental interest by protecting citizens from social media moderation).

129. See *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, OFF. OF THE FLA. GOVERNOR (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship->

media platforms moderate their sites implies that the platforms are doing more than just using algorithms to filter spam or obscenity in their moderation practices.¹³⁰ The court's argument inherently states that the social media sites are engaging in editorial intervention and expressive conduct by claiming that the platforms are purposefully choosing liberal voices to allow on their platforms and intentionally removing or suppressing conservative voices.¹³¹ Therefore, the platforms are engaging in speech of their own through their moderation choices and the state laws of Florida and Texas would prohibit their ability to speak, or not to speak, by forcing the sites to host users and content that violate their community standards.¹³²

The Supreme Court has upheld different levels of government regulation depending on the type of media such as radio, television, print, or the internet, with *Reno v. American Civil Liberties Union* serving as the first major Supreme Court ruling on the regulation of content on the internet.¹³³ *Reno v. American Civil Liberties Union* established that the internet is entitled to the same protections that other forms of media, like print, have and that the special factors in *Reno* did not permit the government to enforce regulations on the protected content medium.¹³⁴ *Reno* supports the argument that speech on the internet is entitled to the same First Amendment protections as other forms of media from government interference.¹³⁵

of-floridians-by-big-tech/ (stating that Governor DeSantis sought to fight against “big tech oligarchs that . . . censor if your views run contrary to their radical leftist narrative”); see also *Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship*, OFF. OF THE TEX. GOVERNOR (Sept. 9, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship> (stating that there is a “dangerous movement by social media companies to silence conservative viewpoints and ideas”).

130. See *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1210 (arguing that the social media platforms are expressing themselves through their content moderation choices).

131. See *id.* (arguing that when a platform “selektivly removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in ‘speech’ within the meaning of the First Amendment.”).

132. See *id.* at 1216 (stating that social media platforms are in the business of disseminating curated collections of speech).

133. See 521 U.S. 844, 849 (1997) (holding that anti-indecency provisions in the 1996 Communications Decency Act violated the First Amendment freedom of speech).

134. See *id.* at 874 (arguing that, to protect minors, the CDA effectively suppressed substantial amounts of speech that adults have a constitutional right to receive).

135. See *id.* at 846, 874 (arguing that the provision unconstitutionally restricted adults from content they legally could access); see also 47 U.S.C. § 230(d) (1996) (prohibiting the transmission of obscene or indecent material via the internet to anyone under the age of 18).

The Supreme Court stated that, unlike radio stations or newspapers, the internet cannot be considered a scarce commodity that warrants government regulation for the benefit of the public.¹³⁶ Social media platforms are not scarce commodities, nor does any single platform have a true monopoly over the internet.¹³⁷ Alternative options to mainstream social media platforms exist for those who do not like the functionality of Facebook, Twitter, Instagram, or Snapchat.¹³⁸ Former President Trump's migration to the alternative social media site Parlor, and later, his own Truth Social, demonstrates the ease with which an individual who has either been deplatformed or who seeks an alternative platform with differing content moderation policies can find a social media site that meets their needs.¹³⁹ The Supreme Court holding in *Reno v. American Civil Liberties Union* undermines the Fifth Circuit's argument by affording the same First Amendment protections of print media to internet speech and by stating that the internet is particularly excluded from the scarcity or monopolization arguments used to justify government regulations on other broadcast mediums.¹⁴⁰ Both H.B. 20 and S.B. 7072 were enacted to curtail the perceived intentional censorship of conservative voices and ideas due to the liberal bias of Big Tech and the social media giants.¹⁴¹ However, the lawmakers behind H.B. 20 and S.B. 7072 argue that the platforms are not entitled to First Amendment editorial protections because they do not exercise any editorial discretion and merely act as passive conduits

136. See *Reno*, 521 U.S. at 869-70 (explaining the different circumstances in which the Court has found enough government interest in protecting the public access to content, such as in radio broadcasts, due to the limited number of channels and invasive nature of the radio).

137. See *id.* at 870 (supporting the argument that there is no justification for government regulation of the internet for the public's benefit when there is no issue of scarcity).

138. See Bhagwat, *supra* note 93, at 112 (stating that different ideologically oriented social media platforms can and do coexist online).

139. See Nell Clark, *Trump's Social Media Site Hits App Store a Year After He Was Banned from Twitter*, NPR (Feb. 22, 2022), <https://www.npr.org/2022/02/22/1082243094/trumps-social-media-app-launches-year-after-twitter-ban> (stating that former President Trump advertised the social media platform as free from political discrimination and free from algorithm manipulation).

140. See 521 U.S. at 845 (establishing the precedent that speech on the internet is entitled to the same high level of First Amendment protections as print media).

141. See *Governor Ron DeSantis Signs Bill*, *supra* note 129; see also *Governor Abbott Signs Law*, *supra* note 129.

transporting information between users.¹⁴² These platforms cannot be both singling out conservative or non-left individuals or perspectives to satisfy their bias while not exercising any editorial intervention. Therefore, by Texas, Florida, and the Fifth Circuit's own arguments, social media sites engage in editorial discretion when they moderate content because they actively decide what, and to what extent, conservative voices are published on their platforms.¹⁴³

B. The Fifth Circuit Erred in Holding that Social Media Sites Were Correctly Classified as Common Carriers.

Social media platforms are not common carriers because they do not hold themselves out to serve all members of the public indiscriminately and they serve a role in curating and moderating the content users may post and see.¹⁴⁴ The traditional definition of a common carrier is a person or company that offers transport services for passengers or goods, for a fee, to the general public; established prior to the invention of the internet.¹⁴⁵ As common carriers, telephone companies or internet service providers are not allowed to engage in discriminatory practices when providing their services.¹⁴⁶ Social media platforms have acceptable use agreements prospective users must accept, which outline the objectionable behavior and language that could cause a user or their content to be removed, demonstrating that the platforms do not hold themselves out to serve all members of the public

142. See S.B. 7072, 123rd Leg., Reg. Sess., § 1(10)-(11) (Fla. 2021) (purporting to serve the State's interest in protecting Florida citizens from censorship); H.B. 20, 87th Leg., Reg. Sess., § 143A.002 (a) (1)-(2) (Tex. 2021) (prohibiting social media platforms from censoring users or a user's expressions based on the viewpoint expressed in the content).

143. See *NetChoice, LLC v. Paxton*, 49 F.4th at 452 (asserting that social media platforms cannot use hypotheticals involving "vile expression" to ignore what is actually at stake with internet censorship: the suppression of alternate viewpoints).

144. See *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (*NARUC I*) (stating that common carriers must hold themselves out to all citizens indiscriminately); see also *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (*NARUC II*) (affirming the definition of common carriers from *NARUC I* and adding that common carriers must transmit information of the customer's choosing, not that of the carrier's).

145. See Legal Info. Inst., *Common Carrier*, CORNELL L. SCH. (June 2021), https://www.law.cornell.edu/wex/common_carrier (stating that typical examples of traditional common carriers include railroads, airlines, taxi services, and ship owners).

146. See 47 U.S.C. § 202(a) (prohibiting designated common carriers from giving any undue preference or advantage in favor of one person over another).

without exercising selectivity based on their terms and conditions.¹⁴⁷

In his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*, Justice Clarence Thomas opined that social media platforms share many of the characteristics of traditional common carriers, such as having market or monopoly power, holding oneself out to the public, and whether the business is affected with the public interest.¹⁴⁸ The Fifth Circuit noted the Texas legislature found social media platforms to function as common carriers because they are central public forums, are affected by public interest, and are supported by the government.¹⁴⁹ By concluding social media platforms are common carriers, the Texas legislature is vested with the power to regulate their activities.¹⁵⁰ The common carrier doctrine generally grants the government the power to implement nondiscrimination requirements on communication providers that present themselves as serving all members of the public indiscriminately; therefore, classifying social media platforms as common carriers would allow state governments to enforce legislation limiting the moderation power of the sites in the name of preventing discrimination.¹⁵¹

However, when users choose to use and sign up for social media platforms, the platforms rarely purport to hold themselves out to serve all members of the public.¹⁵² A potential user must agree to the platform's terms and conditions, which state circumstances in which a user may be removed from the platform as well as types of content that are not allowed on the site.¹⁵³ The two state laws at issue both seek to protect a person's ability to

147. See, e.g., *Facebook Cmty. Standards*, *supra* note 94 (outlining what is and is not allowed on Meta's platforms); see also *Hateful Conduct*, X (April 2023), <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (describing what language is considered in violation of the Hateful Conduct policy and what the consequences are for violating the policy on X (formerly Twitter)).

148. See *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224, 1226 (2021) (Thomas, J., concurring) (suggesting that Congress should regulate social media platforms as common carriers).

149. See *NetChoice, LLC v. Paxton*, 49 F.4th at 445 (arguing that large platforms with vast numbers of users are common carriers because of their market dominance).

150. See *id.* at 448 (allowing the states to control whether, to what extent, and in what manner third-party content is available to citizens rather than the platforms themselves making such decisions).

151. See *id.* at 469 (stating that social media platforms are communication firms of extreme public importance).

152. See, e.g., *Facebook Cmty. Standards*, *supra* note 94 (outlining what is and is not allowed on Meta's platforms).

153. See *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1204 (11th Cir. 2022) (stating

post on social media without editorial interference or moderation from the platform; however, the Eleventh Circuit highlighted the fact that no one is required to post or consume social media content and no one has a vested right to demand that a platform allows them to post or consume content.¹⁵⁴ This highlights that access to social media sites and the ability to post whatever content one wants is not a constitutional right, and content moderation policies are not infringing on any citizen's rights.¹⁵⁵ Therefore, the Texas and Florida statutes are unconstitutional.¹⁵⁶ Previous regulations regarding broadcast mediums, classifying them as common carriers, invoked a less stringent First Amendment scrutiny by the Supreme Court, and the Court's precedent suggests that social media sites are not common carriers.¹⁵⁷

Supreme Court precedent states the act of delivering a compilation of third-party content to users, such as social media, cable operators, or newspapers, is entitled to First Amendment protections.¹⁵⁸ In *Turner Broadcast Systems v. FCC*, the Court compared television cable operators to other media, such as railroads and electricity providers, who are traditionally protected by the First Amendment.¹⁵⁹ In the *Turner (I)* case, the Court ultimately held that compared to electricity providers or railroads, which are subject to economic regulation, cable operators act more like newspapers, publishers, and bookstores.¹⁶⁰ The Court held that while cable operators do not always generate the content, they still decide what content to transmit, which is comparable to newspapers deciding which articles to print or

that platforms will exercise editorial judgment when it removes posts that violate its terms of service or community standards).

154. *See id.* (arguing that no person is forced to use content on any social media platform and there are a variety of platforms to serve everyone's needs).

155. *See id.*

156. *See id.* (stating that the Constitution protects citizens from governmental efforts to restrict their access to social media sites but it does not protect citizens from the user policies of the private sites).

157. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) (stating that broadcast media was specifically unique due to physical limitations, such as scarcity in radio or television frequencies).

158. *See id.* at 636 (recognizing that cable operators have First Amendment rights to freedom of speech and expression).

159. *See id.*

160. *See U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 428 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (distinguishing the public utility role that electricity providers and railroads play in society).

bookstores deciding which books to carry.¹⁶¹ The Court's comparison is important as it distinguishes the type of role cable operators play in delivering a compilation of third-party content to users from that of a public utility like electricity providers and railroads.¹⁶² The FCC has also applied different forms of regulatory treatment to different broadcast and communications media.¹⁶³ An important classification difference is the FCC's grouping of some services as telecommunications services and others as information services.¹⁶⁴ Information services generate, acquire, store, transform, process, retrieve, utilize, or make available information via telecommunications and electronic publishing.¹⁶⁵ By contrast, telecommunication services are defined as offering the transmission of information of the user's choosing, without changing the form or content of the information.¹⁶⁶

In analyzing the two classifications by the FCC, social media platforms fit the definition of information service because they allow users to generate, acquire, store, or make available information via their platforms.¹⁶⁷ As an information service, social media platforms would not be classified as common carriers under the FCC's own definitions.¹⁶⁸ Therefore, Texas and Florida would not have the regulatory power to implement content

161. *See id.* at 427. (rejecting the argument that cable operators merely operated as transmission pipes that disseminate third-party content and do not exercise any kind of editorial discretion).

162. *See id.* (supporting the argument that social media platforms are entitled to First Amendment protections).

163. *See id.* at 383 (stating that the FCC classified digital subscriber line ("DSL") service as a telecommunications service, which requires them to be treated as common carriers).

164. *See id.* at 383-84 (stating that the FCC chose to classify DSL broadband services as telecommunications services and cable broadband as an information service).

165. *See* 47 U.S.C. § 153(20) (defining information services as not including any use of such capability for the management, control, or operation of a telecommunications system).

166. *See id.* at § 153(46) (further defining telecommunications services as the offering of these services, for a fee, directly to the public).

167. *See* U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 395 (D.C. Cir. 2017) (Brown, J., dissenting) (stating that generating, acquiring, storing, retrieving, transforming, or utilizing information is what users do on social media platforms and with email providers).

168. *See id.* at 384 (stating that information services are subject to less extensive regulatory obligations and oversight than telecommunications providers).

moderation restrictions.¹⁶⁹ Florida recognized that the basic characteristic of a common carrier is the requirement to hold oneself out to serve the public indiscriminately.¹⁷⁰ Social media platforms do not hold themselves out to serve the public indiscriminately.¹⁷¹ Instead, they serve those who agree to abide by their community standards and terms of service.¹⁷² Further, Justice Thomas along with Texan and Floridian politicians argue social media platforms prioritize and favor liberal or left-leaning users, yet also argue that they act like common carriers because they hold themselves out to the public indiscriminately.¹⁷³ The state legislatures as well as the Fifth Circuit seem to argue both that social media sites act as common carriers and that they need government regulation because they refuse to carry certain content that they do not ideologically agree with. The state legislatures are effectively arguing that social media platforms are common carriers and can be subjected to government regulation but also that platforms act contrary to the definition of a common carrier.¹⁷⁴ By moderating users and content, per the terms and conditions outlined when signing up to use a particular site, the platforms do not hold themselves out to accommodate certain language and behavior.¹⁷⁵

169. *See id.* (demonstrating that because information services are subjected to less extensive regulations, Texas and Florida would not have the legal justification to enforce these statutes).

170. *See NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1221 (11th Cir. 2022) (stating that the State did not argue that market power and public importance are alone sufficient reasons to re-characterize a private company as a common carrier).

171. *See Facebook Cmty. Standards, supra* note 94 (stating that Facebook removes content that could contribute to a risk of harm to the physical security of persons).

172. *See id.* (outlining the community standards as well as the specific policy rationale that states what content is not allowed and what content may require additional information to lead to an enforcement action).

173. *See NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) (stating that the largest social media platforms, such as Twitter and Facebook, are common carriers by virtue of their market dominance).

174. *See id.* at 452 (arguing that the purpose of the state law is to protect Texas citizens from censorship at the hands of social media platforms).

175. *See NetChoice, LLC v. Att’y Gen.*, 34 F.4th at 1220 (noting that although social media platforms do hold themselves out to the public, they require users to accept their terms of service and agree to their community standards as a precondition to access to the platform).

The Texas and Florida social media content moderation statutes both attempt to implement laws that would force social media platforms to carry all users and content that does not explicitly violate federal law.¹⁷⁶ The statutes could be compared to Florida's right-to-reply statute that required Florida newspapers to allow political candidates the space in their publications to respond to criticisms published.¹⁷⁷ However, the Supreme Court held a law forcing a newspaper to publish content that went against the paper's editorial judgments violated their First Amendment right to freedom of the press and freedom of speech.¹⁷⁸ The Supreme Court also held that decisions regarding what to post, what not to post, how much space within the newspaper to give content, how to prioritize content throughout the newspaper, and what gets published on the front page are all protected editorial judgments.¹⁷⁹ Following Supreme Court precedent, the decisions social media platforms make regarding what posts to allow on their platforms, what users they allow to use their services, how to organize and prioritize the content on their platforms should all be considered editorial judgments that are protected under the First Amendment.¹⁸⁰

IV. POLICY RECOMMENDATION

Social media content moderation is a crucial tool for platforms to push back against the growing hateful and incendiary rhetoric toward vulnerable communities that can encourage or exacerbate real-world acts of violence.¹⁸¹ Social media usage is deeply ingrained in American culture; approximately eighty-two percent of the U.S. population over the age of twelve uses some form of social media daily.¹⁸² In 2020, there were 7,759 reported hate crimes

176. See S.B. 7072, 123rd Leg., Reg. Sess. (Fla. 2021) (requiring social media platforms to host political candidates on their sites); see also H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021) (requiring social media platforms to host all users and third-party content so long as it does not violate federal law).

177. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (defining Florida's right-to-reply law).

178. See *id.* (arguing that right-to-reply rules allowed *Tornillo* the space in the newspaper to print his response).

179. See *id.* at 258 (holding that newspapers exercise editorial discretion when making decisions regarding what to publish).

180. See *id.* (holding that editorial judgments are protected speech under the First Amendment).

181. See *id.* (highlighting the power social media companies have to curb hate speech online).

182. See Jay Baer, *Social Media Usage Statistics for 2021 Reveal Surprising Shifts*, CONVINC & CONVERT, <https://www.convinceandconvert.com/social-media/social->

in the United States, nearly sixty-four percent of which were motivated by a bias against race, ethnicity, or ancestry.¹⁸³ The U.S. Department of Justice's National Institute of Justice sponsored a study that found individuals in the United States who participated in violent and non-violent hate crimes and other extremist acts actively engaged with social media and extremist groups online.¹⁸⁴

The dangerous prevalence of both hate crimes as well as online hate speech is not only an issue in the United States but also worldwide.¹⁸⁵ There have been numerous instances demonstrating the connection between online speech and acts of violence in the United States and around the world.¹⁸⁶ In April 2018, Alek Minassian killed ten pedestrians when he drove a rented van into citizens in the business district of Toronto, Canada.¹⁸⁷ Minassian was a self-identified "incel" (involuntary celibate) who purposefully intended to target women, and he praised Elliot Rodger, an American mass murderer and part of the "incel movement," on his Facebook account.¹⁸⁸ In October 2018, Robert Bowers killed eleven Jewish congregants at the Tree

media-usage-statistics/ (last accessed Mar. 07, 2023) (stating that approximately 223 million Americans used social media in 2021).

183. See Joe Hernandez, *Hate Crimes Reach the Highest Level in More Than a Decade*, NPR (Sept. 1, 2021), <https://www.npr.org/2021/08/31/1032932257/hate-crimes-reach-the-highest-level-in-more-than-a-decade> (indicating that the scapegoating the Asian community for COVID-19, including former President Trump calling it the "Chinese virus," contributed in part to a sudden increase in hate crimes against the Asian community).

184. See *Domestic Extremists and Social Media: Study Finds Similarities, Differences in Web Habits of Those Engaged in Hate Crimes vs. Violent Extremism*, DEPT. OF JUSTICE (Apr. 19, 2022), <https://nij.ojp.gov/topics/articles/domestic-extremists-and-social-media-study-finds-similarities-differences-web> (noting that use of social media among ideological groups showed varying patterns within those with radical ideologies).

185. See Zachary Laub, *Hate Speech on Social: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 7, 2019), <https://www.cfr.org/background/hate-speech-social-media-global-comparisons> (stating that the increasing number of attacks against minority communities has raised concerns about the relationship between inflammatory speech online and these violate attacks).

186. See *id.* (stating that social media posts and conspiracy theories can inspire violent acts offline).

187. See Les Perreux et al., *Suspect in Toronto Van Attack Publicly Embraced Misogynist Ideology*, GLOBE & MAIL (Apr. 24, 2018), <https://www.theglobeandmail.com/canada/article-facebook-post-connected-to-suspect-in-van-rampage-cites-incel/>.

188. See *id.*

of Life Congregation in Pittsburgh, Pennsylvania.¹⁸⁹ Bowers frequently posted anti-Semitic slurs and conspiracy theories on the social media network Gab where his bio read “Jews are the children of Satan.”¹⁹⁰ In August of 2019, Philip Manshaus live-streamed to Facebook while he opened fire on the Al-Noor Islamic Center in Bærum, Norway.¹⁹¹ Manshaus stated online that “Saint Tarrant” chose him, referring to the gunman who killed fifty-one people at mosques in Christchurch, New Zealand and who also live-streamed the attack to Facebook.¹⁹²

More recently, in 2022, perpetrators of violent attacks in Bratislava, Slovakia; Dover, England; and Buffalo, New York posted extremist language online indicating their violent ideologies.¹⁹³ In Slovakia, the shooting occurred in front of a well known gay bar after the perpetrator posted an original manifesto with homophobic and transphobic views to his public Twitter account the day before the attack.¹⁹⁴ In Dover, the perpetrator, who firebombed a Dover migrant center, posted “I will end illegal migration into this country within one year from the French boat side,” in addition to posting racist comments online and liking the Facebook groups “Close UK

189. See Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>; see also Julie Turkewitz & Kevin Roose, *Who is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting?*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/robert-bowers-pittsburgh-synagogue-shooter.html?action=click&module=Intentional&pgtype=Article>.

190. See Campbell, *supra* note 185; see also Turkewitz, *supra* note 185.

191. See Jason Burke, *Norway Mosque Attack Suspect “Inspired by Christchurch and El Paso Shootings”*, THE GUARDIAN (Aug. 11, 2019), <https://www.theguardian.com/world/2019/aug/11/norway-mosque-attack-suspect-may-have-been-inspired-by-christchurch-and-el-paso-shootings> (stating that Manshaus said “we can’t let this continue, you gotta bump the race war threat in real life”).

192. See *id.*

193. See *Slovakia: Two Dead After Shooting Outside LGBT Bar*, BBC (Oct. 13, 2022), <https://www.bbc.com/news/world-europe-63239523>. See also Peter Nicholls, *Man Attacks Migrant Processing Center in Dover, Kills Himself*, REUTERS (Oct. 30, 2022), <https://www.reuters.com/world/uk/man-attacks-uk-border-force-centre-kills-himself-reuters-eyewitness-2022-10-30/>; Jesse McKinley, et al., *Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting>.

194. See *Bratislava Shooter Promoted White Supremacist Content on Twitter for Over a Year*, ANTI-DEFAMATION LEAGUE (Oct. 14, 2022), <https://www.adl.org/resources/blog/bratislava-shooter-promoted-white-supremacist-content-twitter-over-year>.

Borders” and “God Hates Islam.”¹⁹⁵ The perpetrator of the Buffalo supermarket shooting live-streamed the attack to the online service Twitch and posted a manifesto describing his radicalization on Internet message boards like 4chan and being largely inspired by great replacement theory.¹⁹⁶ His manifesto stated he became radicalized in his racist and ecofascist beliefs from the internet.¹⁹⁷

The danger in passing laws such as those in Texas and Florida is shown repeatedly in the increase of violent crimes against minorities.¹⁹⁸ Based on the viewpoint neutrality required by both the Texas and Florida laws, it would be illegal under these state statutes to block or remove: hate speech directed at racial, sexual, or gender minorities; white supremacist groups such as the Ku Klux Klan or the Proud Boys; and speech praising or supporting terrorist violence.¹⁹⁹ While the politicians behind these statutes may be solely focused on promoting and favoring elected officials who align with their own ideology, these laws would force social media platforms to allow all awful but lawful content.²⁰⁰ Experts at the United Nations stated there is an urgent need for more accountability from social media companies to fight the rising hate speech online and to actively work to combat posts and activities that advocate for hatred and inspire violent acts.²⁰¹

It is clear that social media has become part of the organization, radicalization, and necessary communication for individuals online to take their prejudiced views beyond the internet and enact violence against

195. See Matthew Weaver, “I Will End Illegal Immigration:” Who Was Dover Firebomb Suspect Andrew Leak?, THE GUARDIAN (Nov. 1, 2022), <https://www.theguardian.com/world/2022/nov/01/immigration-who-was-dover-firebomb-suspect-andrew-leak>.

196. See Isaac Stanley-Becker & Drew Harwell, *Buffalo Suspect Allegedly Inspired by Racist Theory Fueling Global Carnage*, WASH. POST (May 15, 2022), <https://www.washingtonpost.com/nation/2022/05/15/buffalo-shooter-great-replacement-extremism/>.

197. See *id.*

198. See Harrison & Hamilton, *supra* note 3 (demonstrating that hate speech on twitter predicted hate crimes in the real world).

199. See Fla. S.B. 7072 (barring moderation based on user or post viewpoint); see also Tex. H.B. 20 (prohibiting removal of content that is permissible by federal law).

200. See Fla. S.B. 7072; Tex. H.B. 20 (requiring social media sites to allow all legal content on their sites).

201. See “Urgent Need” for More Accountability from Social Media Giants to Curb Hate Speech: UN Experts, UNITED NATIONS (Jan. 6, 2023), <https://news.un.org/en/story/2023/01/1132232> (arguing that social media CEOs should center on human rights, racial justice, accountability, and ethics in their business model).

vulnerable communities.²⁰² In order to fight the growing threat of racial, sexual, and gendered violence in the United States, social media platforms need protections put in place to allow them to moderate their platforms in line with their community standards, not laws that tie their hands back from fighting increasing hatred online.²⁰³

V. CONCLUSION

Although many states are adopting social media content moderation statutes, either prohibiting or requiring social media sites to moderate third-party user content, the Supreme Court has consistently chosen to provide private entities exercising editorial judgements First Amendment protections.²⁰⁴ When comparing the Texas and Florida statutes, both states assert that there should be a place for social media platforms to be able to remove content that violates federal law.²⁰⁵ However, neither state considered hate speech or the increased correlation with real world violence against vulnerable communities when drafting their laws, completely ignoring the impact these laws would have by allowing incendiary rhetoric to run rampant and unchecked online.²⁰⁶

The increasing frequency of hate crimes in the United States and the correlations found between the role online communities play in emboldening individuals to act on their preexisting prejudiced and discriminatory views demonstrates the importance of allowing social media content moderation beyond the restrictions imposed by the Texas and Florida statutes.²⁰⁷ The Eleventh Circuit made three crucial points when articulating its holding: (1) social media platforms are private entities; (2) social media platforms publish their own content such as community standards, posts, or content warnings;

202. *See id.* (stating that social media has emboldened people to act on their prejudiced views throughout the world).

203. *See id.* (arguing that social media giants are capable of curbing hate speech online through moderation policies).

204. *See generally* *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Reno v. Am. Civ. Liberties Union*, 51 U.S. 844 (1997); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

205. *See* Fla. S.B. 7072 (requiring social media platforms to host political candidates); *see also* Tex. H.B. 20 (prohibiting removal of content that is permissible by federal law).

206. *See* Harrison, *supra* note 3 (finding that more targeted, discriminatory tweets posted in a city related to a higher number of hate crimes); *see also* Newman et al., *supra* note 6 (stating that data tracked an increase in bias-related violence after former President Trump won the 2016 election).

207. *See* Hernandez, *supra* note 183 (stating that nearly two of every three hate crimes reported in 2020 were motivated by a bias against race, ethnicity, or ancestry).

and (3) social media platforms are not just servers or internet service providers as they provide a curated and edited compilation of content for each individual user.²⁰⁸ Supreme Court precedent supports these three important distinctions highlighted by the Eleventh Circuit, whereas the Fifth Circuit relied on Supreme Court precedent that is readily distinguishable from the facts at hand. Future cases regarding state laws attempting to bind the hands of social media companies from exercising editorial discretion and moderation policies should follow the reasoning of the Eleventh Circuit and ensure First Amendment protections for social media platforms.

On September 29, 2023, the Supreme Court agreed to weigh in on the constitutionality of the Texas and Florida laws as part of their 2023-2024 docket.²⁰⁹ When the Supreme Court granted the application to vacate the stay of the Texas law in May of 2022, Justices Alito, Thomas, and Gorsuch joined in a dissent stating the “law before [the Supreme Court] is novel, as are [the] applicants’ business model.”²¹⁰ In his dissent, Justice Alito stated that the law at issue is a “ground-breaking” state law that “addresses the power of dominant social media corporations to shape public discussion of the important issues of the day.”²¹¹ A decision either finding the state laws to be constitutional or unconstitutional would have widespread first amendment implications. This Comment argues that the Fifth Circuit incorrectly applied Supreme Court precedent regarding First Amendment editorial protections to hold that social media platforms do not engage in editorial judgments.²¹² The Fifth Circuit seems to argue both that social media sites act as common carriers and need government regulation, but also refuse to carry certain content that they do not ideologically agree with by way of their terms of service.²¹³ At time of publication, the Supreme Court

208. See *NetChoice v. Att’y Gen., LLC*, 34 F.4th 1196, 1204 (11th Cir. 2022) (outlining the reasons why social media platforms are afforded First Amendment protections).

209. See Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, N.Y. TIMES (Sept. 29, 2023), <https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html> (nothing that this sets the stage for a major ruling on how the First Amendment applies to power tech platforms).

210. *NetChoice, LLC v. Paxton*, 596 U.S. 1, 3 (2022) (Alito, J., dissenting).

211. *Id.*

212. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 462-65 (5th Cir. 2022) (stating that content moderation is not an editorial judgment).

213. See *id.* at 445 (stating that the largest social media platforms, such as Twitter and Facebook, are common carriers by virtue of their market dominance); See, e.g., *Facebook Cmty. Standards*, *supra* note 94 (outlining what is and is not allowed on

has yet to issue any decision on this issue; this Comment urges the Court to find the state laws unconstitutional and to protect the First Amendment rights of social media platforms. Social media content moderation is a vital tool for platforms to fight the growing hateful and incendiary rhetoric toward vulnerable communities that can encourage or exacerbate offline acts of violence.

Meta's platforms); *see also* *Hateful Conduct*, X (April 2023), <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (describing what language is considered in violation of the Hateful Conduct policy and what the consequences are for violating the policy on X (formerly Twitter)).