2023

PublicSquare.gov: A Social Media Platform with First Amendment Protection

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INTRODUCTION

On October 27, 2022, billionaire Elon Musk purchased the social media platform Twitter for $44 billion dollars.[1] Upon completion of the sale, Musk took to his personal Twitter account and tweeted that "the bird is freed".[2] In the days that followed, Musk remained active on his Twitter account and continued to tout his purchase as a victory for the freedom of speech.[3] Even with Musk running the show, though, Twitter would not feature completely free speech. In yet another tweet, Musk let everyone know that he would be creating a content moderation council to determine who could use Twitter and what kinds of content could be posted there.[4] One decision that Musk made upon his takeover was to suspend accounts that parodied particular individuals without clearly labeling themselves as parody accounts.[5] Later, Musk also made the decision to ban accounts that post any person's location information in real time.[6] He did so in response to an account that posted live updates on the location of his private jet.[7] The new policy also lead Twitter to suspend the accounts of journalists who posted about the jet tracking account, or criticized Musk for his handling of the situation.[8] Washington Post executive editor Sally Buzbee criticized Musk for undermining the very First Amendment rights he sought to protect when he first purchased

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[1] Kate Conger and Lauren Hirsch, *Elon Musk Completes $44 Billion Deal to Own Twitter*, THE NEW YORK TIMES (Oct. 28, 2022), https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html.
[2] Elon Musk (@ElonMusk), TWITTER (Oct. 27, 2022, 11:49 P.M.), https://twitter.com/elonmusk/status/1585841080431321088.
[3] *See* Elon Musk (@ElonMusk), TWITTER (Oct. 28, 2022, 5:16 P.M.), https://twitter.com/elonmusk/status/1586104694421659648, Elon Musk (@ElonMusk), TWITTER (Oct. 28, 2022, 5:21 P.M.), https://twitter.com/elonmusk/status/1586105918143406080, and Elon Musk (@ElonMusk), TWITTER (Nov. 4, 2022, 10:28 A.M.), https://twitter.com/elonmusk/status/1588538640401018880.
[4] Elon Musk (@ElonMusk), TWITTER (Oct. 28, 2022, 2:18 P.M.), https://twitter.com/elonmusk/status/1586059953311137792.
[5] Jon Brodkin, *Musk Announces Twitter ban on unlabeled parody after celebs impersonate him*, ARS TECHNICA (Nov. 7, 2022), https://arstechnica.com/tech-policy/2022/11/musk-announces-twitter-ban-on-unlabeled-parody-after-celebs-impersonate-him/.
[6] Elon Musk (@ElonMusk), TWITTER (Dec. 14, 2022, 7:13 P.M.), https://twitter.com/elonmusk/status/1603181423787380737.
[7] Matt O'Brien, *Twitter suspends journalists who wrote about owner Elon Musk*, THE ASSOCIATED PRESS (Dec. 16, 2022), https://apnews.com/article/elon-musk-technology-business-dac21de7abb6167bb604f5317aeda10a.
[8] *Id.*

Twitter.[9] Two days later, Musk was once again touting Twitter as a haven for free speech by retweeting a tweet published by internet pioneer Marc Andreessen.[10]

While it may seem counterintuitive that Elon Musk can promote free speech while still censoring certain people on his platform, what he is doing falls squarely in line with the First Amendment of the Constitution. He owns the website, so it can contain whatever information and be available whichever users he would like. This is in part because his acts of censorship are themselves acts of speech. For example, his censorship of the account tracking his private jet is tantamount to a statement saying that tracking his private jet is wrong, and deleting the account is his way of spreading that message to other users on Twitter. The government cannot force him to have any users, and it cannot force him to display anything on Twitter that he does not want to display. This line of reasoning protects censorship decisions by Musk on Twitter, Mark Zuckerburg on Facebook and Instagram, Steve Huffman on Reddit, Chad Hurley on YouTube, or the developer of any other social media website. If the government forces someone to say or advocate for anything, they also abridge the First Amendment.[11]

This creates a wrinkle in First Amendment doctrine. Pew Research Center reports that 69% of American adults use Facebook, 40% use Instagram, 23% use Twitter, and 18% use Reddit.[12] A large quantity of Americans engage in at least some speech on the internet, but none of that speech is protected because social media websites are privately owned and cannot be forced to host speech they do not want to host. This paper proposes that the Federal Communications Commission (FCC)

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[9] O'Brien, *supra* note 7.
[10] Marc Andreessen (@pmarca), Twitter (Dec. 16, 2022, 1:02 A.M.), https://twitter.com/pmarca/status/1603631535659237377.
[11] *W. Va. State Bd. Of Educ. V. Barnette*, 319 U.S. 624, 633-34 (1943) (holding that forcing students to stand and salute the flag was just as much an abridgement of free speech as not allowing them to do the same).
[12] *Growing share of Americans say they use YouTube; Facebook remains one of the most widely used online platforms among U.S. adults*, PEW RESEARCH CENTER (April 5, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/pi_2021-04-07_social-media_0-01/.

create its own social media platform called PublicSquare.gov, named after the public squares that were once the American citizens' most common fora for free speech. This way, there is a space on the internet where speech is completely protected by the First Amendment. There are three sections to this paper. The first section examines the current legal relationship between social media websites and the First Amendment to show that speech on those websites is ultimately unprotected from censorship by the host platforms. The second section lays out the bureaucratic structure for creating and maintaining such a website. The third section describes how the website would operate in accordance with First Amendment doctrine.

I. THERE IS A NEED FOR A PUBLIC SOCIAL MEDIA PLATFORM BECAUSE THE FIRST AMENDMENT DOES NOT PROTECT SPEECH ON PRIVATE PLATFORMS.

The internet is a vital and widely used tool for speech in the 21st century. This section will explore the complicated relationship between the First Amendment and the internet. The first subsection will discuss generally the First Amendment's relationship with speech on the internet. The second subsection will look at speech on social media specifically and is itself divided into two more subsections. The first establishes that acts of censorship are protected expressive conduct under the First Amendment, and the second establishes that social media websites are not subject to common carrier regulation that would impede their right to engage in that expressive conduct.

A. The First Amendment applies to speech on the internet.

The Supreme Court first spoke on the issue of whether the First Amendment is binding on online speech when it decided the case of *Reno v. ACLU*. The *Reno* case saw the Court examine portions of the Communications Decency Act of 1996 (CDA); the first provision at issue barred websites from knowingly transmitting obscene or indecent content to anyone under the age of 18,

and the other prohibited the knowing display of patently offensive content in a manner available to anyone under the age of 18.[13]

Before getting into their analysis of these specific parts of the statute, the Court opined about the role of the internet in speech in the 1990's. The Court mainly spoke in terms of transmitting information via online newspapers, chatrooms, and emails, pointing out that the information spread spanned from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls."[14] The internet also hosts a large quantity of pornography, which the CDA aimed to keep away from children.

Justice J.P. Stevens distinguished the internet from the oft regulated media of television and radio, both of which were considered common carriers. Both communications formats had been heavily regulated for years, while there was no precedent for regulating the internet in excess of what the First Amendment otherwise allowed.[15] The court further distinguished the internet from television and radio by pointing out that there is a scarcity of service for the latter two; a person needs thousands of dollars in equipment and the capability to broadcast over the airwaves in order to speak over television or radio, whereas they only need a comparatively inexpensive computer and an internet connection to speak there.[16] Since the internet was so differentiable from television and radio, the Court was able to provide basic First Amendment protection rather than a standard more forgiving to the government as they had to the other media. Applying this higher burden to the government, The Court found that the relevant portions of the CDA were unconstitutional because they were essentially a blanket ban on obscene material on the internet.[17]

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[13] *Reno v. ACLU*, 521 U.S. 844, 859-60 (1997).
[14] *Id.* at 851.
[15] *Id*. at 867.
[16] *Id*. at 870.
[17] *Id*.

The government attempted to claim it was not a total ban because it was designed to only prevent children under eighteen-years-old from seeing such content, but the Court pointed out that reliable age verification was nearly impossible over the internet, so the restrictions ought to be treated as a total ban.[18]

B. Social media websites' acts of censorship are protected by the First Amendment.

Since the First Amendment protects speech on the internet, the next step in this analysis is to determine exactly what constitutes speech on the internet. Specifically, the next step is to ask whether censoring specific individuals or posts is in and of itself an act of speech.[19] A circuit split arose when the states of Florida and Texas passed laws preventing social media websites from censoring their users.[20] The major social media websites, represented by the trade association Netchoice, brought suit in both states.[21] As of December 16, 2022, both cases were consolidated and are distributed for conferencing until January 6, 2023.[22]

There are two components to each circuit's argument, each of which will be considered below. The first sub-part here will explore the circuits' arguments regarding whether acts of censorship ought to be considered acts of expressive conduct. The second will consider the alternative argument that social media websites can otherwise be regulated because they are common carriers.

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[18] *Reno*, 521 U.S. at 855-57.
[19] Nithin Venkatramen, *NetChoice, L.L.C. v. Paxton: 5th Circuit Sets Up Supreme Court Battle Over Content Moderation Authority of Social Media Giants*, THE HARVARD JOURNAL OF LAW AND TECHNOLOGY (October 21, 2022) http://jolt.law.harvard.edu/digest/netchoice-l-l-c-v-paxton-5th-circuit-sets-up-supreme-court-battle-over-content-moderation-authority-of-social-media-giants (edited by Erica Chen).
[20] *Id.*
[21] *Id.*
[22] Supreme Court Docket, *Moody v. NetChoice, L.L.C.*, No. 22-277 (https://www.supremecourt.gov/docket/docketfiles/html/public/22-277.html).

1. Acts of censorship are expressive conduct.

The Eleventh Circuit was the first to take a stance on this issue. The state of Florida enacted S.B. 7072, which regulates internet services, systems, search engines, or access service providers who do business in the state and have gross revenues in excess of $100 million or at least 100 million monthly individual platform participants globally.[23] Websites covered by the statute could not deplatform or ban candidates for political office, use algorithms to ensure posts by or about candidates would not be seen by many users in a process known as "shadow banning", censor "journalistic enterprises", inconsistently apply its censorship standards based on the content users post, or make changes to their rules more than once every thirty days.[24] S.B. 7072 also requires platforms to allow users to opt out of any algorithms that control what content they see, and make mandatory disclosures regarding their standards, rules, and promotion of political candidates.[25] The Northern District of Florida granted Netchoice's request for a preliminary injunction barring S.B. 7072's enforcement, holding that the law infringed upon websites' First Amendment right of editorial judgment.[26] The court came to this decision by applying strict scrutiny based on its determination that S.B. 7072 had a content-based purpose of "defend[ing] conservatives' speech from perceived liberal 'big tech' bias."[27]

The state appealed the decision in part arguing that S.B. 7072 is a permissible regulation of conduct and not speech in light of the cases *PruneYard Shopping Center v. Robins* and *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*.[28] In *PruneYard*, a shopping center tried to bar people from passing out leaflets on their property, but the Supreme Court held that doing so

[23] FLA. STAT. §501.2041(1)(g).
[24] *See* FLA. STAT. §501.2041 *and* FLA. STAT. §106.072.
[25] *Id*.
[26] *Netchoice, L.L.C. v. AG, Fla.*, 34 F.4th 1196, 1207 (11th Cir. 2022).
[27] *Id*.
[28] *Id.*

violated the First Amendment.[29] The Court ruled this way because the defendants in that case simply did not want to host any speakers on their publicly accessible property; they did not make any claims their own right to speak would be implicated.[30]. In *Rumsfeld*, the other case cited, there was a law that required law schools to give the military access to students and space in their buildings as a prospective employer.[31] FAIR attempted to claim that denying the military access was an attempt to make a statement condemning the military's "Don't Ask Don't Tell" policy regarding homosexual service members.[32] The Supreme Court rejected FAIR's argument, holding that their denying access to the military was not an expressive activity that received First Amendment protection.[33] Hosting an employer to speak with students is not speech, so denying an employer's request to speak with students is not speech either.[34] In essence, Florida attempted to argue that censorship was conduct and not speech, so the First Amendment did not prevent them from regulating it.[35]

The Eleventh Circuit disagreed with the state and went on to uphold the injunction with regards to S.B. 7072's content moderation regulations.[36] One case The Eleventh Circuit cites to in support of its position is *Miami Herald v. Tornillo*. In that case, Florida attempted to force newspapers that criticize politicians to give those same politicians page space to respond.[37] The Supreme Court held that, since newspapers put in time and effort to select stories that tell specific messages, telling those newspapers that they need to publish other stories is tantamount to forcing

[29] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).
[30] *AG, Fla.*, 34 F.4th at 1215.
[31] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006)
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *AG, Fla.*, 34 F.4th at 1215.
[36] *Id*. at 1208-10.
[37] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

them to speak in violation of the First Amendment.[38] Therefore, when curating content for display or dissemination, there is a right not to include content one does not agree with.[39] This reasoning does not only apply to newspapers, either; The Supreme Court extended this right to utility company newsletters, cable television, and parades as well.[40] The Eleventh Circuit follows suit and extends the right of editorial discretion to social media websites as well.[41]

The Fifth Circuit took the opposite position in *Netchoice L.L.C. v. Paxton*. That case arose in reaction to a Texas law that determined all social media websites with more than 50 million monthly active users were common carriers subject to heightened regulation.[42] The law, referred to as HB 20 throughout the opinion, went on to establish two separate but related requirements. First, it barred any regulated social media platform from censoring users, their expression, or their ability to receive the expression of another based on either viewpoint or geographic location within the state.[43] Second, it set mandatory operation requirements which include providing users with an "acceptable use policy", publishing a biannual "transparency report", and maintaining an appeal process for content removal.[44] The District Court for the Western District of Texas issued a preliminary injunction against enforcing the law because it likened social media websites to newspapers, similar to the Eleventh Circuit.[45] Additionally, court held that the disclosure and operational requirements were unduly burdensome in a way that was likely to chill speech.[46] Finally, the court held that exceptions to the censorship requirement, such as for threats of violence

[38] *Miami Herald*, 418 U.S. at 258.
[39] *AG, Fla.*, 34 F.4th at 1219.
[40] *Id.* at 1210-12 (citing *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), *Turner Broadcasting Systems, Inc v. FCC*, 512 U.S. 622 (1994), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995)).
[41] *Id*. at 1212-13.
[42] *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022).
[43] TEX. CIV. PRAC. & REM. § 143A.002.
[44] *See* TEX. CIV. PRAC. & REM. §§ 120.051-52 *and* TEX. CIV. PRAC. & REM. §§ 120.101-04.
[45] *Paxton*, 49 F.4th at 447.
[46] *Id*.

to a protected class, are impermissible restrictions because they only apply to speakers on large social media platforms.[47]

The Fifth Circuit was wholly unconvinced by Netchoice and the Western District of Texas's arguments from the start. They begin their analysis by considering the merits of Netchoice's claims and looking at the historical roots of First Amendment protection. They point out that the First Amendment was initially written into the Bill of Rights to prevent against prior restraints on speech, and to allow everyone to speak their mind on issues of public concern.[48] They claim that the restrictions on social media websites are not prior restraints, even if there is a right of editorial discretion, and that the restrictions promote people's right to speak their minds.[49]

The Fifth Circuit also turns to Court doctrine to combat Netchoice's arguments. They point out that the prevailing doctrine makes a distinction between regulating host entities' conduct and regulating those entities' speech itself.[50] Like the Eleventh Circuit. The Fifth also discusses *Miami Herald*, *PruneYard*, *Hurley*, and *Rumsfeld* in coming to their conclusion.[51] Using these cases, placing particular emphasis on *Rumsfeld*, the Fifth Circuit synthesizes a rule that justifies compelling social media websites to host users' speech. They held that an entity must show that being forced to host speech either actually compels them to speak or restricts their own speech in order to have a First Amendment claim.[52]

The Fifth Circuit rejected Netchoice's editorial discretion argument because they felt that the censorship of content was not in and of itself speech; it was conduct that the government is traditionally allowed to regulate.[53] They claim that there is no discernable message to be garnered

[47] *Paxton*, 49 F.4th at 447.
[48] *Id*. at 453.
[49] *Id*. at 454.
[50] *Id.* at 455-59.
[51] *Id.*
[52] *Id*. at 459.
[53] *Id*. at 461.

from the content that these social media websites censor, unlike when newspapers or parade organizers send a message by including some speakers and excluding others.[54] Additionally, they claim that this in no way prevents the social media websites from speaking themselves, in the same way a shopping center is not prevented from disavowing the speech of pamphleteers on its grounds.[55] For these reasons, the Fifth Circuit held that Texas was permitted to pass its law forcing social media websites to host speech.

The Eleventh Circuit's argument that the act of censorship is expressive conduct is stronger than the Fifth Circuit's argument that it is not. Both the Fifth and the Eleventh Circuit agree that, for there to be First Amendment protection, there must be a perceivable message connected to the censorship.[56] The Fifth Circuit points to representations by the platforms that they are hosts for all speech, do not serve as editors, and do not endorse any of the content that they host in order to support the claim that censorship is not expressive.[57] The Eleventh Circuit, on the other hand, points out that these representations are merely clever marketing by the social media websites themselves. In reality, any time a social media platform removes a post or a user, it is making a statement about what types of people or information are valuable to the public discourse.[58] This statement does not go unnoticed by the users of these social media platforms, or even the government. When the state of Florida first enacted S.B. 7072, they did so in an attempt to prevent "the big tech oligarchs in Silicon Valley" from censoring conservatives and promoting a "radical leftist" agenda.[59]

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[54] *Paxton*, 49 F.4th at 461.
[55] *Id.* at 462.
[56] *See Paxton*, 49 F.4th at 460-61 *and AG, Fla.*, 34 F.4th at 1212.
[57] *Paxton*, 49 F.4th at 460.
[58] *AG, Fla.*, 34 4th at 1210.
[59] *Id.* at 1203 (quoting the State of Florida).

The state of Florida was not the only government entity to recognize that the social media platforms were trying to say something with who they chose to censor. On April 26, 2018, Congress held a hearing about big tech's censorship of conservatives on social media. The hearing featured testimony from conservative figures, including congresswoman Marsha Blackburn of Tennessee and internet personalities Diamond and Silk, who believed that they were censored because of their conservative views online.[60] The most prominent figure to allege that social media has an anti-conservative bias is former president Donald Trump. Twitter banned President Trump's account on January 8, 2021, alleging that his tweets incited the violence in the Capitol building two days prior on January 6, 2021.[61] Following his suspension, President Trump released a statement criticizing the social media giant for silencing him and the "75,000,000 great patriots who voted for [him]", a reference to other conservatives who were censored on the platform.[62] He closed the statement by calling Twitter a "radical left platform".[63] It is clear that in censoring specific users, social media platforms intend to send a message and the censored users are receiving that message; this is protected, expressive conduct.

2. Social media websites are not, and cannot become, common carriers.

The Eleventh Circuit also rejects the state's argument that social media websites are common carriers. They claimed not to know whether the state argued the websites were already common carriers or became common carriers with S.B. 7072's passage, but were nonetheless unconvinced either way.[64] They point to *FCC v. Midwest Video Corp.*, a case which held that

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[60] *Filtering Practices on Social Media Platforms: Hearing Before the H. Comm. On the Judiciary*, 115th Cong. 115-56 (2018) (statements of witnesses Rep. Marsha Blackburn, Lynette "Diamond" Hardaway, and Rochelle "Silk" Richardson).
[61] *Permanent suspension of @realDonaldTrump*, TWITTER, (January 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.
[62] Donald J. Trump, *Statement on the Suspension of the President's Personal Twitter Account Online*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/347534.
[63] *Id*.
[64] *AG, Fla.*, 34 4th at 1220.

communications common carriers are entities who "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[65] Social media websites set specific terms on the public's access, so they fall outside this definition.[66] Additionally, the Telecommunications Act of 1996 explicitly says that "interactive computer services" are not common carriers.[67] Finally, the Eleventh Circuit sees a designation of social media websites as common carriers as a law designed solely to abridge freedom of expression.[68] They hold that the government cannot use a common carrier designation to give itself the right to censor a particular entity.[69]

The Fifth Circuit took aim at the Eleventh Circuit's common carrier arguments. The Fifth Circuit took issue with the Eleventh's lack of regard for the history of common carrier doctrine.[70] They point to the different industries deemed common carriers, such as trains, ferries, telephones, and telegraphs.[71] These industries were all designated as common carriers because the government believed their services were important, and they wanted to prevent them from discriminating against different members of the population.[72] Additionally, the Fifth Circuit claimed the Eleventh Circuit used cyclical reasoning, claiming: "So in the Eleventh Circuit's view, a firm can't become a common carrier unless the law already recognizes it as such, and the law may only recognize it as such if it's already a common carrier. Again, that's circular."[73] The Fifth Circuit held that social media websites were common carriers and went on to uphold HB 20 on these grounds.

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[65] *AG, Fla.*, 34 4th at 1220 (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)).
[66] *Id*.
[67] *Id*. (citing 47 U.S.C. §223(e)(6)).
[68] *Id*.
[69] *Id*.
[70] *Id*. at 493.
[71] *Paxton*, 49 F.4th at 494.
[72] *Id*.
[73] *Id.*

Once again, the Eleventh Circuit makes the more persuasive argument. The Fifth Circuit's rationale opens with a long summary of common carrier doctrine, which places emphasis on its purpose of preventing important industries from discriminating against minorities.[74] They ultimately gave three reasons that social media websites ought to be considered common carriers: (1) they are communications firms, (2) they hold themselves out to serve the public without individualized bargaining, and (3) they are affected with the public interest.[75] Under their claim that social media websites are communications firms, they point out that the websites' primary function is aiding in communication and claim that this makes them no different from Verizon or AT&T.[76] This is an oversimplification and ignores the difference in the type of communication that social media offers to users. Where telephone companies like Verizon and AT&T facilitate direct, one-on-one communication, social media allows a user to communicate with potentially millions of people at once. Given how many people may see a particular post get deleted or notice when a user has been banned from a platform, it is more likely that there is a message sent and received in that case than when someone is denied phone service. The Fifth Circuit should not have been so quick to lump the two together given how different the forms of communication actually are.

The Fifth Circuit also attempted to take aim at the Eleventh Circuit's argument that the declaration of social media websites as common carriers in and of itself is a violation of the First Amendment. They claim that doing so involves cyclical reasoning: social media websites cannot be regulated as common carriers because they discriminate based on conduct, which they do because they were never regulated as common carriers.[77] This rejects a key point in the Eleventh

[74] *Paxton*, 49 F.4th at 469.
[75] *Id*. at 473-74.
[76] *Id*.
[77] *Id.* at 494.

Circuit's holding, though. Censorship in this case is expressive conduct protected by the First Amendment.[78] Since the censorship is essentially speech, the government must satisfy some level of scrutiny in regulating it. Given the political climate surrounding these laws, and their passage in order to combat a perceived leftist bias in big tech, it is likely that they will not satisfy any scrutiny, as their purpose is to censor social media platforms' desired political viewpoints.[79]

To summarize Section I, it is likely that social media platforms cannot be forced to protect their users' First Amendment rights because doing so would abridge those platforms' own First Amendment rights. The issue is currently before the Supreme Court, who are faced with appeals from both sides of a circuit split. The Fifth Circuit argues that these social media websites are common carriers who need to be regulated to protect the average American's First Amendment right. The Eleventh Circuit, on the other hand, argues that social media websites are private actors whose censorship decisions are in and of themselves acts of expressive conduct that the government cannot limit. The Eleventh Circuit ultimately presents the stronger argument than the Fifth. Social media websites ought to be considered private actors with no obligation to give every user a platform regardless of their viewpoint. The websites themselves have their own viewpoints that they express by allowing certain speech and censoring other speech.

II. A PUBLIC-PRIVATE PARTNERSHIP WITH THE FCC IS AN EFFECTIVE WAY TO RUN A FIRST-AMENDMENT PROTECTED PLATFORM.

Running a social media platform is far from an easy task and is particularly labor intensive. In December 2021, a year before Elon Musk's takeover and subsequent shake up, Twitter boasted

[78] *AG, Fla.* 34 F.4th at 1226-27.
[79] *See AG, Fla.* 34 F.4th at 1203.

7,500 employees.[80] Meta, who run Facebook, Messenger, WhatsApp, and Instagram, boasted 71,970 employees in the same year.[81] Social media is also an expensive industry to operate in. The publication Trading Economics reported Twitter had over $5.4 billion in operating expenses in 2021.[82] The same publication reported that Meta and its four social media websites had $71.2 billion in operating expenses.[83] These are precisely the websites that PublicSquare.gov would need to compete with for users. To even come close, they will need more manpower and money than the government alone can commit to the project. This paper proposes an FCC public-private partnership as a method for getting the required resources. The first subsection herein will examine public-private partnerships and discuss how one would be beneficial to this project. The second subsection will explain why the FCC ought to be the host agency for the partnership.

A. A public-private partnership makes sense for creating a social media platform.

In 1999, Congress asked the U.S. General Accounting Office (GAO) to conduct research on how public-private partnerships work and report their findings.[84] The office examined six successful public-private partnerships across three government agencies: the National Parks Service (NPS), the Department of Veterans Affairs (VA), and the U.S. Postal Service (USPS).[85] Using that information, J. Christopher Mihm discusses the benefits of a successful partnership and outlines five things that partnerships ought to have in order to be successful.[86]

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[80] Statista Research Department, *Twitter: number of employees 2008-2021*, STATISTA (Nov. 28, 2022), https://www.statista.com/statistics/272140/employees-of-twitter/.

[81] S. Dixon, *Meta: number of employees 2004-2021*, STATISTA (July 27, 2022), https://www.statista.com/statistics/273563/number-of-facebook-employees/.

[82] *Twitter | TWTR - Operating Expenses*, TRADING ECONOMICS (Dec. 1, 2022, 1:59 PM), https://tradingeconomics.com/twtr:us:operating-expenses#.

[83] *Facebook | Meta | FB - Operating Expenses*, TRADING ECONOMICS (Dec. 1, 2022, 2:01 PM), https://tradingeconomics.com/fb:us:operating-expenses.

[84] Letter from J. Christopher Mihm, Assoc. Dir. of Fed. Mgmt. and Workforce Issues, U.S. Gen. Acct. Off. (GAO), to Cong. (Feb. 3, 1999) (on file with U.S. GAO, since renamed the Gov't Accountability Off.).

[85] *Id.* at 2.

[86] *Id.*

Before discussing the five factors present in the public-private partnerships he researched, Mihm opens with a discussion on the benefits of public-private partnerships for certain projects. The first thing that Mihm mentions is resources for obvious reasons. He cites to testimony given roughly a year prior about how, even though government agencies were facing strict budgetary constraints, there was an increased demand for better services.[87] To meet these demands within the strict financial limits, government agencies took particular interest in making the most effective possible use of the resources available to them, and felt that the best means to do so would be to run things in a more "businesslike manner."[88] This involved contracting with a private company with expertise in the area to manage the project in the most effective way possible.[89] These are precisely the types of benefits that the government needs with regards to creating a social media platform; they need experts in the field who can run it in a businesslike manner and make something effective to compete with other platforms. These benefits line up well with the government's needs if it were to build a social media platform.

The letter moves on to describe five things that public-private partnerships need in order to be successful: (1) a catalyst for change, (2) a statutory basis to act, (3) detailed business plans, (4) an organizational structure, and (5) stakeholder support.[90] This section will address the catalyst for change, detailed business plans, and the stakeholder support for such a social media platform. Subsection B, which addresses the FCC as a host for the platform, will discuss the statutory basis to act and organizational structure.

[87] Letter from Mihm to Cong. *supra* note 84 at 1 (citing *Budget Issues: Budgeting for Capital*: Testimony by Paul L. Posner before the President's Commission to Study Capital Budgeting (1998)).
[88] *Id*.
[89] *Id*. at 1-2.
[90] *Id*. at 2.

The first factor to discuss is a catalyst for change. Mihm's letter points out that the three agencies he researched, NPS's catalyst was congress's creation of the Golden Gate National Recreation Area (GGNRA) on land that had two defunct army bases on it.[91] The bases together contained over 1,200 historic structures protected under the National Historic Preservation Act of 1966 that required restoration, but the agency did not have the technical expertise or funds to restore the buildings.[92] NPS partnered with several different businesses to restore different buildings then rent them to tenants in order to maintain them.[93] The USPS did something similar with two post offices, one in Manhattan and one in San Francisco.[94] The facilities were out of date and taking up space on some of the country's most valuable real estate.[95] The USPS partnered with private companies in order to operate in more of a businesslike manner to generate the most revenue possible from their valuable real estate.[96]

The above catalysts share some parallels with the catalysts for a First Amendment protected website. As stated in Section I, there is immense tension between social media websites and their users regarding censorship practices.[97] Modern historical events such as the 2016 presidential election, the COVID-19 pandemic, and the events of January 6, 2021 have metaphorically thrown a gasoline can onto the fire. Daphne Keller, the director of Stanford University's Program on Platform Regulation within its Cyber Policy Center, claims that the present political conditions have given rise to political pressures to censor, creating a pivotal moment for online speech.[98]

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[91] Letter from Mihm to Cong. *supra* note 84 at 9.
[92] *Id*. at 9-10.
[93] *Id*. at 10.
[94] *Id*.
[95] *Id*.
[96] *Id.* at 10.
[97] *See AG, Fla*., 34 4th at 1203 (quoting the State of Florida), *Filtering Practices on Social Media*, *supra* note 60, *and* Trump, *supra* note 62.
[98] Will Oremus, *How social media 'censorship' became a front line in the culture war*, THE WASHINGTON POST (October 28, 2022, 6:22 AM), https://www.washingtonpost.com/technology/2022/10/09/social-media-content-moderation/.

First Amendment rights online are clearly important to many people, as evinced by two states passing laws attempting to enforce those rights against social media companies. If there were a website with guaranteed First Amendment protection, people would be attracted to it. In order to adequately take advantage of the situation, and turn a profit doing so, the government would need to act in a manner becoming of a social media website. Their motivation is similar to the USPS in developing their valuable real estate in Manhattan and San Francisco; they have something valuable to offer, but it needs to be properly utilized in order to generate the maximum utility. Much like the NPS, though, the government does not have the technical knowledge or funds to build a competitive social media platform. A public-private partnership would bring that expertise and help the government to run an effective platform.

The next aspect to discuss is a detailed business plan. Public-private partnerships require close work between the government and the private actor.[99] The relationship usually culminates with a contract outlining each party's obligations with respect to the partnership, so working together on a detailed plan early in the relationship will ease the process of drafting that contract.[100] Business plans help both parties make informed decisions, justify those decisions to critics, and protect their interests in the deal.[101] Another positive feature of planning is that, by bringing up issues earlier on, it becomes easier for both the agency and the private partner to deal with them.[102] The USPS, the NPS, and the VA all used business plans, and cited to their business plans as a reason for their respective projects' success.[103]

[99] Letter from Mihm to Cong. *supra* note 84 at 14.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*. at 15.

This paper itself aims to serve some of the functions listed above. Thus far, it has shown that there is a demand for a social media platform with its own First Amendment protection for users' speech. It will also show that a public-private partnership is an effective way for the government to put together such a social media platform. In addition, it will address some common First Amendment questions related to social media that the government will want to keep in mind when designing and ultimately launching PublicSquare.gov. Obviously, there will be other issues that the government and the private company will need to iron out, but this paper aims to be a jumping off point for those discussions.

The final concern for this subsection is stakeholder support. The letter speaks about stakeholder support as a means to allow the community who will use the fruits of the public-private partnership to give input on it.[104] In the NPS's GGNRA project, for example, the surrounding community made their voices heard for several years leading up to the park's construction.[105] Local lobbying was able to change the NPS's property management policies to ones that would better preserve historical buildings.[106] Additionally, the VA is actually obligated to hold public hearings ahead of any partnerships for land use in order to flesh out the effects on veteran services, employees, local commerce, and the community.[107]

PublicSquare.gov shares some similarities in this area with the GGNRA. Hopefully, the platform will go on to host people from across the United States the same way that the GGNRA does in San Francisco. In order to set the platform up for success, the government would be wise to keep the public in the loop, as they will be the ones using it. For all intents and purposes, the GGNRA was a success under this model, and it would work for PublicSquare.gov as well.

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[104] Letter from Mihm to Cong. *supra* note 84 at 15-16.
[105] *Id.* at 15.
[106] *Id*. at 15-16.
[107] *Id*. at 16.

B. The FCC would be a suitable host for PublicSquare.gov.

The FCC would make for a suitable host agency for PublicSquare.gov because its statutory goals and functions are conducive to creating a First Amendment-protected social media platform. Mihm's letter to congress spends significant time discussing the need for a statutory basis to enter into a public-private partnership. He points out that in every partnership the GAO reviewed, Congress had enacted legislation allowing (1) the partnership to exist, and (2) the agency to use revenue collected from the partnership.[108] Generally, there are two types of legislation that can be passed to achieve these ends: project specific legislation, or legislation that generally allows agencies to enter partnerships.[109] For example, development in GGNRA was subject to project-specific statutes which allowed the NPS to develop and lease the Letterman Hospital Complex in the park.[110] The VA, on the other hand, had a statute of general applicability that allowed the agency to lease some of its property to non-VA tenants and receive monetary consideration to do so.[111]

This paper proposes the FCC as the host agency for PublicSquare.gov. There is currently no government agency specifically tasked with providing people in the United States with an online, First Amendment-protected forum. Therefore, Congress will need to pass a law giving the FCC the authority to do so. The FCC's enabling statute, The Communications Act of 1934, lists the agency's functions and objectives. The Act says that the main objective is to make communications services available to all people of the United States regardless of who they are.[112] This sentiment, even if it does not directly enable the FCC to create a social media platform, still

[108] Letter from Mihm to Cong. *supra* note 84 at 11.
[109] *Id.* at 12.
[110] *Id.*
[111] *Id.*
[112] The Commc'ns Act of 1934, 47 U.S.C. §151.

reflects the general goal of creating such a platform: to give every person in the United States a voice. A new statute would need to be passed in order to create a public-private partnership for this purpose, but Congress is no stranger to allowing the FCC to form partnerships. In the Middle-Class Tax Relief and Job Creation Act of 2012, Congress asked the FCC to form a partnership to create a broadband network dedicated to public safety.[113] As long as Congress is willing to pass a statute giving the FCC the power to create a social media platform, there should be no issue satisfying the statutory authority requirement for a public-private partnership.

The final thing the letter says public-private partnerships need is an organizational structure conducive to creating such a partnership.[114] The key aspect within the organizational structure of the agency is a point of contact for the private partner, someone with expertise that they can work with on the project.[115] For example, the VA created the Office of Asset and Enterprise Development in order to facilitate their partnerships.[116] The office was staffed with experts in the field of asset management who could work effectively with partners and help guide agency policy to a place where partnerships could run smoothly.[117]

The organizational structure prong also suggests that the FCC would be a suitable host for PublicSquare.gov. The FCC themselves claim they are "the United States' primary authority for communications law, regulation and technological innovation."[118] They further claim to have extensive knowledge of the First Amendment itself, since they were formed initially to regulate the content of radio broadcasts, and later did the same for broadcast television.[119] The

[113] *In the Matter of Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, DA 12-1462 (Sept. 7, 2012).
[114] Letter from Mihm to Cong. *supra* note 84 at 13.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *What We Do*, FED. COMMC'NS. COMM'N., https://www.fcc.gov/about-fcc/what-we-do (last visited Dec. 9, 2022).
[119] *The FCC and Speech*, FED. COMMC'NS. COMM'N., https://www.fcc.gov/consumers/guides/fcc-and-speech (last visited Dec. 9, 2022).

Communications Act specifically says that none of the FCC's regulations may abridge the freedom of speech, so their stance has long been that "the public interest is best served by permitting the free expression of views."[120] Instead, their goal is to foster responsive counter-speech in the face of an idea that is otherwise unpopular.[121] Given the FCC's claims that they are experts in technology and the First Amendment, they are likely an agency with the ability to put together a strong sub-agency to help create a First Amendment social media platform. There may be shortcomings since the FCC does not directly deal in social media, but they can be made up for by the private partner to the partnership.

Overall, if the government decided to create a First Amendment-protected social media platform, a public-private partnership with the FCC could be an effective means of doing so. J. Christopher Mihm's letter to Congress on the subject outlines five conditions that make for successful partnerships. The first, a catalyst for change, is clearly present given that two separate states passed laws currently slated for Supreme Court review on the subject. Second, there are also the beginnings of a statutory basis. Congress would need to pass a statute to authorize this type of project, but the FCC's goal in its enabling statute is to make communications services more available to the masses. This goal is in line with the prospect of creating a protected social media platform because doing so would allow more people to post online, since they have an actual right to do so. Third is an organizational structure that will foster the partnership's growth. The FCC is actually in a great position to create a sub-agency for this project because they are self-proclaimed experts in technology and the First Amendment, which will make them an ideal point of contact with the private entity helping to build and run the website. Fourth is a detailed business plan, which this paper aims to be a blueprint for. Fifth and finally is stakeholder support, which the FCC

[120] *The FCC and Speech, supra* note 119 (citing The Commc'ns Act of 1934 § 326).
[121] *Id*.

can drum up simply by keeping the internet community in the loop on the project since they will be the ones using the platform. The project is possible, and a public-private partnership with the FCC is a way to achieve it.

III. THE WEBSITE COULD ORGANIZE CONTENT BASED ON A TAG-AND-FILTER SYSTEM TO BOTH COMPLY WITH THE FIRST AMENDMENT AND ENSURE THAT PEOPLE SEE WHAT THEY WANT TO SEE.

One of social media's main functions is to organize the content that users see. A social media website that simply showed every user every post in chronological order would be an unusable mess that no one would use. Facebook, for example, has two content organization systems. Primarily, every user has the ability to create a list of friends, so they see posts from people they know or care to hear from. Facebook also has groups users can join so they can see posts that are not from people they are necessarily friends with, but are about topics they care about. Twitter does something similar. Twitter allows users to follow other users to see what they are saying, similar to the friends lists found on Facebook. Twitter also has a system called "hashtagging", where users can label their posts. Users can then look at posts based on their hashtags to see things they care about. Finally, there is Reddit, which is entirely focused on the content of posts. The entire website is organized into content-specific fora, so users only need to find their desired forum to find the information they want to read. Additionally, all the aforementioned websites have community standards and use standards that govern the content posted to make their services more palatable for their users.[122]

[122] *See Facebook Community Standards*, Meta, https://transparency.fb.com/policies/community-standards/?source=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2F (last visited Dec. 11, 2022), *The Twitter Rules*, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Dec. 11, 2022), *and Reddit Content Policy*, Reddit Inc., https://www.redditinc.com/policies/content-policy (last visited Dec. 11, 2022).

This creates a First Amendment issue. Any time the government opens a space for speech or other expressive activity, it creates a designated public forum.[123] The only restrictions that are typically available on such a forum are reasonable ones on the time, place or manner of speaking.[124] If the government wants to regulate the content of speech, it must have a compelling reason to do so and a method that is narrowly tailored to that interest.[125] Since the government would be opening an online forum for speech, they cannot regulate any of the speech that ends up there based on its content the way other platforms like Facebook, Twitter, and Reddit do.

There may be another way to ensure that people only see what they want to see and can therefore effectively navigate PublicSquare.gov. While the government cannot themselves screen content in a public forum, they can provide the public with tools to filter out information that it does not want to receive. In the case *Rowan v. U.S. Post Office*, the Court saw a challenge to a law that allowed anyone to contact the post office when they received mail they found objectionable, then required the post office to compel the sender to remove the recipient from their mailing list.[126] The Court upheld the law, and in doing so emphasized how important it is that a person's personal space be free of unwanted content.[127] Even though there is a right to speak freely, there is no such right for those words to be heard by people who do not want to hear them.[128]

This leads to the proposed content organization system for PublicSquare.gov. The website would be based on a series of filters curated by users themselves. At the outset, PublicSquare.gov would allow any post to remain on its website as long as there is a First Amendment right to say its contents. For example, if someone attempted to incite violence, made a true threat, or posted

[123] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).
[124] *Id*.
[125] *Id*. at 46.
[126] *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 729 (1970).
[127] *Id*. at 737.
[128] *Id*. at 738.

child pornography, the post would be removed because those things are not protected by the First Amendment.[129] There are of course other objectionable categories of speech that the First Amendment still protects, such as swear words, hate speech, or nudity.[130] PublicSquare.gov would allow content featuring protected speech to be posted, but give users options to filter out what they do not want to see. This is not necessarily limited to objectionable content, either. If someone did not like professional football for example, they could filter out posts talking about professional football. The goal of filtering is not to make any speech more or less accessible, but to give users the power to see what they want to see while allowing anyone to say what they please.

This raises the question of exactly how to accurately filter every post made on PublicSquare.gov. A program that reads each post and categorizes it is one answer, although it would be inefficient. Keeping up with the professional football example, imagine someone posted on PublicSquare.gov: "I love going to Texas and seeing the Cowboys!" The context of this sentence is unclear; is the speaker talking about seeing actual cowboys, or the professional football team the Dallas Cowboys? In all likelihood, a computer program would not be able to tell. Another possible solution would be to allow other users on the website categorize speech, but this runs into the same problem since other people are just as clueless as to the speaker's true message when there is such ambiguity. This paper proposes that PublicSquare.gov compel every user to tag their posts with the relevant topics. There are some associated free speech issues with that solution, though. For one thing, it could be considered compelled speech because it forces people to say something that they may otherwise not want to say.[131] Additionally, it could also be considered in

[129] *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), *Watts v. United States*, 394 U.S. 705, 708 (1969), *and New York v. Ferber*, 458 U.S. 747, 765-66 (1982).
[130] *See Cohen v. Cal.*, 403 U.S. 15, 18 (1971), *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949), *and Erznoznik v. Jacksonville*, 422 U.S. 205, 211-12 (1975).
[131] *See Barnette*, 319 U.S. at 633-34.

and of itself a content-based limit on the freedom of speech because untagged posts would hypothetically be deleted or otherwise disfavored by the website.[132]

In either case, adding a rule that all posts must be labelled with their topic would need to pass strict scrutiny.[133] Strict scrutiny requires that the government act in line with a compelling interest, and the act must be narrowly tailored to that interest.[134] There is very likely to be a compelling government interest here, and it can be found in the *Rowan* case. The Court in *Rowan* opined about the importance of maintaining the sanctity of one's personal space, and being free from bothersome speakers.[135] Even though the Court was not applying strict scrutiny in *Rowan*, they still supported in dicta the idea that there is an important interest in a person's right to filter what information makes its way into their homes and personal space.[136] Compelling people to label their posts before publishing them on PublicSquare.gov is also narrowly tailored to that interest. An adequate filtering system would need to categorize posts based on their content, so that people would not need to be bombarded with posts they do not care about or found offensive to their sensibilities. Since the person who makes a post is the only one who knows its meaning with absolute certainty, a truly accurate filtering system requires disclosures from people making posts regarding their content.

In all, a First Amendment-compliant social media platform would need to allow all protected forms of speech without discrimination based on content. A platform that simply bombards users with all of its content all the time is highly undesirable and borderline unusable, though. This requires a system for organizing content that will show people what they actually

[132] *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015).
[133] *Reed*, 576 U.S. at 157 *and Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018).
[134] *Reed*, 576 U.S. at 163.
[135] *Rowan*, 397 U.S. at 737.
[136] *Id*.

want to see. A filtering system, where users tell the website which topics they want to see and which topics they do not want to see, would comply with the First Amendment according to the case *Rowan v. U.S. Post Office Dep't.* Such a filtering system would require users to disclose the topics of their posts at the outset. While this may be a form of either compelled speech or content-based regulation, it satisfies strict scrutiny in part because there is such a strong interest in giving people control over the information that makes its way into "[their] castle", to quote the *Rowan* opinion.

CONCLUSION

Tensions between social media websites, their users, and the First Amendment are growing, so much so that two states attempted to enact legislation to deal with the issue. Florida and Texas both passed laws attempting to prevent social media websites from censoring their users based on the content they post. These laws lead to a split between the Fifth and Eleventh Circuit Courts of Appeals. The Fifth Circuit held that such laws were permissible regulations of conduct and not speech, and in the alternative that social media giants such as Twitter and Facebook ought to be regulated as common carriers with limits on their ability to deny service to consumers. The Eleventh Circuit held that acts of censorship were expressive conduct protected by the First Amendment, and that social media websites were not common carriers. Ultimately, the Eleventh Circuit's reasoning is more persuasive because any time a social media website censors a user or post, it is making a normative judgment and communicating that judgment to others on the internet.

Since the First Amendment likely does not prevent private social media companies from censoring users, the US government would be wise to step in and offer its own social media platform with true First Amendment protection. Creating a competitive social media platform would be expensive and require expertise that likely cannot be found in government. A public-

private partnership would give the government the means and the expertise needed to create something that could compete with private industry. Additionally, basing that partnership in the FCC would give it the best chance to succeed. The agency's enabling statute and its own statements suggest that they have the resources required to maintain such a partnership. As long as there is a plan in place and support from people that will ultimately work on or use PublicSquare.gov, a public-private partnership should serve as an effective method for creating and maintaining it.

Finally, PublicSquare.gov would need to be structured very specifically to comply with the First Amendment. Any content in line with a First Amendment protected form of speech would need to be allowed, no matter how objectionable it may be. Even though people have a right to say what they wish, they do not have a right to be heard by anyone and everyone. Users will have the ability to filter out content they do not wish to see, to maintain their personal space. These filters will operate based on tags that everyone uses to label their own posts once they are made. This way, everyone has a right to speak, but no one needs to see things they do not want to see.

A fully First Amendment protected website faces many challenges, the most pressing of which will be how the Supreme Court handles the cases arising out of Texas and Florida. Bureaucratic red tape, monetary issues, and a lengthy development would surely follow even a favorable decision. As long as there is a group of people both in the government and in the private sector willing to work to make it happen, it is at the very least possible.