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For Freedom or Full of It? State Attempts to Silence Social Media

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For Freedom or Full of It? State Attempts to Silence Social Media

GRACE SLICKLEN*

*Freedom of speech is, unsurprisingly, foundational to the “land of the free.” However, the “land of the free” has undergone some changes since the First Amendment’s ratification. Unprecedented technological evolution has ushered in a digital forum in which the volume, speed, and reach of words transcend the Framers’ visions of the First Amendment’s aims. Social media platforms have become central spaces for public discourse, where opportunities to create—and repress—speech are endless. From enabling individuals to freely express their views, to allowing state actors to limit open exchanges, it is about time that the Supreme Court tackles this complex issue of national importance through *NetChoice v. Moody* and *NetChoice v. Paxton*.*

This Note explores free speech in the context of social media platforms and their content-moderation decisions. While the Supreme Court has previously grappled with the challenges of adapting constitutional principles to technological advancements, it has yet to fully address the unique dynamics of social media platforms and how they remove content. When a social media platform deletes a post or bans a President, is that “speech” protected by the First Amendment? And if it is, should it be? This Note spotlights a recent split between the Eleventh and Fifth Circuits, stemming from politically motivated attempts to regulate social media platforms in Florida and Texas. This Note aims to serve as a guide to the evolving

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legal landscape surrounding social media content moderation, offering insights into the imminent Supreme Court decisions that will address the circuit split and shape the future of the digital “land of the free.”

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INTRODUCTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I.

By its text, the First Amendment precludes the government from restraining speech, whether that is words spoken by an individual, a newspaper, or a private corporation.¹ In the Founding Era, freedom of speech and freedom of the press were considered requisites to guard against all-too-familiar abuses from the Crown.² But as society has progressed from public town squares to metaphysical newsfeeds, the amount of speech, the speed at which it travels, and its reach stretch far beyond what the Framers could have envisioned.³ Suffice it to say that the meaning of the term “speech” has grown complex.

The Supreme Court has dealt with technological advancements before.⁴ When it encountered the internet in 1997, the Court reconciled unprecedented innovations with archaic vehicles of communication common in Colonial times, like town criers and pamphleteers.⁵ However, the Court has not yet drawn the same parallels to

¹ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978); *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

² See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002).

³ See Lucia E. Rodriguez, *Freedom of Speech in the Era of Social Media: A Review of Senate Bill 7072, Florida’s Anti-Censorship Bill Aimed at Big Tech*, 46 NOVA L. REV. 29, 34–35 (2021) (“Today’s marketplace for ideas has changed from the public square to virtual platforms . . . [that] provide avenues for historically unprecedented amounts of speech . . . Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.” (footnotes omitted)).

⁴ See generally David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 101–02 (2020) (addressing technological change and Fourth Amendment doctrine).

⁵ See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”).

social media platforms and their content-moderation decisions. This is set to change with the recent split between the Eleventh and Fifth Circuits.⁶ At the center of the divide exists two separate—politically motivated—attempts by states to regulate social media platforms: Florida’s Senate Bill 7072 (“SB 7072”) and Texas’s House Bill 20 (“HB 20”).⁷

This Note considers two recent decisions in the Eleventh and Fifth Circuits that highlight exactly the challenges with interpreting the meaning of “speech” in today’s technological landscape. Previously united as one, and still considered to share parallel views, the two circuits diverge on an issue of national importance.⁸ While each case concerns a state statute, the objective of this Note is to confront exactly what social media platforms are doing when they delete a post or ban a President, although that answer is nowhere near black and white. This Note also serves as a guide for the Supreme Court, which will confront the circuit split in 2024. Although the Court has hinted at where it may stand in assessing social media platforms, it has delayed issuing an opinion on the matter for far too long.

Part I explores First Amendment jurisprudence, from the Amendment’s initial aims to its expansion as technological advancements—including the rise of the internet and social media—have permeated society and tested the Supreme Court. Part II examines the background of the laws and parties at the center of the circuit split and summarizes the Eleventh and Fifth Circuit opinions, focusing on the portions relevant to this Note. It concludes by revealing the status of these controversial cases.

Part III addresses how and why First Amendment principles should be applied to social media platforms through the lens of the

⁶ See James Romoser, *Elon Musk, Internet Freedom, and How the Supreme Court Might Force Big Tech into a Catch-22*, SCOTUSBLOG (Nov. 6, 2022, 6:00 PM), <https://www.scotusblog.com/2022/11/elon-musk-internet-freedom-and-how-the-supreme-court-might-force-big-tech-into-a-catch-22>.

⁷ S.B. 7072, 2021 Reg. Sess. (Fla. 2021); H.B. 20, 87th Leg., 2d. Sess. (Tex. 2021).

⁸ See *U.S. Court of Appeals for the Fifth Circuit - Brief History*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, <https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history> (last visited Sept. 18, 2023); *Circuit Court Map*, VISUAL FIRST AMENDMENT (2010), <http://visualfa.org/circuit-court-map>; *Biden v. Knight First Amend. Inst.* at Colum. Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

Eleventh and Fifth Circuits' focal points. It begins by highlighting the Supreme Court's latest comments on social media. Then, it confronts social media platforms and attempts to reconcile the contentious mediums with current First Amendment doctrine. Specifically, this Note maintains that social media platforms are private actors who likely cannot be transformed into government actors generally. Next, and most relevant to the debate between the Eleventh and Fifth Circuits, this Note argues that social media platforms engage in protected speech when making editorial judgments through their content-moderation decisions. Through its analysis, this Note compares and contrasts platforms with other communication mediums the Supreme Court has opined on before, which it urges the Court to do when tackling this issue. This Note also explores platforms' content-moderation decisions as inherently expressive conduct. After, it briefly touches on the common carrier doctrine, which this Note advises should not be extended to cover social media platforms.

Subsequently, this Note proceeds to scrutinize SB 7072 and HB 20, highlighting their purposes and differences, although it does not suggest that their distinctions warrant altered treatment between the two laws. Then, it considers the consequences that could follow if the Supreme Court were to uphold the censorship laws and looks to Communist China to paint that picture.

Finally, Part IV argues that states are not equipped to confront Big Tech and mentions the push to reform Section 230 as an alternative solution. However, this Note proposes that social media platforms' influence on society is not as strong as many suggest, and thus does not necessitate government intervention now. Ultimately, this Note opines that the solution to reducing social media's influence on society simply lies with individual social media users and their choices to utilize platforms. Through this, this Note explores Elon Musk's acquisition of Twitter.⁹

⁹ In July 2023, Twitter formally changed its name to "X." Irina Ivanova, *Twitter Is Now X. Here's What That Means*, CBS NEWS (July 31, 2023, 5:16 PM), <https://www.cbsnews.com/news/twitter-rebrand-x-name-change-elon-musk-what-it-means>.

I. FIRST AMENDMENT JURISPRUDENCE: FROM NEWSPAPERS TO NEWSFEEDS

The First Amendment sets the United States—the land of the *free*—apart from other nations.¹⁰ The United States was founded on the belief “that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”¹¹ The First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”¹² In the Founding Era, the influence of disseminated information was obvious: With “the pen and press [having] merit equal to that of the sword,” together its words amounted to “an essential factor in pushing the colonists toward revolution.”¹³ It came as no surprise then that the Framers placed great significance on an unrestrained press whose purpose “was to serve the governed, not the governors.”¹⁴ The First Amendment endeavored to prevent the government’s manipulation of what and who could print based on what it felt was disloyal or offensive.¹⁵ It is evident, then, that the target of the First Amendment was centered around thwarting *government* censorship,¹⁶ which suggests, at its core, the view that political and ideological speech necessitated preservation.¹⁷

¹⁰ See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 229 (1992) (“No other nation [besides America] claims as fierce and stringent a system of legal protection for speech. It is the strongest affirmation of our national claim that we put liberty ahead of other values.”).

¹¹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹² *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹³ See Robert G. Parkinson, *Print, the Press, and the American Revolution*, OXFORD RSCH. ENCYCLOPEDIAS (Sept. 3, 2015), <https://oxfordre.com/american/history/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-9#acrefore-9780199329175-e-9-note-1>; see also 2 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* 633–34 (Lester H. Cohen ed., Indianapolis: Liberty Fund 1990).

¹⁴ *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

¹⁵ See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002).

¹⁶ See Alan Z. Rozenshtein, *Silicon Valley’s Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 357 (2021).

¹⁷ See *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966).

Although newspapers were considered partisan in early America, the press was understood to have presented various views to its readers, fostering a true marketplace of ideas.¹⁸ But the channels of dialogue have gone far beyond what existed in the early days of the United States; ink to parchment and the distribution of pamphlets were replaced over time by the mass distribution of national newspaper goliaths.¹⁹ Newspapers were perceived as governing the marketplace of ideas, and thus became antagonized by attempts of governmental interference.²⁰ However, any narrative control or dilution of viewpoints by a newspaper was still viewed as favored over the invisible hand of the true enemy that the First Amendment sought to protect the people against.²¹ If newspapers were required to distribute articles they disagreed with, the government could then end up pulling the strings of public discourse, making the Framers' worst nightmare come to fruition.²²

While the protection of the press seems obvious given the First Amendment's text, the Supreme Court has extended First Amendment liberties beyond journalistic enterprises and individual speakers to mediums that the Framers did not contemplate.²³ The broad spectrum of First Amendment protection²⁴ encompasses parades, broadcasters, cable companies, and law schools.²⁵ As it has defined these different groups, the Court has strived to emphasize that the First Amendment prohibits only governmental—not private—

¹⁸ See *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248 (1974).

¹⁹ See *id.* at 248–49.

²⁰ See *id.* at 260–61 (White, J., concurring).

²¹ See *id.* at 260.

²² See Fried, *supra* note 10, at 252–53.

²³ See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978) (“[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.” (footnote omitted)).

²⁴ See Wes P. Rahn, *Burning the House to Roast a Pig: Examining Florida's Controversial Social Media Law*, 73 *MERCER L. REV.* 667, 671 (2022) (“These holdings have established a spectrum of how laws regulating speech should be applied differently under the First Amendment depending on the form of expression.”).

²⁵ See Rozenshtein, *supra* note 16, at 364 (“It makes sense that the First Amendment would provide strong protections in these situations . . . [as] [t]hey can crowd out other kinds of speech: with newspapers because of editorial capacity; with parades because of the physical capacity limits on the number of participants . . .”).

abridgment of speech.²⁶ Moreover, the First Amendment has not been interpreted by courts in a silo. With property rights, another fundamental founding principle, the government is limited in the restraints it may impose on “quintessential public forums” such as streets or public parks, even when owned by private property owners.²⁷

Technology has further complicated how entities’ words and actions are assessed under the First Amendment, sometimes creating extraordinary circumstances that warrant altered treatment.²⁸ With the rise of broadcast media, the Court took a distinct approach to regulatory efforts because of the medium’s “unique physical limitations,” as it emphasized the importance of individual speakers’ rights over the rights of broadcast channels with a semblance of fear that technology could present problems of interference that would prevent some from being heard.²⁹ However, when technology advanced to resolve spatial constraints, First Amendment scrutiny of regulations on relevant mediums like cable operators remained the strictest.³⁰ Yet, the Court still recognized that cable operators, as opposed to newspapers, wielded stronger control over access, giving those who manage these dominant vehicles of communications ample opportunity for abuse.³¹

A. *Doctrinal Dormancy in the Digital Days*

The rise of the internet was first perceived as less invasive than radio or television due to the limitless nature of cyberspace in the

²⁶ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

²⁷ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); see also *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

²⁸ See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 740–41 (1996).

²⁹ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637 (1994); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387–88 (1969).

³⁰ See *Turner*, 512 U.S. at 639. The Court even found that precedent did not offer a “basis for qualifying the level of First Amendment scrutiny that should be applied to” the internet. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

³¹ See *Turner*, 512 U.S. at 656, 657.

1990s.³² The internet as a “dynamic, multifaceted category of communication” was recognized to encompass “not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.”³³ To the Supreme Court, the internet was not unlike a town crier or pamphleteer, reducing this novelty to something so rudimentary.³⁴ Even as the internet advanced in sophistication (i.e., utilization of search engines), lower courts still recognized full First Amendment protection for technological entities.³⁵ While Congress has promoted a policy that the internet remain free from governmental control through Section 230 of the Communications Decency Act,³⁶ the Supreme Court has tiptoed around its analysis of this “new” medium and the specifics it has produced, even pondering its uniqueness in 2017.³⁷ As the digital revolution has progressed, the Court has endeavored to “exercise extreme caution before suggesting that the First Amendment provides scant protection for” its many mediums that evolve daily.³⁸ Yet, technological transformation has been considered an “important catalyst for doctrinal evolution,” and social media specifically may finally be just that.³⁹

B. *A Potential Status Update*

After the Court saw social media as one of the most imperative forums for the interchange of ideas in 2017,⁴⁰ in 2021, eighty-two percent of Americans utilized social media.⁴¹ The earliest forms of social media began as settings for certain topics, but the medium has

³² See *Reno*, 521 U.S. at 869–70. But see Rahn, *supra* note 24 (“While the internet does generally enjoy the highest level of First Amendment protection, that is not to say that speech on the internet cannot be regulated.”).

³³ *Reno*, 521 U.S. at 870.

³⁴ See *id.*

³⁵ See *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014).

³⁶ 47 U.S.C. § 230.

³⁷ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

³⁸ *Id.*

³⁹ Han, *supra* note 4, at 112.

⁴⁰ See *Packingham*, 137 S. Ct. at 1735.

⁴¹ Stacy Jo Dixon, *Percentage of U.S. Population Who Currently Use Any Social Media from 2008 to 2021*, STATISTA (July 27, 2022), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile>.

swiftly developed to center around the individual.⁴² While key players have shifted over the years as competitors find untapped niches,⁴³ as of 2021, Facebook, Instagram, LinkedIn, Twitter, and TikTok respectively sat in the top ten most popular platforms.⁴⁴ These platforms demand some level of content moderation to control information overload.⁴⁵ Congress has recognized this requirement through Section 230, which confers on social media platforms full discretion to moderate their content, protecting platforms from facing liability for those decisions.⁴⁶

But this accountability shield of sorts has grown increasingly controversial, especially as many perceive content-moderation decisions as being applied arbitrarily.⁴⁷ While the First Amendment was designed to prevent government censorship, the Framers could not have imagined that a private medium could possess the power to regulate the speech of those individuals who propelled the protections in the first place.⁴⁸ The government's limitations in restricting freedom of speech does not impede it from protecting private voices.⁴⁹ Thus, several states have attempted to combat platforms'

⁴² See Karen McIntyre, *The Evolution of Social Media from 1969 to 2013: A Change in Competition and a Trend Toward Complementary, Niche Sites*, 3 J. SOC. MEDIA SOC'Y 2, 6–7 (2014).

⁴³ See *id.*

⁴⁴ Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021>.

⁴⁵ Jacob Kosakowski, *Delete and Repeat: The Problem of Protecting Social Media Users' Free Speech from the Moderation Machine*, 55 SUFFOLK U. L. REV. 65, 71, 74 (2022) ("Content moderation is a definitional and indispensable aspect of what internet platforms do.").

⁴⁶ *Id.* at 73–74 ("[T]he CDA shields internet platforms from responsibility no matter the inconsistency or ineffectiveness of their moderation practices . . . [and] will continue to emphasize liability protection for moderation practices" (footnote omitted)).

⁴⁷ See Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J. L. TECH. & ARTS 36, 43–44 (2019).

⁴⁸ See Rozenshtein, *supra* note 16 ("[T]he First Amendment's proper target was restricting government censorship. But [now] . . . the main day-to-day regulator of individuals' speech is no longer the government but rather the technology platforms").

⁴⁹ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 657 (1994).

alleged boundless power to silence certain speech.⁵⁰ Two of the most high-profile laws come from Florida and Texas, but courts have differed in their treatment, creating a question of whether these legislative attempts by states are constitutional.⁵¹ Put differently, can states—and should they—regulate social media platforms and their content-moderation decisions?

II. THE CIRCUIT SPLIT: NETCHOICE VERSUS FLORIDA AND TEXAS

Founded in 2001, NetChoice is a trade association that consists of the biggest technology businesses, from Amazon and eBay, to Meta and TikTok.⁵² NetChoice’s mission is to ensure free enterprise and free expression on the Internet.⁵³ The Computer & Communications Industry Association, which is comprised of many of the same companies as NetChoice, has advocated for tech companies since 1972 by promoting open markets and fair competition.⁵⁴ The two associations have challenged laws in Florida and Texas to defend the First Amendment rights of its social media platform members.⁵⁵

A. NetChoice v. Moody

On May 24, 2021, Florida Governor Ron DeSantis signed into law Senate Bill 7072 in an effort to reclaim “the virtual public square

⁵⁰ See Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229>. As of July 2022, 34 states have introduced over 100 bills within a year aimed at regulating how social media platforms handle moderating users’ posts. *Id.*

⁵¹ See VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10748, FREE SPEECH CHALLENGES TO FLORIDA AND TEXAS SOCIAL MEDIA LAWS 1 (2022).

⁵² *About Us*, NETCHOICE, <https://netchoice.org/about> (last visited Sept. 18, 2023).

⁵³ *Id.*

⁵⁴ See *id.*; see also *Members*, COMPUT. & COMM’NS INDUS. ASS’N, <https://www.cciainet.org/about/members> (last visited Sept. 18, 2023).

⁵⁵ Chris Marchese, *NetChoice & CClA v. Paxton*, NETCHOICE (Sept. 22, 2021), <https://netchoice.org/netchoice-ccia-v-paxton>; *NetChoice & CClA v. Moody*, NETCHOICE, <https://netchoice.org/unconstitutional-social-media-bill-circumvents-rights-afforded-under-the-constitution> (last visited Sept. 18, 2023).

as a place where information and ideas can flow freely” in Florida.⁵⁶ Drawing parallels between tyranny in Cuba and Venezuela and experiences on social media today, DeSantis proclaimed that “Big Tech censors” would now be held accountable for “discriminat[ing] in favor of the dominant Silicon Valley ideology” with this bill’s passage.⁵⁷ In response, NetChoice filed suit in the Northern District of Florida to enjoin the law’s enforcement, arguing that certain provisions (codified in Fla. Stat. §§ 106.072 and 501.2041)⁵⁸ violate platforms’ First Amendment right to free speech.⁵⁹ In granting the preliminary injunction, the district court held that the challenged provisions restricted the platforms’ constitutionally protected exercise of editorial judgment.⁶⁰ Florida appealed to the Eleventh Circuit, arguing that SB 7072 does not implicate the First Amendment because platforms are not engaged in protected speech, but rather are hosting third-parties’ speech, which the Government may compel.⁶¹

1. THE ELEVENTH CIRCUIT: SB 7072 IS UNCONSTITUTIONAL

In an opinion authored by Circuit Judge Kevin Newsom, the Eleventh Circuit addressed whether social media platforms engage in First Amendment speech-protected activity.⁶² To answer this pivotal question, the Court characterized platforms as “private companies with First Amendment rights.”⁶³ The Court declared that platforms engage in speech when putting out information, placing emphasis on the judgments—rooted in their own views—that platforms

⁵⁶ *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, FLA. GOVERNOR RON DESANTIS (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech>.

⁵⁷ *Id.*

⁵⁸ *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1206–07 (11th Cir. 2022). For the Eleventh Circuit, the relevant provisions of the law contain content-moderation restrictions, disclosure obligations and a user-data requirement. *See id.* at 1206.

⁵⁹ *Id.* at 1207.

⁶⁰ *Id.* at 1207–08.

⁶¹ *Id.* at 1208.

⁶² *Id.* at 1209.

⁶³ *Id.* at 1210.

make when they choose what to publish.⁶⁴ These choices, whether they may be removing public health “fake news” or violence-inciting political rhetoric, convey messages and thus constitute the platforms’ speech.⁶⁵

To support the First Amendment’s implications here, the Court first explored precedent surrounding “editorial judgment,” surmising that a “private entity’s choices about whether, to what extent, and in what manner it will disseminate speech—even speech created by others—constitute [protected] ‘editorial judgments.’”⁶⁶ The Court also explored the concept of “inherently expressive conduct” that is protected by the First Amendment, which entails looking at whether the reasonable person would interpret certain conduct as displaying some sort of message.⁶⁷ In applying these principles to the entities at issue, the Eleventh Circuit found that “social media platforms exercise editorial judgment that is inherently expressive.”⁶⁸ The content-moderation decisions that platforms make are analogous to parade organizers and cable operators as platforms deliver “curated compilations of speech created . . . by others” and decide “not to propound a particular point of view,” which is entirely acceptable as they “cultivate different types of communities that appeal to different groups,” even ones wholly political.⁶⁹ Further, a reasonable person would likely infer a message—that the platforms disagree with certain viewpoints—from the entire removal of speech or a user, thus qualifying content-moderation activities as First Amendment-protected expressive conduct.⁷⁰

While the Court addressed Florida’s argument that platforms do not review most content, it found that the statute implicates only content that *is* reviewed.⁷¹ The Eleventh Circuit instead focused on the State’s analysis surrounding the “hosting” cases and strove to differentiate them.⁷² Through this, the Court reiterated that SB 7072 interferes with platforms’ own speech that occurs when the entities

⁶⁴ *Moody*, 34 F.4th at 1210.

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *See id.* at 1212.

⁶⁸ *Id.* at 1213.

⁶⁹ *Id.* at 1213–14.

⁷⁰ *Moody*, 34 F.4th at 1214.

⁷¹ *Id.*

⁷² *See id.* at 1215–16.

exercise editorial judgments.⁷³ Then, the Court pronounced that “a law that requires the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights.”⁷⁴ It did not find that explanatory speech is necessary for a reasonable observer to perceive a message from conduct, emphasizing the importance of context when looking at whether conduct is inherently expressive.⁷⁵

Next, the Court confronted the State’s attempt to classify social media platforms as “common carriers.”⁷⁶ For the Eleventh Circuit, platforms have never acted like common carriers, the Supreme Court has not considered companies like them common carriers, and Congress has distinguished internet companies from common carriers.⁷⁷ While social media platforms hold themselves out to the public, users accept terms of use, thus restricting their ability to express whatever they would like.⁷⁸ Further, platforms do not serve the public indiscriminately and have a right to exercise editorial judgment.⁷⁹ Social media’s widespread use and popularity did not change the Court’s conclusion.⁸⁰

The Court next pointed to specific provisions of SB 7072 that interfere with platforms’ abilities to exercise editorial judgment in order to assess the level of First Amendment scrutiny to apply.⁸¹ Specifically, the content-moderation provisions prevent platforms from removing or deprioritizing content, thus compelling them to circulate messages they disagree with.⁸² While the Court alluded to SB 7072’s illicit political motivations throughout the opinion, it found that NetChoice is unlikely to succeed with its claim that the *entire* Act is impermissibly viewpoint-based because there is no precedent that has relied on legislative history or statements to characterize a law entirely as viewpoint-based on free-speech grounds.⁸³

⁷³ *Id.* at 1216.

⁷⁴ *Id.* at 1217.

⁷⁵ *Id.*

⁷⁶ *See Moody*, 34 F.4th at 1220–22.

⁷⁷ *Id.* at 1220.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1221.

⁸⁰ *Id.* at 1222.

⁸¹ *See id.* at 1223.

⁸² *Moody*, 34 F.4th at 1222.

⁸³ *Id.* at 1224.

Ultimately, the Court did not find it necessary to classify each and every content-moderation provision because all likely regulate expressive conduct and thus trigger at least intermediate scrutiny.⁸⁴

The Court found that SB 7072's content-moderation provisions do not survive intermediate scrutiny because they fail to further any substantial or compelling governmental interest.⁸⁵ To the Eleventh Circuit, social media platforms have a First Amendment right to be "unfair."⁸⁶ Further, social media platforms are not the only means in which political candidates, for example, can disseminate their speech, and it does not matter if alternate platforms are less effective.⁸⁷ Platforms' speech cannot be restricted in order to enhance the voices of others.⁸⁸ Ultimately, the Court concluded by holding that the district court did not abuse its discretion by preliminarily enjoining SB 7072 provisions that likely violate the First Amendment.⁸⁹

2. PROCEDURAL POSTURE

Just days after the Eleventh Circuit issued its decision, on September 21, 2022, Florida petitioned the Supreme Court for certiorari, arguing that the Eleventh Circuit's decision "strips [s]tates of their historic power to protect their citizens' access to information, implicating questions of nationwide importance" and that the Fifth Circuit's conflicting decision presents an "irreconcilable divide [that] warrants this Court's review."⁹⁰ On October 24, 2022, NetChoice filed its response, also arguing that the Supreme Court should grant certiorari to consider SB 7072 in its entirety and to address the circuit split.⁹¹ Three days after the case was first distributed for conference on January 20, 2023, the Court invited the Solicitor General to file a brief expressing the United States' view in the case.⁹² On August 14, 2023, the Solicitor General filed an amicus brief on behalf

⁸⁴ *Id.* at 1226–27.

⁸⁵ *Id.* at 1228.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See Moody*, 34 F.4th at 1228.

⁸⁹ *Id.* at 1231.

⁹⁰ Petition for a Writ of Certiorari at 3, *Moody*, 34 F.4th 1196 (No. 22-277).

⁹¹ Brief for Respondents at 3, *Moody*, 34 F.4th 1196 (No. 22-277).

⁹² Supreme Court Docket for *NetChoice v. Moody*, SUPREME COURT, <https://www.supremecourt.gov/docket/docketfiles/html/public/22-277.html> (last visited Oct. 26, 2023). A "Call for the View of the Solicitor General," as this is referred

of the United States, urging the Court to grant certiorari and affirm the Eleventh Circuit.⁹³ On September 29, 2023—over a year after Florida petitioned the Court—the Supreme Court granted certiorari.⁹⁴

B. NetChoice v. Paxton

On September 9, 2021, Texas Governor Greg Abbott signed into law House Bill 20 to defend Texans’ First Amendment rights from “a dangerous movement by social media companies”—which “have become [the] modern-day public square”—“to silence conservative viewpoints and ideas.”⁹⁵ In response, NetChoice filed suit in the Western District of Texas.⁹⁶ The district court issued a preliminary injunction, holding that Sections 2 and 7 of HB 20 are facially unconstitutional.⁹⁷ Namely, the district court stated that social media platforms are not common carriers and that they exercise editorial discretion that consists in part of viewpoint-based censorship that is protected by the First Amendment.⁹⁸

1. THE SUPREME COURT STEPS IN

The State of Texas appealed and moved for a stay of the preliminary injunction, which the Fifth Circuit granted on May 11, 2022.⁹⁹ On May 31, 2022, the Supreme Court vacated the stay in a five-to-

to, is not entirely uncommon; fifteen cases in front of the Court receive this treatment yearly. See Patricia A. Millett, *‘We’re Your Government and We’re Here to Help’ Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209, 212 (2009).

⁹³ Brief for the United States as Amicus Curiae at 11–12, *Moody*, 34 F.4th 1196 (No. 22-277).

⁹⁴ Amy Howe, *Justices Take Major Florida and Texas Social Media Cases*, SCOTUSBLOG (Sept. 29, 2023, 9:48 AM), <https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases>.

⁹⁵ *Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship*, GREG ABBOTT: OFF. TEX. GOVERNOR (Sept. 29, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship>.

⁹⁶ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 447 (5th Cir. 2022).

⁹⁷ *Id.* Section 2 mandates disclosure requirements and Section 7 focuses on viewpoint-based censorship of users’ post. See *id.* at 445, 446.

⁹⁸ *Id.* at 447.

⁹⁹ *Id.*

four decision.¹⁰⁰ Justice Alito, joined by Justices Thomas and Gorsuch, issued a dissent that expressed there were “issues of great importance [with HB 20] that will plainly merit this Court’s review.”¹⁰¹ Most strikingly, the dissent indicated that “[t]he law before us is novel, as are [social media platforms’] business models” and thus whether NetChoice is “likely to succeed under existing law is quite unclear.”¹⁰² To at least three Justices, it is “not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies”¹⁰³

2. THE FIFTH CIRCUIT: HB 20 IS CONSTITUTIONAL

Despite the Supreme Court’s hesitations, the Fifth Circuit, in an opinion authored by Circuit Judge Andrew Oldham, proceeded to apply existing law to find that HB 20 protects other people’s speech and regulates social media platforms’ conduct.¹⁰⁴ The Court began by analyzing the overbreadth doctrine but found that it did not apply because Section 7 chills no speech at all and, if anything, it chills censorship.¹⁰⁵ This is because HB 20’s prohibitions on censorship would not stifle the justification of the overbreadth doctrine—the marketplace of ideas.¹⁰⁶ Next, the Fifth Circuit accused social media platforms, not the government, of operating the modern public square.¹⁰⁷ HB 20 is consistent with the First Amendment’s original purpose and protects the guarantees of freedom of expression.¹⁰⁸

The Court moved on to address NetChoice’s contention that HB 20 burdens platforms’ right to speak because the platforms have a right to host or reject other’s speech, which in and of itself becomes

¹⁰⁰ *Id.*

¹⁰¹ *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting).

¹⁰² *Id.*

¹⁰³ *Id.* at 1717.

¹⁰⁴ *Paxton*, 49 F.4th at 447–48.

¹⁰⁵ *Id.* at 448. The overbreadth doctrine “provides that laws regulating speech can sweep too broadly and prohibit protected as well as non-protected speech.” Richard Parker, *Over-breadth*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1005/overbreadth> (last visited Sept. 18, 2023).

¹⁰⁶ *Paxton*, 49 F.4th at 450.

¹⁰⁷ *Id.* at 454.

¹⁰⁸ *Id.*

the platforms' speech.¹⁰⁹ The Court "reject[ed] the [p]latforms' efforts to reframe their censorship as speech," accusing the platforms of "doctrinal gymnastics" in an attempt to extend First Amendment protections from free speech to free censoring.¹¹⁰ Turning to Supreme Court precedent, the Fifth Circuit pronounced that states may require private entities to "host, transmit, or otherwise facilitate speech" so long as the host itself is not forced to speak.¹¹¹

In order to provide a First Amendment challenge to a law, a speech host must show that the law (a) compels it to speak or (b) restricts its own speech, and according to the Fifth Circuit, NetChoice failed to make either showing.¹¹² Looking first to compelled speech, the Court found that social media platforms are nothing like newspapers because they exercise no editorial control when using algorithms and failing to review most content.¹¹³ Further, observers would not deduce the platforms' support simply by their hosting of a message.¹¹⁴ The expressive quality of censoring certain speech exists only when the platform itself then speaks.¹¹⁵ Platforms are also unlike parade organizers as they do not carefully select content in order to put forth a collective point.¹¹⁶ As Section 7 does not compel the platforms to speak, it also does not prevent them from speaking.¹¹⁷ The Court emphasized the limitlessness of social media, as there are no spatial restraints that restrict platforms from speaking because of their hosting.¹¹⁸ Additionally, the Fifth Circuit refused to acknowledge a First Amendment right to editorial discretion.¹¹⁹ Instead, it interpreted Supreme Court precedent as treating editorial judgment as a relevant consideration in determining whether a challenged law restricts or compels protected speech, not as a standalone category of constitutionally protected expression.¹²⁰

¹⁰⁹ *Id.* at 454–55.

¹¹⁰ *Id.* at 455.

¹¹¹ *Id.*

¹¹² *Paxton*, 49 F.4th at 459.

¹¹³ *Id.*

¹¹⁴ *Id.* at 460.

¹¹⁵ *Id.* at 461.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 462.

¹¹⁸ *Paxton*, 49 F.4th at 462.

¹¹⁹ *Id.* at 463.

¹²⁰ *Id.*

Next, the Court argued that the common carrier doctrine supported its holding that the platforms' censorship is not protected speech.¹²¹ For the Fifth Circuit, social media platforms are common carriers because they are communication firms, hold themselves out to the public without bargaining individually, and are affected with a public interest.¹²² Comparing platforms to Verizon and AT&T, the Court stated that platforms' entire purpose is to enable their users to communicate with each other.¹²³ As for the platforms' argument that they cannot be common carriers because they engage in viewpoint discrimination, the Court accused platforms of "historical amnesia."¹²⁴ Finally, to support that platforms are affected with a public interest, the Court pointed to society's reliance on social media as well as the platforms' "modern public square" and "government public forum" labels.¹²⁵

In considering that platforms *do* have First Amendment rights implicated by HB 20, the Court still found that facial pre-enforcement relief is not warranted because the law is content- and viewpoint-neutral and is therefore subject to intermediate scrutiny at most, and Texas's interests underlying Section 7 are sufficient to satisfy that level of scrutiny.¹²⁶ Section 7 applies consistently regardless of a user's viewpoint or a platform's motive.¹²⁷ It advances a compelling governmental interest—protecting the free exchange of ideas in Texas—and it does not burden more speech than necessary to further that interest.¹²⁸

Before it concluded, the Fifth Circuit addressed the Eleventh Circuit's decision surrounding SB 7072, beginning by declaring that Texas's law is very different than Florida's.¹²⁹ These differences include that "SB 7072 prohibits *all* censorship of *some* speakers, while HB 20 prohibits *some* censorship of *all* speakers" and that SB 7072's provisions restrict platforms' own speech, whereas HB 20

¹²¹ *Id.* at 469.

¹²² *Id.* at 473.

¹²³ *Id.* at 474.

¹²⁴ *Paxton*, 49 F.4th at 474.

¹²⁵ *Id.* at 475.

¹²⁶ *Id.* at 480.

¹²⁷ *Id.*

¹²⁸ *Id.* at 482.

¹²⁹ *Id.* at 488.

does not interfere with the platforms' own speech in any way.¹³⁰ Thus, per the Fifth Circuit, the Eleventh Circuit's analysis did not apply to this case.¹³¹ Unlike the Eleventh Circuit, the Fifth Circuit did not believe that the Supreme Court has not recognized "editorial discretion" as its own category of First Amendment-protected expression, but even if the Court had, the platforms' censorship is dissimilar to the "editorial judgment" mentioned by the Court.¹³² After its attack on the Eleventh Circuit, the Court concluded by vacating the preliminary injunction and remanding the case because social media platforms' censorship is not speech and HB 20 is constitutional because it neither compels nor obstructs the platforms' own speech.¹³³

For Circuit Judge Edith Jones, who authored a concurrence, "[i]t is hard to construe as 'speech' what the speaker never says, or when it acts so vaguely as to be incomprehensible" and HB 20 reaches a pro-speech result.¹³⁴ But for Circuit Judge Leslie Southwick, who concurred and dissented in part, "social media platforms engage in First Amendment-protected expression when they moderate their users' content," and the majority "forc[ed] the picture of what the Platforms do into a frame that is too small."¹³⁵

3. PROCEDURAL POSTURE

On December 15, 2022, NetChoice followed Florida's lead and petitioned the Supreme Court for certiorari.¹³⁶ NetChoice insisted that the Fifth Circuit erred in interpreting the First Amendment, and if HB 20 is upheld, it will "threaten to transform speech on the Internet as we know it today."¹³⁷ Ultimately, NetChoice called on the Court to "reaffirm the First Amendment's centuries-old protections prohibiting government from dictating how private entities must publish or disseminate speech" by granting the pending petition from the Eleventh Circuit or granting this petition regarding the

¹³⁰ *Paxton*, 49 F.4th at 489.

¹³¹ *Id.*

¹³² *Id.* at 490–91.

¹³³ *Id.* at 494.

¹³⁴ *Id.* at 495 (Jones, J., concurring).

¹³⁵ *Id.* (Southwick, J., concurring in part and dissenting in part).

¹³⁶ Petition for Writ of Certiorari at 1, *Paxton*, 49 F.4th 439 (No. 22-555).

¹³⁷ *Id.*

Texas law.¹³⁸ Shortly thereafter, Texas filed its response in which it also argued that the Supreme Court should review HB 20, whether or not the Court hears the Eleventh Circuit's case.¹³⁹ HB 20 is currently on hold pending appeal.¹⁴⁰ Like the Eleventh Circuit case, on January 20, 2023, this case was distributed for conference with the Supreme Court, and on January 23, 2023, the Solicitor General was invited to file a brief expressing the views of the United States.¹⁴¹ On August 14, 2023, the Solicitor General filed an amicus brief on behalf of the United States, urging the Court to grant certiorari and reverse the Fifth Circuit.¹⁴² Like *Moody*, on September 29, 2023—over a year after NetChoice petitioned the Court—the Supreme Court granted certiorari.¹⁴³

III. DOCTRINAL GYMNASTICS AND HISTORICAL AMNESIA: THE CENSORSHIP LAWS CANNOT STAND

All sides agree: Social media's novelty and the sharp debate inciting the country regarding social media platforms and free speech warranted the Supreme Court's grant of certiorari to consider SB 7072 and HB 20. While the Court first appeared unconvinced based on its January 2023 requests to the Solicitor General, which were essentially the Court asking whether it should hear these cases at all, the Court is expected to hear both cases in early 2024.¹⁴⁴ As we await oral arguments and a subsequent decision, a recent First Amendment decision may provide more insight on how the Court

¹³⁸ *Id.* at 35.

¹³⁹ Response to Petition for Writ of Certiorari at 2, *Paxton*, 49 F.4th 439 (No. 22-555).

¹⁴⁰ Madlin Mekelburg, *Texas Social-Media Law Put on Hold Pending Supreme Court Review*, BLOOMBERG L. (Oct. 12, 2022, 5:23 PM), <https://news.bloomberglaw.com/bloomberg-law-news/texas-social-media-law-put-on-hold-pending-supreme-court-review>.

¹⁴¹ Supreme Court Docket for *NetChoice v. Paxton*, SUPREME COURT, <https://www.supremecourt.gov/search.aspx?filename=/docket/docket-files/html/public/22-555.html> (last visited Oct. 26, 2023).

¹⁴² Brief for the United States as Amicus Curiae at 11–12, *Paxton*, 49 F.4th 439 (No. 22-555).

¹⁴³ Howe, *supra* note 94.

¹⁴⁴ See Millett, *supra* note 92, at 213; Howe, *supra* note 94.

will rule.¹⁴⁵ In the meantime, this Note attempts to call out overzealous attempts to paint social media platforms as so exotic to necessitate the complete upheaval of First Amendment jurisprudence.

The Supreme Court has, to put it mildly, proceeded with caution when it comes to addressing new technologies. That is not to say that this approach has been fallacious. In 2017, the Court in *Packingham v. North Carolina* began to comment on the relationship between the First Amendment and social media, stressing that it “must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.”¹⁴⁶ While it did not address platforms’ own rights, the Court held that the First Amendment protects users’ access to social media, which is “integral to the fabric of our modern society and culture.”¹⁴⁷ More recently in 2021, the Court declined to comment on social media as it relates to the First Amendment, but Justice Thomas shed light on the difficulties of “applying old doctrines to new digital platforms [which] is rarely straightforward,” in his concurrence.¹⁴⁸ Justice Thomas found difficulty in equating then-President Donald Trump’s Twitter account to a constitutionally protected public forum when a private company had full discretion over the account.¹⁴⁹ For Justice Thomas, the “more glaring concern” when it comes to ensuring free speech must be social media platforms themselves.¹⁵⁰ With the current circuit split over SB 7072 and HB 20, that glaring concern appears to be center stage. But how exactly will—and should—the Supreme Court view social media platforms?

¹⁴⁵ See 303 Creative LLC v. Elenis, No. 21-476, slip op. at 1 (U.S. June 30, 2023).

¹⁴⁶ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

¹⁴⁷ *Id.* at 1738.

¹⁴⁸ *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

¹⁴⁹ *Id.* at 1222.

¹⁵⁰ *Id.* at 1227 (“[I]f the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms.”); see also Rozenshtein, *supra* note 16, at 356–57 (“This has properly raised concerns about the government using its regulatory tools to indirectly censor speech by targeting platforms rather than users directly.” (footnote omitted)).

A. *Platforms Are Private Actors*

The Court has made it unambiguous that corporations have a First Amendment right to free speech as “[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual.”¹⁵¹ Social media platforms are private corporations acting outside of any government action; as a source of speech, platforms command the First Amendment’s protections.¹⁵² Thus, the Eleventh Circuit was correct in declaring that platforms are private actors.¹⁵³ That classification does not oblige platforms to provide forums for free, unhindered speech.¹⁵⁴

However, can these private corporations be *transformed* into government actors, generally?¹⁵⁵ This is an important distinction because when a private entity offers a domain for speech, the entity is usually not constrained by the First Amendment and thus may exercise editorial discretion over the speech, and even the speakers, in its domain.¹⁵⁶ But, owning a domain does not always equate to “absolute dominion [as] [t]he more an owner, for his advantage, opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of

¹⁵¹ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978); *see also id.* at 802 (Burger, C.J., concurring) (“[T]he First Amendment does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.”).

¹⁵² *See id.* at 784.

¹⁵³ *See NetChoice, LLC v. Moody*, 34 F.4th 1196, 1210 (11th Cir. 2022). For the Fifth Circuit, the fact that platforms are private entities is of no consequence. *See NetChoice, LLC v. Paxton*, 49 F.4th 439, 455 (5th Cir. 2022) (“[T]he State can regulate conduct in a way that requires private entities to host, transmit, or otherwise facilitate speech.”).

¹⁵⁴ *See Kristen Cuetos, The Search to Find a Legal Remedy for Regulating Censorship on Social Media*, 2022 B.C. INTELL. PROP. & TECH. F. 1, 5 (2022).

¹⁵⁵ *See* CONG. RSCH. SERV., LSB10141, UPDATE: SIDEWALKS, STREETS, AND TWEETS: IS TWITTER A PUBLIC FORUM? 1, 2 (2018) (“The government can designate new public forums by making ‘an affirmative choice’ to create a space that is open for public expression.”).

¹⁵⁶ *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

those who use it.”¹⁵⁷ And, under the state action doctrine, a private entity may be considered a state actor when it exercises a function “traditionally exclusively reserved to the [s]tate.”¹⁵⁸

There are limited circumstances in which a private entity can qualify as a state actor, and these scenarios do not apply to social media platforms.¹⁵⁹ While it seems fair to say that platforms open themselves up to the public, “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”¹⁶⁰ Exclusivity is the touchstone of this analysis, and social networking is not an exclusive public function.¹⁶¹ Further, platforms are unlike public forums, as social media is an individual, invited choice.¹⁶² Platforms do not offer a public accommodation when users are subject to suspension and removal for breaching terms of use agreed upon at the outset of their signup.¹⁶³ Moreover, these terms

¹⁵⁷ *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). *But see* *Hudgens v. NLRB*, 424 U.S. 507, 516 (1976) (discussing how Justice Black, who authored *Marsh*, dissented in subsequent decisions applying *Marsh*).

¹⁵⁸ *Halleck*, 139 S. Ct. at 1926 (citation omitted).

¹⁵⁹ *See id.* at 1928 (“(i) when the private entity performs a traditional, exclusive public function . . . (ii) when the government compels the private entity to take a particular action . . . or (iii) when the government acts jointly with the private entity” (citations omitted)).

¹⁶⁰ *See id.* at 1930.

¹⁶¹ *See id.* at 1929.

¹⁶² *See* Sydney Shufeltm, *On Halleck and Why Twitter is Not a Public Forum*, AM. U. BUS. L. REV. BUZZ BLOG, <https://aublr.org/2019/02/on-halleck-and-why-twitter-is-not-a-public-forum> (last visited Sept. 18, 2023) (“The most important difference between a social media platform and a public forum is that social media gets invited into our homes and allows for a greater opportunity for deception than one would find in a public square.”). *But see* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017) (Alito, J., concurring) (“[I]f the entirety of the internet or even just ‘social media’ sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders.” (footnote omitted)).

¹⁶³ *See* *Biden v. Knight First Amend. Inst.* at Colum. Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (“[G]overnments have limited a company’s right to exclude when that company is a public accommodation. This concept—related to common-carrier law—applies to companies that hold themselves out to the public but do not ‘carry’ freight, passengers, or communications.” (citation omitted)).

of use are identical for all users who *choose* to sign up.¹⁶⁴ As the Ninth Circuit recognized, a platform's decision to remove a user's post pursuant to adopted community standards reflects a self-interested business decision and does not transform a private entity into a government actor.¹⁶⁵ A platform's choice reveals its own message, not the government's, and it does not suffice to say that social media platforms are governors of cyberspace.¹⁶⁶

Because the First Amendment only confines government actors, as it stands today, it cannot limit social media platforms generally. This is not to say that there are no scenarios in which social media platforms cannot become government actors,¹⁶⁷ but that transformation would need to be considered on a case-by-case basis.¹⁶⁸ However, it has been suggested that the doctrine be extended to cover social media platforms generally because of social media's

¹⁶⁴ See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1728 (2018).

¹⁶⁵ See *Atkinson v. Meta Platforms, Inc.*, No. 20-17489, 2021 WL 5447022, at *1, *2 (9th Cir. Nov. 22, 2021) (affirming dismissal of a complaint filed by a Facebook user against Meta when Facebook removed a political post).

¹⁶⁶ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“Viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances . . . in which the government ‘used private speakers to transmit specific information pertaining to its own program.’” (citations omitted)); see also Kathleen McGarvey Hidy, *The Speech Gods: Freedom of Speech, Censorship, and Cancel Culture in the Age of Social Media*, 61 WASHBURN L.J. 99, 119 (2021).

¹⁶⁷ See *Knight*, 141 S. Ct. at 1226 (Thomas, J., concurring) (“What threats would cause a private choice by a digital platform to ‘be deemed . . . that of the State’ remains unclear.” (citation omitted)).

¹⁶⁸ As an example, the “Twitter Files” conspiracy involves the allegations that the FBI paid Twitter millions of dollars to censor certain accounts that were perceived as harmful to President Biden’s campaign in 2020. See Tiana Lowe, *Government Cannot Fix Twitter When Government is the Problem*, WASH. EXAMINER (Dec. 20, 2022, 3:13 PM), <https://www.washingtonexaminer.com/opinion/government-cannot-fix-twitter-when-government-is-the-problem>; see also Shannon Bond, *Elon Musk is Using the Twitter Files to Discredit Foes and Push Conspiracy Theories*, NPR (Dec. 14, 2022, 5:00 AM), <https://www.npr.org/2022/12/14/1142666067/elon-musk-is-using-the-twitter-files-to-discredit-foes-and-push-conspiracy-theor>. If this were true, it could amount to government action. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1941 (2019) (Sotomayor, J., dissenting) (“The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor.”).

hold over society's conversations.¹⁶⁹ One justification for this lies in the "marketplace of ideas" metaphor.¹⁷⁰ The Court has recognized that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . whether it be by the Government itself or a private licensee."¹⁷¹ In applying the metaphor to platforms, as platforms remove posts, individuals are constrained from fully participating in the marketplace of ideas, the First Amendment cannot fulfill its purpose of preserving an uninhibited marketplace of ideas, and both sides of a debate fail to reach the masses.¹⁷² While Congress has recognized that platforms provide a "forum for a true diversity of political discourse," it has made it a policy to guard that forum from government regulation, which seems to reflect the view that government inter-

¹⁶⁹ Rodriguez, *supra* note 3, at 40 ("Big Tech companies have amassed such a large base and influence that they should be held to the same degree of scrutiny as government actors."); *see also* David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-social-media-first-amendment (last visited Sept. 18, 2023).

¹⁷⁰ The "marketplace of ideas" metaphor has been attributed to Justice Holmes in his famous dissent in *Abrams v. United States*. *See* Robert L. Kerr, *From Holmes To Zuckerberg: Keeping Marketplace-Of-Ideas Theory Viable in the Age of Algorithms*, 24 COMM. L. & POL'Y 477, 478 (2019) ("Justice Holmes proposed that instead of government imposing punishment for 'expression of opinions that we loathe,' a society devoted to freedom and democratic decision making must test the truth of ideas by 'free trade in ideas.'" (footnotes omitted)); *see also* Hudson, *supra* note 169.

¹⁷¹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

¹⁷² *See* *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 251 (1974) ("The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."); *see also* András Koltay, *The Private Censorship of Internet Gatekeepers*, 59 U. LOUISVILLE L. REV. 255, 303–04 (2021) ("[A] platform can also be harmful to democratic public life if it grows really large but fails to manage debates conducted on the platform with due regard to the notion of the 'marketplace of ideas,' i.e., it attempts to influence such exchanges using obscure means that lack transparency.").

vention is the true roadblock to a marketplace of ideas, as appreciated when the First Amendment was ratified.¹⁷³ If social media platforms are recast as government actors because of their popularity, then other successful businesses will be susceptible to the same treatment and erosion of First Amendment liberties.¹⁷⁴

B. *Social Media's Speech and Editorial Discretion*

While the First Amendment cannot restrain social media platforms through the state action doctrine, the threshold question at the center of the circuit split still remains. As Judge Southwick put it in her dissent in *Paxton*, the parties “simply disagree about whether speech is involved in” social media platforms’ content-moderation decisions.¹⁷⁵ Thus, before evaluating SB 7072 and HB 20, the Supreme Court must address whether social media platforms engage in speech when they make content-moderation (or, as the Fifth Circuit says, hosting and censorship) decisions.¹⁷⁶

First, it is important to consider what exactly a content-moderation decision looks like. Facebook’s Community Standards state that it offers “a service for more than [two] billion people to freely express themselves across countries and cultures and in dozens of languages,” and that it “take[s] great care to create standards that include different views and beliefs” with the aim of “ensur[ing] everyone’s voice is valued”¹⁷⁷ Yet, Facebook reserves the right to eradicate posts that violate its Community Standards.¹⁷⁸ The same

¹⁷³ See 47 U.S.C. §§ 230(a)(3), 230(b)(2); see Rahn, *supra* note 24, at 689 (“[T]he [Florida] statutes themselves represent a threat to free speech.”); *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002).

¹⁷⁴ See Hooker, *supra* note 47, at 52–53 (“If the major speech platforms . . . ought to be classified as state actors based not on the assumption of specific state-like duties but merely on their influence, it is hard to know where the category ends.” (footnote omitted)).

¹⁷⁵ See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 496 (5th Cir. 2022) (Southwick, J., concurring in part and dissenting in part).

¹⁷⁶ See *id.* at 465–66 (majority opinion).

¹⁷⁷ *Facebook Community Standards*, META, <https://transparency.fb.com/policies/community-standards> (last visited Sept. 18, 2023).

¹⁷⁸ *Help Center*, FACEBOOK, <https://www.facebook.com/help/260743102021762> (last visited Sept. 18, 2023).

goes for Instagram.¹⁷⁹ Thus, these platforms, while they host an unprecedented amount of content, are permitted to remove posts or users pursuant to broad rules established as conditions for their users to participate on the platforms.¹⁸⁰ This discretionary elimination of posts or people constitutes content-moderation decisions.

But putting aside platforms' reach, growth, and use of technology, how novel are content-moderation decisions? To the Eleventh Circuit, platforms resemble newspapers;¹⁸¹ to the Fifth Circuit, platforms are identical to telecommunication companies like Verizon.¹⁸² Opinions on this vary, and thus are at the heart of the debate for how the First Amendment applies to social media today.¹⁸³ It has been said that existing law cannot be extended to safeguard against the dangers presented by social media, that these platforms present a novel attack on the First Amendment.¹⁸⁴

The Supreme Court has been inconsistent when it comes to its eagerness to create new categories of First Amendment protection as it did for newspapers,¹⁸⁵ expressing that “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems,”¹⁸⁶ but also cautioning, more recently, against creating too many categorical distinctions of types of speech based on particular media, given

¹⁷⁹ *Taking Down Violating Content*, META, <https://transparency.fb.com/enforcement/taking-action/taking-down-violating-content> (Feb. 22, 2023).

¹⁸⁰ Social media undeniably possesses massive power, as it has revolutionized communication. See Julie Brill, *Privacy & Consumer Protection in Social Media*, 90 N.C. L. REV. 1295, 1296 (2012); see also Rodriguez, *supra* note 3 (“These virtual platforms provide avenues for historically unprecedented amounts of speech. . . . Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.” (footnotes omitted)).

¹⁸¹ See *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1213 (11th Cir. 2022).

¹⁸² See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 474 (5th Cir. 2022).

¹⁸³ See Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 407 (2021).

¹⁸⁴ See Han, *supra* note 4, at 100 (“[S]earch engine results represent a unique form of expression that is far afield from core ideological expression. And current First Amendment doctrine—the product of a more traditional, far narrower conception of free speech protection—does not possess the tools to adequately account for this form of speech.”).

¹⁸⁵ See *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

¹⁸⁶ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (citations omitted).

how rapidly technology evolves.¹⁸⁷ Thus, the Court may follow the Eleventh and Fifth Circuits' lead and attempt to harmonize social media platforms with existing mediums. However, it is no secret that the Court contemplates the unfamiliarity of social media, and thus may heed its own warnings when it comes to applying potentially outdated doctrine to this innovation.¹⁸⁸ Perhaps social media, as its own category distinct from commonplace mediums, warrants its own First Amendment treatment, as the Court has acknowledged before.¹⁸⁹ Or, perhaps distinct handling of platforms runs the risk of creating "mere labels rather than . . . categories with settled legal significance."¹⁹⁰ While the Court should avoid a strictly formalistic approach (i.e., proclaiming that social media platforms are exactly like newspapers), it should use existing mediums as guideposts as it explains *why* certain fundamental First Amendment principles can and should apply to platforms, while continuing to consider the need for evolution of First Amendment doctrine when essential.¹⁹¹

The focus of disagreement between the Eleventh and Fifth Circuits centers around the principle of "editorial judgment." Recognizing that "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising," the Court in *Miami Herald Publishing Co. v. Tornillo* defined the exercise of editorial judgment

¹⁸⁷ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326–27, 364 (2010); see also *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("The forces and directions of the Internet are so new . . . and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.").

¹⁸⁸ See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

¹⁸⁹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citations omitted)).

¹⁹⁰ *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 780–81 (1996) (Kennedy, J., concurring).

¹⁹¹ The Supreme Court should caution against forcing platforms into too small of a frame, as the Fifth Circuit did. As Judge Southwick explains, "The frame must be large enough to fit the wide-ranging, free-wheeling, unlimited variety of expression . . . that is the picture of the First Amendment as envisioned by those who designed the initial amendments to the Constitution." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 496 (5th Cir. 2022) (Southwick, J., concurring in part and dissenting in part). See Rozenshtein, *supra* note 16, at 366 ("[P]latforms cannot easily be shoehorned into traditional First Amendment rules based on a simplistic model of platform 'rights.'").

as “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair.”¹⁹² The Court made it apparent that newspapers have a right to speak,¹⁹³ despite the Fifth Circuit’s refusal to acknowledge an editorial judgment privilege rooted in the First Amendment.¹⁹⁴ It is that editorial discretion that constitutes speech for First Amendment purposes, as held by the Court over and over again.¹⁹⁵

The Supreme Court proceeded to recognize and extend editorial discretion rights to other types of mediums, including parades.¹⁹⁶ In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, the Court clarified that speakers originally generating each item featured in a communication is not a prerequisite to First Amendment protection, mentioning cable operators who engage in protected activities when they select programs produced by others.¹⁹⁷ And, it has been said that most speech consists of ideas created by others.¹⁹⁸ Social media platforms’ content-moderation actions appear elementary when comparing them to those of newspapers and parade organizers, making it a safe assessment for the Court to declare that platforms have a right to exercise editorial judgment and when they do so, they are speaking for First Amendment purposes

¹⁹² *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

¹⁹³ *See id.* But see Rozenshtein, *supra* note 16, at 369 (“*Tornillo* is a poor guide for applying the First Amendment to the content moderation decisions of social media platforms,” as it is “famously conclusory and under-reasoned.”).

¹⁹⁴ *See Paxton*, 49 F.4th at 463.

¹⁹⁵ *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.” (citations omitted)); *see also Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (“When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.” (citations omitted)); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“Cable programmers . . . are entitled to the protection of . . . speech . . . provisions of the First Amendment. Through . . . ‘exercising editorial discretion,’ . . . [they] ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’” (citations omitted)).

¹⁹⁶ *See Hurley v. Irish Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995); *see also Ark. Educ. Television Comm’n*, 523 U.S. at 674.

¹⁹⁷ *See Hurley*, 515 U.S. at 570.

¹⁹⁸ *See Randall P. Bezanson, Speaking Through Others’ Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 987 (2003).

like the Eleventh Circuit declared.¹⁹⁹ Platforms, like other mediums, can exercise this discretion for whatever purpose, whether it is in the business's best interest or simply a matter of preference.²⁰⁰ Like a newspaper or parade organizer, platforms can choose what material—originally created by individual users on their platform—to feature (host) or filter out on their sites, even—and perhaps especially²⁰¹—if it relates to government officials, as the First Amendment does not dictate “fairness” for those decisions.²⁰² And the United States appears to agree. In its amicus brief, the Solicitor General stated that “[w]hen a social-media platform selects, edits, and arranges third-party speech for presentation to the public, it engages in activity protected by the First Amendment.”²⁰³ To the United States, content-moderation decisions reflect social media platforms’ Supreme Court-recognized right to editorial discretion.²⁰⁴

While the exercise of editorial judgment triggers First Amendment protections for social media platforms, that does not necessarily mean that its expression is wholly immune from the government’s intervention. Broadcasters are required to employ considerable editorial discretion in selecting and presenting their programming.²⁰⁵ Yet, the Court has adjusted its standard First Amendment analysis as it applies to broadcast speakers, allowing more intrusive

¹⁹⁹ See *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1210, 1213 (11th Cir. 2022); see also Cuetos, *supra* note 154, at 12–13 (“Social media companies do behave in a more passive manner than newspapers and other traditional content providers that hand-pick their content, but they certainly actively employ the same editorial discretion over the content they allow.” (footnote omitted)). *But see* *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (“[U]nlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public.”).

²⁰⁰ See Koltay, *supra* note 172, at 257.

²⁰¹ See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

²⁰² See *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

²⁰³ Brief for the United States as Amicus Curiae at 13, *NetChoice, LLC v. Paxton*, 49 F.4th 439, 496 (5th Cir. 2022) (No. 22-555).

²⁰⁴ *Id.* at 11–14.

²⁰⁵ See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673–74 (1998).

regulations than permitted for other mediums.²⁰⁶ In doing so, the Court regarded broadcast regulation as enhancing, not reducing, freedom of speech.²⁰⁷ The Court emphasized “the fact that the ‘public interest’ in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public” in reference to congressionally delegated authority to regulate broadcast entities.²⁰⁸

It would seem consistent with past precedent for the Court to emphasize that a social media platform’s free speech right does not encompass a right to eliminate its users’ free speech.²⁰⁹ Perhaps the Court could view social media regulation as enhancing freedom of speech.²¹⁰ However, broadcasting’s altered treatment followed from “the unique physical limitations of the broadcast medium.”²¹¹ The Court declined to diminish First Amendment protections for cable operators, who are not plagued by those spatial limitations.²¹² Although the Court contemplated the differences between cable operators and newspapers, focusing on cable operators’ ability to control who hears what, it still did not offer this medium the same reduced protections it extended to broadcasters.²¹³ The Court even has recognized the internet’s lack of scarcity that makes it dissimilar to

²⁰⁶ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (“It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.” (citations omitted)).

²⁰⁷ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387–88 (1969).

²⁰⁸ *Id.* at 385; see also *id.* at 369 (noting that the FTC has “imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage”).

²⁰⁹ See *id.* at 387, 390 (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

²¹⁰ See *id.* at 375.

²¹¹ *Turner*, 512 U.S. at 637 (“It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.”). But see Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 187 (2004) (“However, lost in all the obsession with scarcity was the reality of what was taking place within America’s media. An overload of consumer information and entertainment was drowning out just the kind of political and public affairs dialogue the First Amendment values most.” (footnote omitted)).

²¹² *Turner*, 512 U.S. at 639 (1994). But see *id.* at 638 (acknowledging that the “scarcity rationale” has been criticized but declining to reject its validity).

²¹³ See *id.* at 656–57.

broadcasting.²¹⁴ The same goes for social media platforms, who are able to manipulate narratives and whose forums exist in metaphysical cyberspace where a limit does not appear to exist. While there may be an argument that the platforms' content-moderation decisions impose a limit—interference between users of different viewpoints—which may be similar to a concern of the Court in the broadcasting cases,²¹⁵ the nature of social media platforms does not warrant a diminished First Amendment standard as it applies to platforms themselves and their editorial judgments.²¹⁶

C. *Actions Speak Louder than Words*

While the Fifth Circuit repeatedly emphasized that social media platforms are not speaking when removing content but instead are acting, it failed to consider the proper First Amendment implications of this conduct.²¹⁷ Conduct can be offered the same protections as speech.²¹⁸ But, First Amendment protection only extends to conduct that is inherently expressive.²¹⁹ To be deemed “expressive,” an actor must have intended to propound a specific message that is understood as such by the audience (although this is said to be applied inconsistently).²²⁰ In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Court found that a law school was not speaking when it was forced to host military recruiters because a decision to allow the recruiters is not inherently expressive, dissimilar to a

²¹⁴ *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.”).

²¹⁵ *See Turner*, 512 U.S. at 639 (“Nor is there any danger of physical interference between two cable speakers attempting to share the same channel.”).

²¹⁶ *See id.* (“[W]hatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.”).

²¹⁷ *See NetChoice, LLC v. Paxton*, 49 F.4th 439, 448 (5th Cir. 2022).

²¹⁸ *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“We have long recognized that [First Amendment] protection does not end at the spoken or written word.”); *see also Garry*, *supra* note 211 (“The First Amendment speech clause is not just about speaking.”).

²¹⁹ *See Rumsfeld v. F. for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

²²⁰ *See Caroline Mala Corbin*, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 244 (2015).

newspaper or parade.²²¹ The Court emphasized that inherent expressiveness was not present because the law school's message was not interfered with when hosting.²²² Important to the Court in reaching this conclusion was the fact that outsiders were unlikely to confuse the law school's message with that of the military's, underscoring the law school's freedom to use its own speech to disassociate from the speech it hosts.²²³ The Fifth Circuit took too formalistic of an approach trying to equate social media platforms to law schools and thus failed to contemplate how a law school and a platform are glaringly dissimilar. A platform is in the business of compiling the words of others; the decision to host or to disallow certain messages or users *is* its message, which transforms that choice into inherently expressive conduct.

If there is still a question as to whether removing certain content on social media is expressive conduct, looking at context can help to clarify. A business decision can take on expressive meaning that can evolve with the times, although courts, who influence social meaning as well, are cautioned against focusing on this.²²⁴ But, it is safe to say that certain social media platforms have created their own personalities, and society's reputational impressions have swiftly followed. In 2019, eighty-two percent of American adults believed that social media platforms treat some news organizations differently than others, reflecting the recognized bias amongst the public.²²⁵ In 2020, seventy-three percent of American adults believed that platforms censor political viewpoints.²²⁶ This notion is not foreign: While mediums have progressed from newspapers to social

²²¹ See *Rumsfeld*, 547 U.S. at 64.

²²² *Id.*

²²³ *Id.* at 65.

²²⁴ See Corbin, *supra* note 220, at 267.

²²⁵ Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RSCH. CTR. (Oct. 2, 2019), <https://www.pewresearch.org/journalism/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news>.

²²⁶ Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints>. A study conducted by Twitter in 2020 actually revealed that the platform's algorithm favors conservative speech. Emma Roth, *Twitter's Research Shows That Its Algorithm Favors Conservative*

media platforms, they have remained “intensely partisan and narrow in their views” as characterized when the First Amendment was ratified.²²⁷ This well-known partiality is revealed in Twitter’s controversial ban of then-President Donald Trump “due to the risk of further incitement of violence.”²²⁸ Almost seventy percent of Republicans opposed the ban, but to all, Twitter’s message of *disagreement* with President Trump, no matter the source of it, was crystal clear.²²⁹ Society appreciates that social media platforms are not neutral.²³⁰ While that could change, Generation Z, which is considered to have been raised by social media, saw a decline in social media use in 2021, attributed to platforms’ erosion of adolescents’ trust fueled by platforms’ motivations that drive users’ newsfeeds.²³¹ At least for now, society does not give off the impression that it will sink to ignorance and blindly take everything it reads on social media for its truth.

For the Fifth Circuit, platforms’ use of algorithms negated any sort of valid exercise of editorial control, especially when most content is never reviewed.²³² However, implementing technology for business efficiencies should not change the constitutional analysis of a medium.²³³ Moreover, algorithms are akin to speech in that they

Views, THE VERGE (Oct. 22, 2021), <https://www.theverge.com/2021/10/22/22740703/twitter-algorithm-right-wing-amplification-study>.

²²⁷ See *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 248 (1974).

²²⁸ *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

²²⁹ See Sam Sabin, *Nearly 2 in 5 Say Social Media Companies’ Decisions to Temporarily Suspend Trump’s Account Are ‘Exactly Right,’* MORNING CONSULT (Jan. 12, 2021, 12:01 AM), <https://morningconsult.com/2021/01/12/trump-social-media-moderation-polling>.

²³⁰ See Koltay, *supra* note 172, at 288.

²³¹ See Sara Fischer, *Gen Z Shapes New Social Media Era*, AXIOS (July 26, 2022), <https://www.axios.com/2022/07/26/gen-z-social-media-tiktok-discord-facebook>.

²³² See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 459 (5th Cir. 2022); see also Koltay, *supra* note 172, at 258 (“[A]n algorithm is a method, guideline, or set of instructions that consists of a sequence of steps and is suitable for solving a problem.” (footnote omitted)).

²³³ See Han, *supra* note 4, at 93 (“[T]here is a distinction between novel circumstances that . . . fall within the broad contours of existing constitutional doctrine . . . and those that force courts to confront the fundamental question of whether, and to what extent, the constitutional right ought to even extend to the situation in question.”).

convey messages.²³⁴ Algorithms resemble an editor by curating content for users based on a user's past activity, whether on the platform itself or another service, taking into account an individual user's interests and preferences.²³⁵ The content-moderation activities of platforms, executed using algorithms, goes beyond mere functionality by conveying messages to its users through this personalization.²³⁶ Whether the utilization of algorithms amounts to speech or expressive conduct does not change the level of First Amendment protection platforms are entitled to.

Once we can look over that seeming complexity for its true simplicity, and with that, its benefits, the analysis becomes more straightforward.²³⁷ Like the parade council in *Hurley*, which was compared to a musical composer, a social media platform selects the expressive units of its site from its user base.²³⁸ The fact that most content is posted without review is irrelevant and for the same reasons, it is of no consequence that *each* selection does not produce a particularized message. Constitutional protection does not require a specific message; a platform can elect to remain silent on one subject and invoke its right as a private speaker on another subject.²³⁹ Further, there is no speech necessary to accompany a platform's choice to remove content it does not agree with; the action is

²³⁴ See Koltay, *supra* note 172, at 260.

²³⁵ See *id.* at 258.

²³⁶ See *id.* at 260; see also Kosakowski, *supra* note 45.

²³⁷ See Garry, *supra* note 211, at 188 ("Like water, speech is a vital thing, but not when it floods.").

²³⁸ See *Hurley v. Irish Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995).

²³⁹ See *id.* ("The Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."); *id.* at 575 ("Whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."); *id.* at 573 ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' and 'tailor' the content of his message as he sees fit." (citation omitted)).

enough.²⁴⁰ As poet Emily Dickinson has said, “Saying nothing . . . sometimes says the most.”²⁴¹ While Twitter can issue a statement or a disclaimer to declare that it disagrees with a certain user’s post, the platform should not have to. This argument, if taken as a solution to justify a reduction in First Amendment protections, would excuse any law that compels speech.²⁴² Moreover, Twitter’s purpose is a compilation of other’s messages. Twitter has a right to decide how it displays its message because how speech is disseminated is essential—it impacts the meaning of a message.²⁴³ Twitter speaks when it removes a tweet or a user. That choice of presentation, whether biased or not, is inherently expressive in and of itself.

The First Amendment shelters speech from government censorship only.²⁴⁴ Although it has been argued that its meaning has become vague,²⁴⁵ censorship has been defined as a “form of restriction that is applied arbitrarily and without any legal guarantee prior to the publication of a given piece of content, which prevents that content from being presented to the public.”²⁴⁶ It is likely that “Facebook has a First Amendment right to censor whatever it wants in order to maintain the kind of social space it wants.”²⁴⁷ Moreover, this “censorship” is really just direct regulation implemented by platforms themselves by creating standards that dictate certain

²⁴⁰ See *Rumsfeld v. F. for Acad. and Institutional. Rights, Inc.*, 547 U.S. 47, 66 (2006) (“The expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it.”).

²⁴¹ *The Power of No*, POETRY FOUND., <https://www.poetryfoundation.org/poetrymagazine/articles/74605/the-power-of-no> (last visited Sept. 18, 2023).

²⁴² See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring) (“The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech.”).

²⁴³ See Bezanson, *supra* note 198.

²⁴⁴ *What Speech Is Protected by the First Amendment?*, FREEDOM F., <https://www.freedomforum.org/is-your-speech-protected-by-the-first-amendment> (last visited Sept. 18, 2023).

²⁴⁵ See Koltay, *supra* note 172, at 265.

²⁴⁶ See *id.* (footnote omitted).

²⁴⁷ Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325, 326 (2014). See Rahn, *supra* note 24, at 672 (“[C]ourts would likely rule that internet service providers, such as social media platforms, actually have a constitutional right to decide whether to censor speech on their sites.”).

speech that users are privileged to post on their platforms.²⁴⁸ Privileges and rights are far from the same, and proponents of SB 7072 and HB 20 seem to be confusing the two. The First Amendment cannot be used to combat social media platforms' exercise of content moderation—their right to editorial discretion—even if it is framed as the plague of “censorship” that is regarded as an infringement on democracy.²⁴⁹

D. *Commonplace Cannot Characterize a Common Carrier*

Florida and Texas are not alone in endeavoring to classify social media platforms as common carriers.²⁵⁰ The common carrier doctrine concerns businesses who accommodate the public, like railroads or telephone companies.²⁵¹ However, the nature of social media does not warrant labeling platforms as common carriers. Social media platforms, as discussed, do not generally hold themselves out to the public.²⁵² Moreover, social media platforms exercise editorial discretion, and thus are speakers protected by the First Amendment.²⁵³ Importantly, the Court has emphasized the lack of choice customers have when dealing with common carriers, but social media users reserve the choice to utilize platforms or not.²⁵⁴ Social media platforms, despite popular belief, are not essential, which starkly contrasts platforms from typical common carriers.²⁵⁵ While it is ar-

²⁴⁸ See Dr. Franciska A. Coleman, *They Should Be Fired: The Social Regulation of Free Speech in the U.S.*, 16 FIRST AMEND. L. REV. 1, 25–26 (2017).

²⁴⁹ See Hooker, *supra* note 47, at 46 (“While social media platforms may be subject to criticism and complaints of bias and arbitrariness in the application of content regulations, the First Amendment currently provides no recourse.”).

²⁵⁰ See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (“There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.”).

²⁵¹ See *Munn v. Illinois*, 94 U.S. 113, 130 (1876); *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 440 (1889); see also *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 739 (1996).

²⁵² See *supra* notes 160–66 and accompanying text.

²⁵³ See Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 505 (2021).

²⁵⁴ See *Liverpool & G.W. Steam Co.*, 129 U.S. at 441.

²⁵⁵ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

gued that communication mediums should stick to providing infrastructure rather than monitoring the contents of communication, simply enabling communication between users is not enough to transcend the common carrier doctrine's purpose.²⁵⁶ If that were adequate, "historical amnesia" would be the catalyst for this detrimental misapplication of the law.²⁵⁷

E. *SB 7072 and HB 20: The Same . . . but Different*

While it is important to explore generally what social media platforms do, and that is this Note's focus, the circuit split concerns two distinct laws that have been considered almost identical.²⁵⁸ For the Eleventh Circuit, SB 7072 interferes with platforms' own speech;²⁵⁹ for the Fifth Circuit, HB 20 regulates the platforms' conduct, chilling, at most, censorship.²⁶⁰ Although I do not propose that the differences are meaningful, I would like to highlight a few.

SB 7072 places emphasis on protecting Florida residents,²⁶¹ whereas HB 20 focuses on promoting the free exchange of ideas.²⁶² A perception of protection seems defensive and offensive, whereas promotion appears much less aggressive. These respective tones appear throughout the provisions of the laws. For example, SB 7072 defines words that have been given a negative connotation, such as "shadow ban," whereas HB 20 stays silent.²⁶³ Moreover, HB 20 emphasizes "expression" throughout its wording, whereas SB 7072 fails to mention that fundamental pillar of First Amendment protection.²⁶⁴ SB 7072 also leaves no mystery to its motive (although comments from the drafters of both laws sufficiently disclose their aims).²⁶⁵ SB 7072 specifically carves out politicians and journalistic

²⁵⁶ See Volokh, *supra* note 183, at 385.

²⁵⁷ The Fifth Circuit accuses social media platforms' argument for why they cannot be regulated as common carriers of "involv[ing] a fair bit of historical amnesia." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 474 (5th Cir. 2022).

²⁵⁸ See BRANNON, *supra* note 51.

²⁵⁹ *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1216 (11th Cir. 2022).

²⁶⁰ *Paxton*, 49 F.4th at 447–48.

²⁶¹ See S.B. 7072, 2021 Reg. Sess. (Fla. 2021).

²⁶² See H.B. 20, 87th Leg., 2d. Sess. (Tex. 2021).

²⁶³ See FLA. STAT. § 501.2041(1)(f).

²⁶⁴ HB 20 uses the word "expression" nearly twenty times. H.B. 20, 87th Leg., 2d. Sess. (Tex. 2021).

²⁶⁵ See *supra* note 56; *supra* note 95.

enterprises,²⁶⁶ whereas HB 20 does not specify and instead purports to focus on the viewpoints of all²⁶⁷ (which SB 7072 arguably does too in calling for platforms to make content-based decisions *consistently*).²⁶⁸ HB 20 also appears to align itself with the Community Standards of at least Meta, pronouncing instances where platforms are not prohibited from censoring expression as it relates to inciting violence, as an example.²⁶⁹ On the other hand, SB 7072 seems to negate any such Community Standards, unless content is “obscene.”²⁷⁰

These differences are unlikely to—and should not—alter the Supreme Court’s treatment between the two laws. The Fifth Circuit was technically correct in saying that “[i]t is undisputed that [p]latforms want to eliminate speech,” but no “doctrinal gymnastics” are even necessary.²⁷¹ The concern with laws like SB 7072 and HB 20 is the speech of a private corporation, not the users who choose to offer up their words via the platforms. Florida and Texas venture to prevent social media platforms from discriminating based on users’ viewpoints, yet the states themselves are suppressing social media speakers’ own viewpoints.²⁷² The actual laws are thus perceived appropriately as threats to free speech.²⁷³ However, for some on the Court, social media platforms are the “more glaring concern” when it comes to protecting free speech, and so the Court could employ an alternative outlook.²⁷⁴

²⁶⁶ FLA. STAT. § 106.072 (1)(d); FLA. STAT. § 501.2041(1)(f).

²⁶⁷ TEX. CIV. PRAC. & REMS. CODE ANN. § 143A.002(a) (West 2021).

²⁶⁸ FLA. STAT. § 501.2041(2)(b).

²⁶⁹ See TEX. CIV. PRAC. & REMS. CODE ANN. § 143A.006(a)(3) (West 2021); see also *Facebook Community Standards*, *supra* note 177.

²⁷⁰ FLA. STAT. § 501.2041(2)(j).

²⁷¹ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 455 (5th Cir. 2022).

²⁷² See *Speech on Campus*, ACLU, <https://www.aclu.org/other/speech-campus> (last visited Sept. 18, 2023).

²⁷³ Rahn, *supra* note 24, at 689 (“[T]he [Florida] statutes themselves represent a threat to free speech.”).

²⁷⁴ See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring) (“[I]f the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves.”); Rozenshtein, *supra* note 16, at 357 (“This has properly raised concerns about the government using its regulatory tools to indirectly censor speech by targeting platforms rather than users directly.”).

When a law obliges a speaker to disseminate a particular message, courts apply strict scrutiny.²⁷⁵ Like the statute at issue in *Tornillo*, SB 7072 and HB 20 require platforms to grant access to all users' messages.²⁷⁶ The First Amendment does not mandate that the government offer a platform for all.²⁷⁷ The laws are both triggered when a social media platform opts to remove certain content, which, as discussed thoroughly, constitutes activity protected by the First Amendment.²⁷⁸ Although both Florida and Texas have argued that the regulations are neutral as they merely compel platforms to apply content-moderation decisions consistently to all users, "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."²⁷⁹ That is exactly the manifest purpose of both censorship laws, even though Texas's arguably conceals it better through the text itself.²⁸⁰

Ultimately, Florida and Texas oppose social media platforms' ejection of posts or users.²⁸¹ While the state governments' interests—protecting the marketplace of ideas—may be noble, "[d]isapproval of a private speaker's statement does not legitimize use of [a state's] power to compel the speaker to alter the message by including one more acceptable to others."²⁸² Moreover, "the mere assertion of dysfunction or failure in a speech market, without more, is inadequate to shield a speech regulation from the First Amendment

²⁷⁵ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).

²⁷⁶ See *id.* at 653 ("Although the statute [in *Tornillo*] did not censor speech in the traditional sense—it only required newspapers to grant access to the messages of others—we found that it imposed an impermissible content-based burden on newspaper speech.").

²⁷⁷ See *supra* note 154 and accompanying text.

²⁷⁸ See discussion *supra* Section III.B.

²⁷⁹ *Turner*, 512 U.S. at 645 (citations omitted).

²⁸⁰ Both statutes regulate speech because of the messages the targeted speech conveys. The political motivations behind both statutes are undeniable. See *id.*; see also *supra* note 56; *supra* note 95.

²⁸¹ See *Turner*, 512 U.S. at 642 ("We have said that the 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" (citations omitted)).

²⁸² *Hurley v. Irish Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995).

standards applicable” to it.²⁸³ While some content-moderation decisions made by social media platforms may not be in the best interest of society, that is not—and cannot become—sufficient to warrant a state’s intervention.

F. *An Oxymoron: Censorship Laws Promote Censorship*

If the Supreme Court were to uphold the censorship laws, First Amendment protections stand to be eroded by increasing government regulation, which would place First Amendment interpretations in direct conflict with the Framers’ aims.²⁸⁴ Laws like SB 7072 and HB 20, which require that social media platforms push out content contrary to the entities’ guidelines and beliefs, “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”²⁸⁵ A group in Texas has already tried to rely on HB 20 and the Fifth Circuit’s precedent to challenge Meta’s content-moderation decisions as “illegal censorship.”²⁸⁶ Based on the text of HB 20, there is no stopping others from attacking content-moderation decisions of sites not even similar to the likes of Twitter and Facebook, such as Etsy.²⁸⁷ This precedent would enable states to push further and further until they command social media as a forum that fosters only their own speech, which would result in the government manipulating the true marketplace of ideas far beyond Big Tech’s bias.

²⁸³ *Turner*, 512 U.S. at 640.

²⁸⁴ See Rahn, *supra* note 24, at 689–90 (“While censorship may stifle public discourse or be unfair to a certain political ideology, the alternative—government regulation—is far more sinister and will only serve to slowly erode at our First Amendment right to free speech.”).

²⁸⁵ *Turner*, 512 U.S. at 641.

²⁸⁶ Andrew Schneider, *Texas Secessionists Sue Facebook’s Parent Company Under Social Media Censorship Law That’s Yet to Take Effect*, HOUS. PUB. MEDIA (Nov. 18, 2022), <https://www.houstonpublicmedia.org/articles/news/politics/2022/11/18/437696/texas-secessionists-sue-facebooks-parent-company-under-law-banning-social-media-censorship>.

²⁸⁷ If Florida’s motivation behind enacting SB 7072 was even valid, the language of the law is much broader than necessary. See Carl Szabo, *Lawsuit Could Block Social Media Censorship Bill in Florida*, NETCHOICE (June 9, 2021), <https://netchoice.org/lawsuit-could-block-social-media-censorship-bill-in-florida>; see also FLA. STAT. § 501.2041(1)(g).

While social media platforms do facilitate conversations, the alternative—handing the government that power—must be avoided.²⁸⁸

Those who find it crucial to strip away social media platforms' ability to police content fail to consider the need for content-moderation.²⁸⁹ It should serve as no surprise that social media is full of evils.²⁹⁰ As of 2018, fifty-nine percent of teenagers in the United States experienced cyberbullying,²⁹¹ which has been found to increase the risk of self-harm and suicidal behavior.²⁹² “Lawful-but-awful” content can leave quite the impression on users and quickly go from abstract to actual.²⁹³ Meta took action regarding over six million pieces of drug content and over eighteen million pieces of terrorism content across Facebook and Instagram in just the third quarter of 2022 alone.²⁹⁴ Without content-moderation policies, platforms would have no option but to sit by and watch unfathomable amounts of hateful and dangerous words circulate. Further, proponents of censoring social media platforms overlook the fact that compelling all content does not achieve equity in reality, as “giving an equal voice to everyone essentially replicates and reifies existing imbalances in privilege and power.”²⁹⁵

The ultimate dangers ripe to emerge if the government could censor speech through social media are not so hard to envision: Just

²⁸⁸ See Rozenshtein, *supra* note 16, at 345.

²⁸⁹ See Kosakowski, *supra* note 45 (“Content moderation is a definitional and indispensable aspect of what internet platforms do.”).

²⁹⁰ See Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 208 (2021).

²⁹¹ Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RSCH. CTR. (Sept. 27, 2018), <https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying>.

²⁹² See *Cyberbullying Increases Risk for Self-harm, Suicidal Behavior*, HEALIO (Apr. 26, 2018), <https://www.healio.com/news/psychiatry/20180426/cyberbullying-increases-risk-for-selfharm-suicidal-behavior>.

²⁹³ See Goldman & Miers, *supra* note 290, at 211.

²⁹⁴ Guy Rosen, *Integrity and Transparency Reports, Third Quarter 2022*, META (Nov. 22, 2022), <https://about.fb.com/news/2022/11/integrity-and-transparency-reports-q3-2022>.

²⁹⁵ Goldman & Miers, *supra* note 290, at 212. There is also the need for platforms to manage information overload. See Garry, *supra* note 211, at 188 (“Like water, speech is a vital thing, but not when it floods.”).

look at China, who claims to give its people free speech rights,²⁹⁶ yet requires media outlets to align their content with the aims of the government, even going as far as to induce journalists to self-censorship.²⁹⁷ If mediums do not comply, they risk an entire ban across the country, as well as other consequences, like fines.²⁹⁸ Similarly, SB 7072 threatens platforms who do not comply with fines, as well as liability under alternative laws and private causes of actions.²⁹⁹ It is not a stretch to consider how laws masked as protecting individuals' speech could lead to a regime that resembles China, where the people are prevented from learning of any viewpoint besides the government's, and entities comply out of fear of repercussions. While there is merit in Judge Southwick's assertion that "[e]xtreme hypotheticals necessarily lead to extreme answers when a First Amendment right is involved," extreme laws lead to extreme realities.³⁰⁰

IV. POWER TO THE PEOPLE

As we await the Supreme Court's decisions, *303 Creative v. Elenis* hints at how the Justices may view the social media censorship laws. In this recent six-to-three decision, the Court applied the First Amendment to determine whether Colorado could force a website designer—through her business—to convey messages inconsistent with her beliefs.³⁰¹ While the Court emphasized the designer's individuality, a corporate entity's involvement did not strip the services provider of First Amendment protection.³⁰² The majority was concerned with preserving the constitutionally guaranteed

²⁹⁶ See James A. Dorn, *China's Constitutional Rights: A Grand Illusion*, CATO INST. (Sept. 1, 2021, 5:17 PM), <https://www.cato.org/blog/chinas-constitutional-rights-grand-illusion>.

²⁹⁷ Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELS. (Feb. 17, 2017, 7:00 AM), <https://www.cfr.org/backgrounder/media-censorship-china>.

²⁹⁸ See *id.*

²⁹⁹ FLA. STAT. § 106.072(3); FLA. STAT. § 501.2041(6).

³⁰⁰ See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 505 (5th Cir. 2022) (Southwick, J., concurring in part and dissenting in part).

³⁰¹ See *303 Creative LLC v. Elenis*, No. 21-476, slip op. at 1, 2 (U.S. June 30, 2023).

³⁰² See *id.* at 17, 25–26.

choice of what to say—or not say—and preventing the government from disturbing the unrestrained marketplace of ideas.³⁰³ In holding that the state could not compel the website designer to create messages inconsistent with her beliefs, what mattered to the Court was that “[a] commitment to speech for only *some* messages and *some* persons is no commitment at all.”³⁰⁴ The dissent viewed this issue as regulating conduct, not speech—which is strikingly similar to the argument the Fifth Circuit used to support its view that HB 20 is constitutional.³⁰⁵

What if the resolution lies outside of the Court? Even if government intervention was crucial to protect free speech as often argued,³⁰⁶ state governments are not equipped to lead this movement.³⁰⁷ Reforming Section 230 has been offered as an alternative route to reigning in social media platforms and their content-moderation decisions.³⁰⁸ Federal regulation of social media platforms at least makes much more sense than individual state regulatory attempts, which could vary as SB 7072 and HB 20 do, and would likely create operational problems for social media platforms forced to comply.³⁰⁹ Section 230 shields social media platforms from liability for any user-generated content hosted on their sites.³¹⁰ Without the potential for liability, platforms can “mismoderate” content all they want.³¹¹ However, it is uncertain how revising Section 230 would apply to the regulatory attempts of Florida and Texas, as both courts find that aspects of Section 230 support their decisions. For the Eleventh Circuit, Section 230 as it stands today provided reinforcement for its position that social media platforms are not common carriers.³¹² For the Fifth Circuit, Section 230 supported its as-

³⁰³ *See id.* at 7–8.

³⁰⁴ *See id.* at 25–26.

³⁰⁵ *See id.* at 2 (Sotomayor, J., dissenting); *see also* NetChoice, LLC v. Paxton, 49 F.4th 439, 448 (5th Cir. 2022).

³⁰⁶ *See* Cuetos, *supra* note 154, at 2.

³⁰⁷ *See id.* at 18–19.

³⁰⁸ *See id.* at 19–20.

³⁰⁹ *See id.* at 18.

³¹⁰ Kosakowski, *supra* note 45, at 73.

³¹¹ *Id.* at 72–73.

³¹² NetChoice, LLC v. Moody, 34 F.4th 1196, 1220–21 (11th Cir. 2022).

assessment that platforms are not speaking when hosting users' content.³¹³ But in May 2023, the Supreme Court passed on reviewing Section 230, so whether platforms may begin to face liability for their content-moderation decisions under the law remains questionable and possibly remote.³¹⁴ Regardless, Section 230 amendments—and any other legislative, regulatory, or administrative measures—should not be the solution.

When joining social media platforms, users are required to accept the platforms' terms of use, thus forming contracts. A platform's breach of its own guidelines could be considered a breach of contract, although the possibility of such a claim remains unclear.³¹⁵ Regardless, it is crucial to place great emphasis on the *choice* to accept the various platforms' terms. Despite the increasing importance of social media and the supposed reliance we as a society have placed on certain outlets, no one is forced to participate. It is for that reason that social media platforms do not present the extraordinary problems that warrant the government's direct attempts to regulate speech.³¹⁶

Yet, many still reason that the distinctive problem presented by platforms results from their influence,³¹⁷ while others propose that influence is not enough to merit exceptional treatment.³¹⁸ While the 2020 presidential election saw more action on social media than any

³¹³ NetChoice, LLC v. Paxton, 49 F.4th 439, 465–66 (5th Cir. 2022).

³¹⁴ See Adam Liptak, *Supreme Court Won't Hold Tech Companies Liable for User Posts*, N.Y. TIMES (May 18, 2023), <https://www.nytimes.com/2023/05/18/us/politics/supreme-court-google-twitter-230.html>.

³¹⁵ See Dreamstime.com, LLC v. Google, LLC, 2019 WL 2372280, at *1–2 (N.D. Cal. June 5, 2019) (“It is . . . beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.’ Victims can sue all day long.” (citation omitted)); Hooker, *supra* note 47, at 71.

³¹⁶ See Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 741 (1996) (discussing how the Court will allow the government to directly regulate speech in certain contexts involving extraordinary problems).

³¹⁷ See Rahn, *supra* note 24, at 668.

³¹⁸ See Hooker, *supra* note 47, at 52–53 (“If the major speech platforms . . . ought to be classified as state actors based not on the assumption of specific state-like duties but merely on their influence, it is hard to know where the category ends.” (footnote omitted)).

other,³¹⁹ it is unclear that Twitter actually played a pivotal role as the narrative suggests.³²⁰ In 2022, 76.9 million Americans used Twitter.³²¹ Compare that to the 154.6 million Americans who voted in the 2020 election, and the influence seems incontestable.³²² Yet, in 2019, only twenty-two percent of American adults on Twitter were considered to be representative of the broader population.³²³ And, in 2020, only about half of Americans at least *sometimes* obtained news on social media more broadly.³²⁴ With these statistics, it is a stretch to say that Twitter meaningfully interfered in the 2020 presidential election, even if it did steer some of the conversation.³²⁵

In a hope to defend users against Big Tech, Florida and Texas overestimate platforms' influence and fail to appreciate the power individual users possess.³²⁶ The principle that lies at the First Amendment's core is "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration,

³¹⁹ *Charting Congress on Social Media in the 2016 and 2020 Elections*, PEW RSCH. CTR. (Sept. 30, 2021), <https://www.pewresearch.org/politics/2021/09/30/charting-congress-on-social-media-in-the-2016-and-2020-elections>.

³²⁰ See Thomas Fujiwara, Karsten Müller & Carlo Schwarz, *The Effect of Social Media on Elections: Evidence from the United States*, PRINCETON UNIV. 1 (Oct. 25, 2022), <https://www.princeton.edu/~fujiwara/papers/SocialMediaAndElections.pdf>.

³²¹ S. Dixon, *Leading Countries Based on Number of Twitter Users as of January 2022*, STATISTA (Nov. 22, 2022), <https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries>.

³²² Press Release, United States Census Bureau, *Census Bureau Releases 2020 Presidential Election Voting Report* (Feb. 27, 2022), <https://www.census.gov/newsroom/press-releases/2022/2020-presidential-election-voting-report.html>.

³²³ Stefan Wojcik & Adam Hughes, *Sizing Up Twitter Users*, PEW RSCH. CTR. (Apr. 24, 2019), <https://www.pewresearch.org/internet/2019/04/24/sizing-up-twitter-users>.

³²⁴ Elisa Shearer & Amy Mitchell, *News Use Across Social Media Platforms in 2020: Appendix: Changing Measurements of News Consumption on Social Media*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/journalism/2021/01/12/appendix-changing-measurements-of-news-consumption-on-social-media/>.

³²⁵ See Chris Pandolfo, *Elon Musk says Twitter 'Has Interfered in Elections,'* FOX BUS. (Nov. 30, 2022, 1:41 PM), <https://www.foxbusiness.com/technology/elon-musk-says-twitter-has-interfered-elections>.

³²⁶ See Koltay, *supra* note 172, at 279; see also Fried, *supra* note 10, at 233 ("Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons.").

and adherence.”³²⁷ The Founding Era stressed the indispensability of discovering and spreading truth, which was thought to be exercised through free speech.³²⁸ As platforms make content-moderation decisions, users are welcome to consider a choice to remove a post or ban a user as warranted or not. What is fundamental to the First Amendment is that an individual make that decision himself or herself, and consistent with this is the notion that users remain free to leave a platform.

Elon Musk controversially purchased Twitter for forty-four billion dollars in 2022 in order to “help humanity” by promoting free speech.³²⁹ While it is contended that social media is an addiction and users cannot simply step away,³³⁰ more than one million Twitter users disagreed as they exited the platform just one week after Elon Musk took over,³³¹ showing how possible it is for users to influence social media, not solely the other way around.³³² Although Musk took his acquisition as ensuring that “the bird”—Twitter—“is freed,” the departure of one million users demonstrates society’s ability to flee from social media.³³³ While boycotts may signal the

³²⁷ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

³²⁸ See *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (“Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.”).

³²⁹ Elon Musk (@elonmusk), TWITTER (Oct. 27, 2022, 9:08 AM), <https://twitter.com/elonmusk/status/1585619322239561728/photo/1>.

³³⁰ See Larissa Sapone, *Moving Fast & Breaking Things: An Analysis of Social Media’s Revolutionary Effects on Culture and its Impending Regulation*, 59 DUQ. L. REV. 362, 379 (2021) (discussing how social media is considered “more addictive than cigarettes and alcohol”).

³³¹ Chris Stokel-Walker, *Twitter May Have Lost More Than a Million Users Since Elon Musk Took Over*, MIT TECH. REV. (Nov. 3, 2022), <https://www.technologyreview.com/2022/11/03/1062752/twitter-may-have-lost-more-than-a-million-users-since-elon-musk-took-over>.

³³² See Sapone, *supra* note 330, at 376 (There is a belief that “the answer to digital distraction lies in individuals learning to exercise forethought and discipline, not demonizing companies that make products people love.” (footnote omitted)).

³³³ Elon Musk (@elonmusk), TWITTER (Oct. 27, 2022, 9:08 PM), <https://twitter.com/elonmusk/status/1585841080431321088>. See Fried, *supra* note 10, at 231 (“No theory of free speech allows a speaker to pursue his audience into her home, break down her door and unstop her ears.”).

demand for alternative social media platforms,³³⁴ platforms such as Parler have gained little traction, with less than one million monthly active users in the first half of 2022.³³⁵ Perhaps there lacks a demand for alternative platforms, or perhaps the right one has not yet come along. Whatever that answer may be, social media's influence today is no match for the autonomy that individual users enjoy.

However, while individual users' freedom is important, as is platforms' freedom of speech, platforms' self-determination in how they operate should not be ignored simply because the government cannot coerce it. Just because social media platforms *can* exercise editorial discretion and remove posts does not mean that they always *should*. Facebook states that “[i]n some cases, we allow content—which would otherwise go against our standards—if it’s newsworthy and in the public interest . . . only after weighing the public interest value against the risk of harm”³³⁶ But how exactly does that balancing occur? And where are those value measures sourced?³³⁷ It does appear dangerous that private entities dictate the “public interest” when their ultimate goal is to maximize profits. While the Supreme Court is restrained from disallowing platforms' content-moderation decisions, the people are permitted, and should be encouraged, to question *everything*.³³⁸ As Americans, this is our calling.³³⁹

³³⁴ See Rahn, *supra* note 24, at 690 (“[S]uch a boycott could signal to savvy investors that there is a need for an alternative to liberal-leaning social media platforms: a platform made by conservatives for conservatives.”).

³³⁵ Anousha Sakoui, *What to Know About Parler, the Right-Wing Platform that Ye Plans to Buy*, L.A. TIMES (Oct. 18, 2022, 6:00 AM), <https://www.latimes.com/entertainment-arts/business/story/2022-10-18/what-is-parler-the-right-wing-website-that-will-ye-and-his-cohorts-new-platform-for-hate-speech>.

³³⁶ *Facebook Community Standards*, *supra* note 177.

³³⁷ These questions raise transparency concerns, but many critics don't think that transparency requirements (like the disclosure requirements embedded in both SB 7072 and HB 20), are effective methods of control. As discussed, platforms cannot be required to say anything. See Mark MacCarthy, *Transparency is Essential for Effective Social Media Regulation*, BROOKINGS (Nov. 1, 2022), <https://www.brookings.edu/blog/techtank/2022/11/01/transparency-is-essential-for-effective-social-media-regulation>.

³³⁸ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

³³⁹ See *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (“The safeguarding of these rights to the ends that men may speak as they think on matters vital to them

CONCLUSION

Social media platforms undeniably possess First Amendment rights, despite states like Florida and Texas attempting to wear away those liberties. While platforms have transformed the communicative landscape, they are not so different from mediums like newspapers who have enjoyed full First Amendment protection. One cannot deny social media's power and the potential influence platforms command over society, but the current nature of social media platforms does not necessitate the frightening governmental interference that is increasingly attempted.

While the circuit split is stark, it is uncertain how the Supreme Court will view social media platforms and their content-moderation decisions. If the Supreme Court allows for laws like SB 7072 and HB 20 to stand, society faces the risk of government censorship masked behind the finger pointing of politicians who are the ones with illicit motivations that disregard First Amendment fundamentals. The true check on social media exists in its users, who remain free to delete their apps at any moment.

and that falsehoods may be exposed through the processes of education and discussion is essential to free government."); *see also Turner*, 512 U.S. at 641 ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").