No.

In the Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA, PETITIONERS

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Throughout our Nation's history, the First Amendment's freedoms of speech and press have protected private entities' rights to choose whether and how to publish and disseminate speech generated by others. *E.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570, 575 (1995); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Over two decades ago, this Court held there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" speech disseminated on "the Internet." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Today, many Internet websites publish and disseminate curated collections of expression generated by themselves and others.

Nevertheless, the State of Texas—much like Florida before it—has enacted a viewpoint-, content-, and speaker-based law (House Bill 20 or "HB20") targeting certain disfavored "social media" websites. HB20 Section 7 prohibits these websites from making editorial choices based on "viewpoint." And HB20 Section 2 imposes on these websites burdensome operational and disclosure requirements, chilling their editorial choices. This Court has already ensured once that Respondent cannot enforce this law against Petitioners' members. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715-16 (2022).

The question presented is whether the First Amendment prohibits viewpoint-, content-, or speaker-based laws restricting select websites from engaging in editorial choices about whether, and how, to publish and disseminate speech—or otherwise burdening those editorial choices through onerous operational and disclosure requirements.

PARTIES TO THE PROCEEDING

Petitioners were the plaintiffs-appellees in the court of appeals. They are NetChoice, LLC d/b/a NetChoice; and Computer & Communications Industry Association d/b/a CCIA.

Respondent was the defendant-appellant in the court of appeals. Respondent is Ken Paxton in his official capacity as Attorney General of Texas.

CORPORATE DISCLOSURE STATEMENT

1. Petitioner NetChoice is a 501(c)(6) District of Columbia organization. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Petitioner CCIA is a 501(c)(6) non-stock Virginia corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

1. This case arises out of trial court proceedings in *NetChoice, LLC v. Paxton*, No. 1:21-cv-00840 (W.D. Tex.), before the Western District of Texas, Austin Division. On December 1, 2021, the district court preliminarily enjoined Respondent's enforcement of Sections 2 and 7 of Texas House Bill 20, as enacted September 9, 2021.

2. Respondent appealed the order granting the preliminary injunction to the United States Court of Appeals for the Fifth Circuit and moved for a stay of the preliminary injunction pending appeal in *NetChoice, L.L.C. v. Paxton*, No. 21-51178 (5th Cir.).

3. On May 11, 2022, the Fifth Circuit stayed the preliminary injunction pending appeal.

4. Petitioners applied for an emergency vacatur of the Fifth Circuit's stay in this Court.

5. This Court vacated the Fifth Circuit's stay of the preliminary injunction on May 31, 2022, in *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022).

6. On September 16, 2022, the Fifth Circuit issued its opinion and judgment reversing the district court's preliminary injunction. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

7. On October 12, 2022, the Fifth Circuit granted Petitioners' unopposed motion to stay the appellate mandate pending certiorari.

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INTRODUCTION

Until the Fifth Circuit's decision below upheld Texas House Bill 20 ("HB20"), no judicial opinion in our Nation's history had held that the First Amendment permits government to compel websites to publish and disseminate speech against their will.[1] If allowed to stand, the Fifth Circuit's opinion will upend settled First Amendment jurisprudence and threaten to transform speech on the Internet as we know it today. This Court has already prevented Respondent from enforcing HB20 against Petitioners' members. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715-16 (2022). It should do so again.

HB20 infringes the core First Amendment rights of Petitioners' members by denying them editorial control over their own websites, while forcing them to publish speech they do not wish to disseminate. As the Eleventh Circuit explained when invalidating Florida's similar law, "social-media companies . . . are 'private actors' whose rights the First Amendment protects, . . . their so-called 'content-moderation' decisions constitute protected exercises of editorial judgment"—and any laws "that restrict large platforms' ability to engage in content moderation unconstitutionally burden that prerogative." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (quoting *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019)) [hereinafter "*Moody*"].

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[1] HB20 regulates "social media platforms," which generally encompasses "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code § 120.001(1); Tex. Civ. Prac. & Rem. Code § 143A.001(4). This Petition will refer to HB20-regulated entities as "covered websites" or just "websites."

The Fifth Circuit expressly "disagree[d] with the Eleventh Circuit's reasoning" on these important First Amendment issues. Pet.App.99a. In seeking review of that Eleventh Circuit decision, the Florida Attorney General recognized that certiorari review is warranted. Fla. Pet. for Cert. 1, *Moody v. NetChoice* (U.S. No. 22-277) (Sept. 21, 2022). Petitioners agreed and thus acquiesced to certiorari review in *Moody* while cross-petitioning. Cond. Cross Pet. 3, *NetChoice v. Moody* (U.S. No. 22-393) (Oct. 24, 2022); Resp. Br. 3, *Moody v. NetChoice* (U.S. No. 22-277) (Oct. 24, 2022). This Court therefore should grant both certiorari petitions in *Moody*, hold this case, rule for NetChoice and CCIA in *Moody*, and then grant, vacate, and remand this case. Alternatively, this Court could grant certiorari in both this case and *Moody*.

At bottom, government "may not . . . tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor." *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). A unanimous panel of the Eleventh Circuit embraced this legal conclusion; a divided panel of the Fifth Circuit rejected it. This split cries out for review.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-142a) is reported at 49 F.4th 439. The opinion of the district court (Pet.App.143a-85a) is reported at 573 F. Supp. 3d 1092.

JURISDICTION

The court of appeals entered its judgment on September 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is reproduced at Pet.App.186a. HB20 is reproduced at Pet.App.187a-206a.

STATEMENT

A. Social media websites "publish" speech. *Reno v. ACLU*, 521 U.S. 844, 853 (1997). And they "disseminate" speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

This disseminated speech is often "written text, photos, and videos" that are "created by third parties." *Moody*, 34 F.4th at 1203. But everything readers and viewers see on covered websites is arranged according to the websites' distinctive editorial policies. R.1771-1825 (websites' policies).[2] Websites "invest significant time and resources into editing and organizing"—that is, "*curating*"—"users' posts into collections of content that they then disseminate to others." *Moody*, 34 F.4th at 1204-05. "By engaging in this" editorial discretion, websites "develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints." *Id.* at 1205; *see* Pet.App.165a. Websites' editorial efforts convey that the speech they choose to disseminate is "worthy of presentation." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570, 575 (1995).

Websites' "editorial discretion" encompasses a broad range of choices affecting "which users' speech the viewer will see, and in what order, during any given visit to the

[2] "R.__" refers to the Fifth Circuit's record on appeal.

site." *Moody*, 34 F.4th at 1203; *see* R.213; R.1138-39; R.1227; R.1309; R.1365-66. At the outset, websites choose who can access their websites. Once eligible viewers have access to those websites, they must comply with the websites' policies. *Moody*, 34 F.4th at 1203; *see* R.359; R.383; R.1664-1721. Websites therefore will "remove[] posts that violate [their] terms of service or community standards—for instance, those containing hate speech, pornography, or violent content." *Moody*, 34 F.4th at 1204; *see* Pet.App.169a. And websites determine how policy-compliant expression gets displayed—"arrang[ing] available content by choosing how to prioritize and display posts." *Moody*, 34 F.4th at 1204 (citation omitted); *see* Pet.App.168a; R.198; R.211.

Covered websites thus do not disseminate *all* speech or treat all speech equally. For example, on websites that allow viewers to "follow" particular accounts, viewers' "feed[s]" "won't just consist of every single post created by every single one of those [accounts] arranged in reverse-chronological order." *Moody*, 34 F.4th at 1204. Instead, viewers "see[] a curated and edited compilation of content," in addition to advertisements and other expression the websites recommend. *Id.*; *see* Pet.App.163a, 165a; R.176; R.184-87; R.378-79.

Covered websites also generate expression by "add[ing] addenda or disclaimers to certain posts (say, warning of misinformation or mature content)[] or publish[ing] [their] own posts." *Moody*, 34 F.4th at 1204; *see* Pet.App.168a; R.198-99. And some websites support certain speech by sharing advertising revenue with certain users for policy-compliant expression. R.199-200.

Without these editorial choices, websites would offer experiences overrun with spam, bullying, and other

harmful content. For example, during six months in 2018, Facebook, Google, and Twitter took action on over 5 billion accounts or submissions—"including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech." Pet.App.173a. Understandably, when covered websites have failed to remove such expression, they have lost the goodwill of their viewers and advertisers—and faced criticism from many others. R.176; R.184-87; R.233.

In the recent past, one of the measurable ways this lost goodwill manifested was viewer and advertiser boycotts. YouTube in 2017 "lost millions of dollars in advertising revenue after" companies "took down their ads after seeing them distributed next to videos containing extremist content and hate speech"—prior to YouTube upgrading its policy enforcement. R.188-89. And Facebook in 2020 "saw a nearly identical response" after advertiser concerns about "hate speech and misinformation." R.189; *see* R.216; R.1135-37; R.1169.

B. The State of Texas enacted HB20 to target certain disfavored websites based on disagreements with their editorial policies and enforcement. Pet.App.144a-45a, 165a-66a, 182a; R.33-35 (collecting statements from leading legislative proponents). The Governor's official signing statement proclaimed that HB20 targets websites to protect "conservative speech": "It is now law that conservative viewpoints in Texas cannot be banned on social media." R.36.

HB20's key coverage definition of "social media platform" is content- and speaker-based. It covers only those social media websites with 50 million or more monthly active U.S. users. Tex. Bus. & Com. Code § 120.002(b); Tex.

Civ. Prac. & Rem. Code § 143A.004(c). At a minimum, HB20 covers Petitioners' members Google (which owns YouTube), Meta (which owns Facebook and Instagram), Pinterest, TikTok, Twitter, and Vimeo. Pet.App.145a. But HB20 expressly excludes certain other Internet websites based on content, namely websites that "consist[ ] primarily of news, sports, [and] entertainment." Tex. Bus. & Com. Code § 120.001(1)(C).

HB20 Section 7 compels speech dissemination by prohibiting websites from engaging in editorial choices based on the "viewpoint" of the expression or user. Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), .002(a). It includes two facially content-based exceptions for (1) incitement and threats against limited protected classes and (2) referrals from particular organizations. *Id.* § 143A.006(a)(2)-(3). Section 7 even appears to force websites to continue operating in Texas. *Id.* § 143A.002(a)(3).

HB20 Section 2 imposes onerous operational and disclosure requirements similarly aimed at chilling websites' editorial discretion. *First*, websites must adopt notice-complaint-appeal procedures for users to challenge specific editorial decisions. Tex. Bus. & Com. Code §§ 120.101-104. *Second*, websites must provide unbounded "disclosures" about their "content management, data management, and business practices." *Id.* § 120.051(a). *Third*, they must "publish an acceptable use policy," that, among other things, must "explain the steps the social media platform will take to ensure content complies with the [website's] policy." *Id.* § 120.052. *Fourth*, they must publish a "biannual transparency report," requiring disclosure of large swaths of information about each action websites take to enforce their policies across billions of pieces of expression—including "a description of each tool,

practice, action, or technique used in enforcing the acceptable use policy." *Id.* § 120.053.

In total, HB20 would wreak havoc by requiring transformational change to websites' operations. As Facebook's declarant testified, even if given 10 years, "I think that we would not be able to comply in a meaningful way with these issues without undoing the whole way that we do business." R.1175. He estimated that, because Facebook "spent billions of dollars" on developing its editorial-discretion tools since 2016, Facebook would need to "invest nearly as much to be able to comply with all that would undo our systems in such a fundamental way." R.1160.

C. After four weeks of discovery, including multiple depositions, the district court preliminarily enjoined Respondent's enforcement of HB20. Pet.App.149a, 185a. Respondent appealed and moved for an opposed stay in the Fifth Circuit. A three-judge motions panel carried the stay motion with the case. Two days after oral argument, the merits panel granted Respondent's five-month-old stay motion by a 2-1 vote. Order, *NetChoice, L.L.C. v. Paxton*, No. 21-51178 (5th Cir. May 11, 2022).

This Court vacated the Fifth Circuit's stay order. *Paxton*, 142 S. Ct. at 1715-16. Though this Court's majority did not issue a written decision, it necessarily determined that there was a reasonable probability of granting review, a fair prospect of reversal on the merits, and a likelihood of irreparable injury to Petitioners' members. *E.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *W. Airlines, Inc. v. Int'l Bhd. of Teamsters & Air Transp. Emps.*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

Four months later, the Fifth Circuit merits panel issued an opinion reversing the district court's preliminary injunction. On HB20 Section 7, the panel majority expressly "disagree[d] with the Eleventh Circuit's reasoning" in *Moody* on two "key issues": (1) whether this Court's precedent protects private entities' editorial discretion; and (2) whether the websites here exercise such editorial discretion. Pet.App.99a, 102a. On HB20 Section 2, the entire panel disagreed with the Eleventh Circuit's invalidation of a similar burdensome operational and disclosure provision. Pet.App.91-99a.

Judge Southwick dissented from the Fifth Circuit majority's holdings on Section 7, finding it an "unconstitutional infringement on the Plaintiffs' rights to edit or remove, after the fact, speech that appears on their private Platforms." Pet.App.142a. The Fifth Circuit granted Petitioners' unopposed motion to stay the appellate mandate pending certiorari.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's decision below expressly split with the Eleventh Circuit on whether government can regulate websites' editorial discretion, while exacerbating confusion over when government can compel disclosures under *Zauderer*.

When this Court vacated the Fifth Circuit's stay order in May, three of the Justices dissenting from that order recognized this case "will plainly merit" the Court's review. *Paxton*, 142 S. Ct. at 1716 (Alito, J., dissenting). Review is even more appropriate now that the Fifth Circuit expressly split with the Eleventh Circuit on many First Amendment issues of exceptional national importance.

A. *HB20 Section 7's prohibition on viewpoint-based editorial discretion*. The Fifth Circuit "disagree[d] with the Eleventh Circuit's reasoning," holding that the First Amendment does not protect social media websites' editorial choices about what speech they disseminate. Pet.App.99a; *see* Pet.App.118a (Southwick, J., dissenting). Moreover, the Fifth Circuit disagreed with the consensus of other lower courts.[3] This conflict implicates several First Amendment issues, as discussed below (at pp.12-28). And the Florida Attorney General agrees this Court should review these issues. *Supra* p.2.

B. *HB20 Section 2's operational and disclosure provisions*. The Fifth Circuit's approval of burdensome operational and disclosure provisions creates a square split with the Eleventh Circuit—and further splits with the Fourth Circuit. Furthermore, both the Fifth and Eleventh Circuits' analyses implicate multiple areas of widespread confusion among the lower courts over the standard for compelled commercial disclosures under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). As articulated by this Court, *Zauderer* provides a limited exception to normal heightened First Amendment scrutiny for compelled disclosures of "purely factual and uncontroversial information" to correct misleading "commercial advertising"—provided that the

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[3] *E.g.*, *O'Handley v. Padilla*, 2022 WL 93625, at *14-15 (N.D. Cal. Jan. 10, 2022), *appeal docketed*, No. 22-15071 (9th Cir. Jan. 18, 2022); *Isaac v. Twitter*, 557 F. Supp. 3d 1251, 1261 (S.D. Fla. 2021); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 629 (E.D. Va. 2019), *aff'd*, 774 F. App'x 162 (4th Cir. 2019); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017).

disclosures are "not unjustified or unduly burdensome." *Id.* at 651.

The Eleventh Circuit held that Florida's notice provision requiring covered websites to provide "detailed justification for every content-moderation action" was "unduly burdensome" and "likely to chill platforms' protected speech." *Moody*, 34 F.4th at 1230 (cleaned up).

Analogously, the Fourth Circuit held that Maryland's political-advertisement disclosure requirements for "online platforms" "intru[ded] into the function of editors" and unconstitutionally compelled speech. *Wash. Post v. McManus*, 944 F.3d 506, 518-20 (4th Cir. 2019).

By contrast, the Fifth Circuit upheld provisions (described above at pp.6-7) requiring covered websites to provide users with detailed justifications for every editorial action. Pet.App.91a-99a. Petitioners provided unrebutted evidence that implementing many of the provisions would entail significant costs, if it were possible at all. *See* Pet.App.172a; R.214-15; R.227-28. In response, the Fifth Circuit held that "technical, economic, or operational burdens" are not relevant under *Zauderer*. Pet.App.95a.

The Fifth and Eleventh Circuits' application of the *Zauderer* standard raises multiple questions that have divided lower courts. Indeed, the D.C. Circuit has acknowledged a "conflict in the circuits regarding [*Zauderer*'s] reach." *Nat'l Ass'n of Mfrs. (NAM) v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (collecting cases); *see also Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas, J., dissenting from denial of certiorari); *CTIA – The Wireless Ass'n v. City of Berkeley*, 873 F.3d 774, 776 & n.1 (9th Cir. 2017) (Wardlaw, J., dissenting from denial of reh'g en banc).

These decisions amplify confusion at every level of the *Zauderer* analysis. The threshold question is whether *Zauderer* applies to government-compelled speech unrelated to "commercial advertising."[4] Next, courts disagree about whether government may compel speech for reasons other than "preventing deception of consumers."[5] Assuming that government may permissibly impose some kind of disclosure, courts disagree about what makes a disclosure permissibly "factual" and "uncontroversial."[6] They similarly disagree about whether financial burdens and litigation risk can make a disclosure "unduly

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[4] *Compare NAM*, 800 F.3d at 523 ("[T]he Supreme Court has refused to apply *Zauderer* when the case before it did not involve voluntary commercial advertising."), *with Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020); *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 843 (9th Cir. 2019) [hereinafter "*CTIA II*"]; *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524 (6th Cir. 2012); *Nat'l Elec. Mfrs. Ass'n (NEMA) v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2011); *United States v. Wenger*, 427 F.3d 840, 850-51 (10th Cir. 2005).

[5] *Compare Recht v. Morrisey*, 32 F.4th 398, 416 (4th Cir. 2022) (remedying consumer deception); *Dwyer v. Cappell*, 762 F.3d 275, 282 (3d Cir. 2014); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 166-68 (5th Cir. 2007); *Cent. Ill. Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987), *with CTIA II*, 928 F.3d at 844 (non-deception interest); *Am. Meat Inst. (AMI) v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014); *Discount Tobacco*, 674 F.3d at 556; *Wenger*, 427 F.3d at 844, 849-50; *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *NEMA*, 272 F.3d at 113-14.

[6] *Compare AMI*, 760 F.3d at 27 (*Zauderer* requires more than "simple factual accuracy"), *with Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014); *Entm't Software Ass'n (ESA) v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006).

burdensome."[7] Finally, courts disagree as to what standard of review applies to compelled speech if *Zauderer* does not.[8]

II. The Fifth Circuit's decision below erroneously interpreted the First Amendment on issues of exceptional national importance.

The Fifth Circuit erred in upholding HB20 Section 7's prohibition on editorial discretion and HB20 Section 2's burdensome operational and disclosure provisions.

A. HB20 Section 7's prohibition on editorial discretion violates the First Amendment.

1. This Court's precedent establishes that private websites have First Amendment rights to make editorial choices over whether and how they disseminate speech.

Decades of this Court's precedent recognizes that the First Amendment protects private entities' editorial choices over whether, and how, to publish or disseminate speech. This precedent applies to social media websites, which both publish and disseminate speech.

a. A long line of this Court's precedent establishes private entities' rights to editorial discretion over which speech they publish or disseminate.

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[7] *Compare Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 479 (9th Cir. 2022) (economic costs like litigation risk are relevant to burden), *with Am. Hosp. Ass'n*, 983 F.3d at 541 (only direct burdens on speech).

[8] *Compare Discount Tobacco*, 674 F.3d at 554 (strict scrutiny), *ESA*, 469 F.3d at 651-52, *with R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012) (intermediate scrutiny).

For example, "*Miami Herald* [*'Tornillo*'], *Pacific Gas* [*'PG&E*'], and particularly *Turner* and *Hurley* establish that a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are" protected "editorial judgments." *Moody*, 34 F.4th at 1212. Websites "deliver[] curated compilations of speech created . . . by others":

> Just as the parade organizer exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social-media platforms regularly make choices "not to propound a particular point of view."

Id. at 1213 (quoting *Hurley*, 515 U.S. at 575).

Tornillo held that the First Amendment protects "the exercise of editorial control and judgment," which includes "[t]he choice of material," "the decisions made as to limitations on the size and content," and the "treatment of public issues and public officials—whether fair or unfair." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *accord* Pet.App.122a-24a (Southwick, J., dissenting). *Tornillo* thus invalidated a law requiring newspapers to publish political candidates' responses to negative coverage. 418 U.S. at 258. This law violated "the First Amendment because of its intrusion into the function of editors"; any "compulsion to publish that which 'reason tells them should not be published' is unconstitutional." *Id.* at 256.

This Court has extended *Tornillo*'s key insights beyond newspapers to *any* case involving the compelled

dissemination of speech. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988); *see Moody*, 34 F.4th at 1211.

PG&E therefore held it unconstitutional for government to compel a public utility "to use *its* property [a newsletter] as a vehicle for spreading a message with which it disagree[d]." *PG&E v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 17 (1986) (plurality op.).[9]

Hurley likewise acknowledged that *Tornillo* covers a parade organizer's decision to exclude certain expression from the parade: "the presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First Amendment security." 515 U.S. at 570. Thus, the "selection of contingents to make a parade is entitled to similar protection" as a newspaper's editorial choices. *Id.*[10]

And *Turner* held that "by exercising editorial discretion over which stations or programs to include in [their] repertoire," cable operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citation omitted).

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[9] All citations to *PG&E* are to the plurality opinion. *See Hurley*, 515 U.S. at 573, 575-76, 580 (treating the *PG&E* plurality opinion as the case's holding).

[10] In reliance on *Hurley*, the lower courts and Respondent have recognized that the "interdependent dynamic between medium and message is well-established and well-protected" under the First Amendment. *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 776 (9th Cir. 2022); *accord* Br. of States as Amici Curiae, *Green*, 52 F.4th 773 (No. 21-35228), 2021 WL 5173256, at *11 (Oct. 29, 2021) (the "Pageant's message is inextricably bound up with who it allows on stage"); *id.* at *12 ("the contenders are the communication").

Many cases beyond *Tornillo*, *PG&E*, *Hurley*, and *Turner* recognize that the First Amendment protects private entities' right to editorial discretion. This Court has long held that private entities have the right to "exercise editorial discretion over . . . speech and speakers"—including when those entities "provide[] a forum for speech" generated by others. *Manhattan*, 139 S. Ct. at 1930 (collecting cases); *e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("distributing"); *Sorrell*, 564 U.S. at 570 ("disseminat[e]"); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("disclosing and publishing information") (cleaned up); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) ("Liberty of circulating is as essential to freedom of expression as liberty of publishing") (cleaned up); *Smith v. California*, 361 U.S. 147, 150 (1959) ("publication and dissemination").[11]

The "editorial function itself is an aspect of 'speech'" protected by the First Amendment. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.); *accord* Pet.App.119a-20a (Southwick, J., dissenting). When an entity "exercises editorial discretion in the selection and presentation" of expression it disseminates, "it engages in [protected] speech activity." *Ark. Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). Consequently, the "compilation of the speech of third parties" is a "communicative act[]." *Id.*

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[11] The Fifth Circuit recognized that private social media websites are not government-run public forums. Pet.App.43a-44a n.15. Yet the majority and Respondent repeatedly referred to websites as "the public square," in reference to *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). That case considered whether *government* can bar sex offenders from social media websites—not whether *private websites* have the right to editorial discretion. *Id.* at 1735.

b. All of this precedent—and more—protects websites' editorial discretion. "Social-media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights, and when they . . . 'disclose,' 'publish,' or 'disseminate' information, they engage in 'speech within the meaning of the First Amendment.'" *Moody*, 34 F.4th at 1210 (cleaned up; quoting *Sorrell*, 564 U.S. at 570).

That conclusion flows directly from this Court's seminal decision in *Reno v. ACLU*: (1) Internet websites "'publish' information"; (2) disseminating speech through websites is inherently "expressive"; and (3) there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to "Internet" websites. 521 U.S. at 853, 870.

Covered websites also engage in myriad editorial choices designed to curate their expressive services. *Supra* p.3-5. At the most basic level, websites must choose among *billions* of pieces of expression, evaluating what to include and how to arrange this for specific viewers. When websites "deprioritize content in viewers' feeds or search results . . . they engage in First-Amendment-protected activity." *Moody*, 34 F.4th at 1213.

2. The Fifth Circuit majority misapplied key precedent.

The Fifth Circuit panel majority's opinion misapplied longstanding constitutional principles in multiple ways.

a. The majority rejected the First Amendment's protection of private entities' editorial choices over whether and how they disseminate speech.

The panel majority incorrectly concluded that covered websites engage in mere "conduct" and "censorship" unprotected by the First Amendment. *E.g.*, Pet.App.9a (emphasis omitted). It neither cited *Reno* nor engaged with this Court's holdings that the First Amendment protects both the "publication" and "dissemination" of speech. Instead, the majority held that when entities disseminate speech authored by others, that "should weaken, not strengthen, the [business's] argument that it has a First Amendment right to censor that speech." Pet.App.106a.

The majority essentially limited this Court's editorial-discretion cases to their facts. It concluded that *Tornillo* was limited to newspapers, suggesting that compelled speech publication uniquely affects newspapers due to space constraints. Pet.App.26a-27a, 40a. But *Tornillo* expressly *rejected* this precise argument. 418 U.S. at 258. And *Reno* later reiterated this point. *See* 521 U.S. at 870.[12]

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[12] The distinction the majority drew between pre-publication ("*ex ante*") and post-publication ("*ex post*") editorial discretion is factually inaccurate and legally irrelevant. Pet.App.46a-47a. Factually, covered websites *do* engage in "ex ante" editorial discretion: many websites "*screen all content* for" at least some kinds of "unacceptable material." *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021) (emphasis added); *see* R.209-12; R.360-73; R.382-85; NetChoice, By the Numbers 5-6, https://bit.ly/3Gn54Hj (quantifying websites' various levels of ex ante editorial discretion). Legally, government cannot compel *continued* dissemination any more than it can compel initial dissemination. *Cf.* Pet.App.131a-32a (Southwick, J.,

The majority also incorrectly ruled that the First Amendment protects editorial discretion only if the entity "accepts reputational and legal responsibility for the content it edits." Pet.App.45a-46a (citing newspaper cases). The constitutional source of this requirement is unclear. Regardless, websites *do* take reputational responsibility for expression they publish. Through editorial discretion, each website endeavors to "foster different sorts of online communities, and promote various values and viewpoints." *Moody*, 34 F.4th at 1205; *see* Pet.App.165a. Websites have faced public criticisms both when viewers have disagreed with websites' policies for their communities and when websites have fallen short in their efforts to foster those communities. *Supra* p.5. Indeed, HB20 was motivated by Texas lawmakers' perception that certain large websites were not moderating content in a way with which lawmakers agreed. *Supra* p.5.

The majority unduly limited *PG&E* to a situation when government "penalized and disincentivized" one entity "by awarding space only to those who disagreed with" that entity's speech while requiring that entity "to associate with speech with which it may disagree." Pet.App.29a-30a (cleaned up; citation omitted). Even under this strained reading, HB20 Section 7 is unlawful. HB20 requires covered websites to disseminate speech of "those who disagree[] with [their] views" on all manner of subjects. *PG&E*, 475 U.S. at 13. Because "the decision about whether, to what extent, and in what manner to

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dissenting). Many other entities like "community bulletin boards," "[c]omedy club[]" open-mic nights, *Manhattan*, 139 S. Ct. at 1930, bookstores, and live call-in shows retain First Amendment rights to cease speech dissemination.

disseminate third-party content . . . is itself speech," HB20 "*does* interfere with [covered websites'] ability to speak." *Moody*, 34 F.4th at 1218 (citation omitted).

PG&E further demonstrates that websites' supposed ability to disclaim association with published speech does not save HB20. Pet.App.41a. Requiring a speaker to "dissociat[e]" itself from forced speech by "simply post[ing] a disclaimer" would "justify any law compelling speech." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring in part); *see Moody*, 34 F.4th at 1218.

Regarding *Hurley*, the panel majority concluded this Court's "cornerstone" was that "parade sponsors were 'intimately connected' to" the parade's message. Pet.App.32a (quoting 515 U.S. at 576). But *Hurley* broadly held that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message"—*even if* it is "rather lenient in admitting participants." 515 U.S. at 569.

The majority insisted that its constrained view of *Tornillo*, *PG&E*, and *Hurley* was justified by *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *See* Pet.App.27a-28, 32a-34a. But neither case involved private decisions about what speech to publish or disseminate, and thus whatever they hold about "hosting" speech is inapplicable here. *See FAIR*, 547 U.S. at 64 ("[R]ecruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper."); *PruneYard*, 447 U.S. at 88 (no "intrusion into the function of editors") (citation omitted); *accord* Pet.App.128a-29a (Southwick, J., dissenting). In

PruneYard, the shopping mall "owner did not even allege that he objected to the content of the [speech]." *PG&E*, 475 U.S. at 12. And *FAIR* distinguished the "conduct" of a law school's employment recruitment assistance from a "number of instances" where the Court "limited the government's ability to force one speaker to host or accommodate another speaker's message"—citing *Hurley*, *PG&E*, and *Tornillo*. *FAIR*, 547 U.S. at 62-63.[13]

b. The majority erred by concluding that HB20 is not subject to strict scrutiny.

The Fifth Circuit majority erred when it concluded that HB20 is not subject to strict scrutiny. Pet.App.80a-91a. HB20 triggers "strict scrutiny" because it is a viewpoint-, content-, and speaker-based law in many independent ways. *Ams. for Prosperity (AFP) v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (strict scrutiny requires "the least restrictive means of achieving a compelling state interest") (citation omitted).

i. Applicable to both HB20 Sections 2 and 7, HB20 relies on a speaker- and content-based definition of "social

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[13] The Fifth Circuit panel majority also erroneously concluded that 47 U.S.C. § 230(c)(1) "reflects Congress's factual determination that the Platforms are not 'publishers.'" Pet.App.51a. Congress made no such factual determination, and Congress cannot override the Constitution in any event. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Section 230 reflects Congress's judgment that all websites are publishers of expression, and not mere passive conduits. This statute protects all websites both when they (1) publish user-generated speech, 47 U.S.C. § 230(c)(1), and (2) refuse to publish or continue publishing user-generated speech, *id.* § 230(c)(2). *See* Pet.App.140a (Southwick, J., dissenting). In fact, § 230(f)(4) expressly protects websites that "filter, screen, allow, . . . disallow[,] pick, choose, analyze, . . . digest content[,] transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."

media platforms." This Court has warned that speaker-based restrictions "are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *accord Nat'l Inst. Fam. and Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2378 (2018); *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015); *Sorrell*, 564 U.S. at 580. And HB20's coverage definition regulates websites based on their perceived viewpoint, as confirmed by the Governor's and key legislators' statements.

HB20's key definition of "social media platform" singles out speakers in two ways; (1) it imposes an arbitrary size threshold of 50-million-monthly-U.S.-users, and (2) it contains content-based exceptions for websites that "consist[] primarily of news, sports, entertainment." *Supra* p.6. The Fifth Circuit majority dismissed news, sports, and entertainment websites as "fundamentally dissimilar mediums," but it did not explain why such websites offering "chat, comments, or interactive functionality" should not be covered by HB20. Pet.App.82a.

Both the statute's plain text and the "history of the Act's passage," *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring), confirm that HB20's speaker-based restrictions are designed as content- and viewpoint-based. The Governor's official signing statement and statements from HB20's authors illustrate that Texas enacted HB20 to counteract a perceived anti-conservative bias among covered websites. *Supra* p.5.

The majority dismissed that record evidence and failed to take into account this Court's speaker-based analysis. It eschewed heightened scrutiny, flipping its focus to the covered websites' purported *lack* of First Amendment rights. Pet.App.83a-85a. For instance, the majority distinguished *Arkansas Writers' Project, Inc. v.*

Ragland, 481 U.S. 221 (1987), *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), because "Section 7's focus on a particular subset of firms is not directed at *suppressing* particular ideas or viewpoints." Pet.App.84a. But HB20 is designed to "suppress" *the websites'* viewpoints and choices about whether and how to disseminate speech. Thus, the majority should have considered HB20's effect on the websites' editorial discretion. The majority also dismissed *Minneapolis Star* and *Grosjean* as limited to differential taxation for publishers. Pet.App.83a-85a. But this Court's precedent clarifies such holdings are not so limited. *E.g.*, *Citizens United*, 558 U.S. at 342.

ii. HB20 Section 7 also imposes viewpoint- and content-based regulations on covered websites' exercise of editorial discretion.

By its plain language, HB20 Section 7 is *viewpoint*-based. It compels websites to disseminate "viewpoint[s]" they otherwise would not. Tex. Civ. Prac. & Rem. Code § 143A.002.

More generally, HB20 is "a content-based regulation." *Riley*, 487 U.S. at 795. It compels covered websites to publish speech, and "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.*

HB20 Section 7 also contains content-based exceptions. The Fifth Circuit majority construed Section 7's exception for incitement and threats against protected classes to reach only unprotected speech. Pet.App.82a-83a. Even if this exception were so limited (and nothing in the text includes such a limitation), regulating only a subset of low-value speech is still a *viewpoint*-based distinction.

R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992). The majority also ignored HB20's other exception allowing editorial discretion over any expression that "is the subject of a referral or request from" select organizations. Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2).

c. The majority erred by concluding that HB20 would satisfy intermediate scrutiny.

HB20 fails even intermediate scrutiny, just as the Eleventh Circuit recognized when it largely invalidated Florida's analogous law. *Moody*, 34 F.4th at 1227. HB20 (1) does not "serve a significant governmental interest"; (2) is not unrelated to the suppression of First Amendment rights; and (3) is not "narrowly tailored to" furthering that significant interest. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citation omitted).

First, the Fifth Circuit majority erred by concluding that the State has a legitimate interest advanced by HB20. Pet.App.86a-87a. *Hurley* held that "forbidding acts of discrimination" among expressive viewpoints is "a decidedly fatal objective" for the First Amendment's "free speech commands." 515 U.S. at 578-79. In a variety of contexts, this Court has long rejected regulating private free-speech rights "to enhance the relative voice of others," *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam)—or to "level the playing field," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748-50 (2011). *Tornillo*, for instance, held that government cannot mandate "enforced access" to "enhance[]" speech, promote "fairness," prevent "abuses of bias and manipulative reportage," or address purported "vast

accumulations of unreviewable power in the modern media empires." 418 U.S. at 245, 250-51, 255.

The majority largely ignored these rulings, instead relying on *Turner* to find a significant governmental interest in "assuring that the public has access to a multiplicity of information sources." Pet.App.86a (cleaned up) (quoting *Turner*, 512 U.S. at 663). But *Reno* held that *Turner*'s intermediate-scrutiny analysis about broadcast television channels does not apply to Internet websites. *Reno*, 521 U.S. at 870.[14] And if government has a valid interest in requiring private entities to maximize speech sources, that would justify *any* law compelling speech dissemination—and the outcomes in *Tornillo*, *PG&E*, and *Hurley* would have been different. Pet.App.136a (Southwick, J., dissenting).

Second, the majority incorrectly concluded that HB20 is "unrelated to the suppression of free speech because at most *it curtails the Platforms' censorship—which they call speech*[.]" Pet.App.88a (emphasis added). Labeling editorial choices as "censorship" is no basis for declining

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[14] Though *Turner* upheld a federal law compelling cable television operators to carry *broadcast* television channels, this Court did so for at least two crucial reasons not present here. First, cable companies had a "*physical*" "bottleneck, or gatekeeper, control" over most (if not all) of the country's television programming through their control over the lines that ran into people's homes. *Turner*, 512 U.S. at 656 (emphasis added). Second, there would have been an "elimination of broadcast television" if cable companies nationwide had not been required to carry the broadcast channels the federal government had spent decades cultivating. *Id.* at 636-41, 646. If there were any doubt, this Court later cabined *Turner*'s reach by confirming that cable operators retain editorial discretion over whether to carry *cable* television channels. *Denver*, 518 U.S. at 737-38; *id.* at 823-24 (Thomas, J., concurring in the judgment in part).

to apply heightened scrutiny. Again, the majority purported to assume that the websites' editorial discretion is protected by the First Amendment, but its analysis then refused to perform heightened scrutiny.

Third, the majority erred in concluding that Section 7 is narrowly tailored and "does not burden substantially more speech than necessary." Pet.App.88a (cleaned up). HB20's regulation of how websites curate, promote, and otherwise present expression goes far beyond what is "necessary" and certainly is not "narrowly tailored." *McCullen*, 573 U.S. at 486 (citation omitted). The majority largely ignored the broad range of websites' editorial activities like arranging, recommending, and monetizing speech, instead focusing almost exclusively on websites' removal of expression. In the limited instances the majority considered other editorial tools, it breezily concluded that the government had power to regulate those as well.

Most strikingly, the majority held that the First Amendment permits government to force websites to *subsidize* speech. Pet.App.89a-90a n.35. This directly contravenes this Court's precedent. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018); *see* Pet.App.138a-39a (Southwick, J., dissenting); Br. of the State of Texas as Amicus Curiae, *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021) (No. 20-50448), 2020 WL 4026192, at *1 (5th Cir. July 7, 2020) (arguing that compulsory attorney-bar-dues funding "political and ideological activities . . . violate[] the First Amendment").

Nor did the majority explain why HB20's 50-million-monthly-U.S.-user threshold is tailored to Texas' purported interest in compelling the widest possible dissemination of speech sources. "[I]t's hard to imagine how the

State could have a 'substantial' interest in" regulating "only large platforms." *Moody*, 34 F.4th at 1228.

The majority concluded that HB20's arbitrary threshold was "reasonabl[e]" because covered websites are large and popular. Pet.App.90a. But private entities do not lose First Amendment rights for being large or popular. The "enviable" "size and success" of such entities does not "support[] a claim that [covered websites] enjoy an abiding monopoly of access to spectators." *Hurley*, 515 U.S. at 577-78. Relatedly, entities retain First Amendment rights even if they have an alleged "monopoly of the means of communication." *Tornillo*, 418 U.S. at 250. *PG&E* involved a state-sanctioned energy monopoly, which retained First Amendment protection. 475 U.S. at 17-18 & n.14; *accord Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 534 n.1 (1980) (status as "regulated monopoly" does not "preclude . . . assertion of First Amendment rights").[15]

The majority conceded that "regulating smaller platforms would intrude more substantially on private property rights and perhaps create unique constitutional problems of its own." Pet.App.90a. HB20's targeting of large websites intrudes just as equally on private property rights and implicates the same constitutional problems.[16]

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[15] No covered website has a monopoly or precludes viewers from accessing billions of pieces of expressive content available via the Internet. The websites fiercely compete among themselves and with other websites.

[16] Because Judge Jones did not join (Pet.App.2a n.*) the common-carrier portions of Judge Oldham's opinion (Pet.App.55a-80a, 110a-112a), the panel majority did not accept Respondent's common-carrier argument. The Eleventh Circuit comprehensively rejected this

d. The majority's "original public meaning" analysis lacks historical evidence and contradicts this Court's precedent.

The majority also erred in concluding that the First Amendment's "original public meaning" provides no protection for private entities' editorial discretion. Pet.App.20a-24a.

Neither Respondent nor the majority provided "persuasive evidence that [HB20's] novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Brown*, 564 U.S. at 792; *cf.* Pet.App.20a-24a. That is why case after case rejects government power to compel speech dissemination. *Supra* pp.12-16; *see also, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). And the original public meaning of freedom of the press extends far beyond mainstream mass media: the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

The majority suggested that the Constitution's "original public meaning" would endorse HB20 because compelled speech is not a "prior restraint." Pet.App.20a-23a. But both *Tornillo* and *Buckley* described the invalid compelled-publication law in *Tornillo* as a governmental

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common-carrier argument for reasons equally applicable here. *Moody*, 34 F.4th at 1220-21. Moreover, even common carriers retain the "right to be free from state regulation that burdens" choices about speech dissemination. *PG&E*, 475 U.S. at 17-18 & n.14. Therefore, HB20's label as "a common carrier scheme has no real First Amendment consequences." *Denver*, 518 U.S. at 825-26 (Thomas, J., concurring in the judgment in part).

"restraint." *Tornillo*, 418 U.S. at 256; *Buckley*, 424 U.S. at 51. In all events, "[t]he protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.3 (1942).

B. The operational and disclosure provisions of HB20 Section 2 likewise violate the First Amendment.

HB20 Section 2 triggers, and fails, strict scrutiny. These operational and disclosure provisions onerously intrude into protected editorial processes, and they would require websites to overhaul their operations. While *Zauderer*'s justifications for narrowly burdening commercial speech do not apply, Section 2 would fail even that lower standard.

1. Section 2 triggers and fails strict scrutiny.

Section 2's requirements are subject to strict scrutiny because they are based on HB20's content- and speaker-based "social media platform" coverage definition. *Supra* pp.20-23; *see NIFLA*, 138 S. Ct. at 2374; *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans"). Section 2 fails strict scrutiny because the State's purported interest in enacting HB20 (1) is constitutionally illegitimate; and (2) lacks any substantial connection to Section 2's requirements. *Supra* pp.23-27.

Section 2 also intrudes on and chills the exercise of protected editorial discretion. *Herbert v. Lando*, 441 U.S. 153, 174 (1979) (government cannot "subject[] the editorial process to private or official examination merely to

satisfy curiosity or to serve some general end such as the public interest"). The Fifth Circuit erroneously concluded that *Herbert* does not apply to covered websites because their editorial discretion is not protected by the First Amendment. Pet.App.97a-98a.

In all events, "laws that single out the press . . . are always subject to at least some degree of heightened First Amendment scrutiny." *Turner*, 512 U.S. at 640-41. Section 2 fails both intermediate and "exacting scrutiny," *AFP*, 141 S. Ct. at 2383, because it neither furthers, nor is tailored to, sufficient governmental interests, *Buckley*, 424 U.S. at 66; *supra* pp.23-27.

2. *Zauderer*'s test for evaluating disclosures related to misleading commercial advertisements does not apply here.

The Fifth Circuit improperly used the lower standard of review set forth in *Zauderer* to approve sweeping operational and disclosure burdens. Pet.App.91a-96a. But *Zauderer* is a narrow exception to the otherwise heightened review of commercial speech regulations. It applies only when government imposes non-burdensome, factual disclosure requirements to cure what would otherwise be inherently misleading commercial advertisements. *Zauderer*, 471 U.S. at 651-52. This Court has never held that *Zauderer* applies when the regulated service is speech itself. And precedent establishes multiple elements limiting *Zauderer*'s reach.

First, *Zauderer* does not apply because HB20 Section 2 does not regulate "commercial speech." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010); *see Zauderer*, 471 U.S. at 651. *NIFLA* and *Hurley* recognized that *Zauderer* concerned only

"commercial advertising." *NIFLA*, 138 S. Ct. at 2372; *Hurley*, 515 U.S. at 573. And *Zauderer* itself "is confined to advertising, emphatically and, one may infer, intentionally." *NAM*, 800 F.3d at 522; *see Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 763 (9th Cir. 2019) (Ikuta, J., concurring in the judgment).

Here, Section 2 does not regulate the covered websites' commercial speech—*i.e.*, "proposal of a commercial transaction." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993). Most glaringly, the notice-complaint-appeal provisions directly regulate websites' individual choices about what speech to publish and disseminate. Tex. Bus. & Com. Code §§ 120.101-104. And the remaining three disclosure requirements are similarly disconnected from compelling speech *during commercial advertisements*. *Supra* pp.6-7.

Second, HB20 Section 2 does not regulate "inherently misleading" commercial advertisements. *Milavetz*, 559 U.S. at 250; *see id.* at 257 (Thomas, J., concurring in the judgment); *United States v. United Foods*, 533 U.S. 405, 416 (2001) ("necessary to make voluntary advertisements nonmisleading for consumers"); *In re R.M.J.*, 455 U.S. 191, 205 (1982) ("not been shown to be misleading").

Here, Section 2 is nowhere near tethered to deception analogous to *Zauderer*. In that case, this Court held that a disclosure requiring lawyers to inform contingent-fee clients they may have to pay court costs would help prevent clients from being misled into thinking they faced no financial risk. *Zauderer*, 471 U.S. at 652.

Third, Respondent, the Texas Legislature, and the Texas Governor did not assert an interest in "preventing deception of consumers." Yet the Fifth Circuit seems to have recognized this is the only permissible governmental

interest triggering *Zauderer*. Pet.App.92a. Nevertheless, the Fifth Circuit concluded that Section 2 "advances the State's interest in 'enabling users to make an informed choice regarding whether to use the Platforms'"—a sweeping claim that would apply to any source of information. *Id.* (cleaned up).

As Respondent has recognized, "'it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information.' This justification is insufficient because it 'would be true of any and all disclosure requirements.'" States' Letter to Vanessa Countryman, Secretary, SEC, at 11 (Aug. 16, 2022), https://bit.ly/3SnE1BO (quoting *AMI*, 760 F.3d at 31 (Kavanaugh, J., concurring in the judgment)).

Fourth, the Fifth Circuit did not explain why Section 2's provisions require only "purely factual and uncontroversial information," like those approved in *Zauderer*. Pet.App.92a.

Section 2's notice-complaint-appeal requirements do not require "factual" information, as they mandate that covered websites must create processes for challenging millions of editorial choices. Likewise, forcing websites to disclose all their "business practices" far exceeds the limited factual disclosure that *Zauderer* deemed permissible. *See Zauderer*, 471 U.S. at 652. Similarly, the biannual transparency report requires websites to explain each of the editorial choices they make millions of times per day, which is far beyond the minimal facts at issue in *Zauderer*. And the mandated "acceptable use policy" requiring, among other things, explanation of "the types of content allowed on the social media platform" mandates disclosure of *editorial* policies—not facts. Tex. Bus. & Com. Code § 120.052(b).

3. Section 2 fails *Zauderer*'s test, even if it applies.

Section 2's provisions are "unduly burdensome and likely to chill [covered websites'] protected speech." *Moody*, 34 F.4th at 1230.

The Fifth Circuit erroneously concluded (without evidentiary support in the record) that covered websites are already capable of complying with Section 2's requirements—and, alternatively, that Section 2's technical and financial burdens are not relevant factors under *Zauderer*. Pet.App.93a-95a.[17] Under the Fifth Circuit's analysis, therefore, Texas could single out entities that disseminate disfavored speech and impose costly, business-altering regulations under the guise of "disclosure."

Section 2's provisions have similar infirmities as the disclosure provision held unlawful by the Eleventh Circuit: they require "detailed justification for every content-moderation action." *Moody*, 34 F.4th at 1230.

Start with HB20's notice-complaint-and-appeal provisions. These require covered websites to develop procedures applicable to *billions* of editorial judgments across websites' international operations. Tex. Bus. & Com. Code §§ 120.101-104. Over a single three-month period in 2021, YouTube removed 9.5 million videos and *1.16 billion comments*. R.214-15. Over a similar period, Facebook removed over 40 million pieces of bullying, harassing, and hateful content. Pet.App.172a-73a. YouTube currently provides appeals for only *video* deletions but not *comment*

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[17] Regardless, it is immaterial whether websites engage in some voluntary transparency measures. Addressing any "gap" between "voluntary" efforts and government mandates "can hardly be a compelling state interest." *Brown*, 564 U.S. at 803.

deletions; so "YouTube would have to expand these systems' capacity by over 100X—from a volume handling millions of removals to that of over a billion removals." R.214. Similarly, both Facebook and YouTube's declarants provided undisputed evidence that their current notice systems did not provide the level of detail that HB20 requires. R.1149; R.1250.

HB20's compelled "biannual transparency report" requires covered websites to collect voluminous data, far exceeding websites' current transparency efforts. Tex. Bus. & Com. Code § 120.053. Websites exercise editorial discretion over *billions* of pieces of content, so the burden of these requirements would be massive and essentially impossible to meet. Even the provisions that appear to call for statistics first require voluminous data *collection* and *calculation*. For example, this provision requires (1) a "*description of each* tool, practice, action, or technique used in enforcing the acceptable use policy," *id.* § 120.053(a)(7) (emphasis added); and (2) websites to track every single "action" they take to, among other things, delete or "deprioritiz[e]" "illegal" or "potentially policy-violating" expression, *id.* § 120.053(a)(1)-(2), (4)-(6), (b). But websites make prioritization decisions about *every* piece of content, thus taking "action" "per individual per piece of content." R.1176; *see* R.227 ("deprioritization" "happens every time a user loads her or his News Feed"). Thus, this provision would require websites to "track" and describe billions of actions a year, including information about that content and how it was reported. *Id.* § 120.053(a)(3), (b). As Facebook's declarant testified, "I don't even know or understand the math that you would need to go through to be able to calculate that." R.1176.

Furthermore, HB20's mandated "public disclosures" as to "content management, data management, and business practices"—with its accompanying non-exhaustive list—encompass virtually *everything* covered websites do. Tex. Bus. & Com. Code § 120.051(a). HB20 cryptically requires these disclosures to "be sufficient to enable users to make an informed choice." *Id.* § 120.051(b). This standard would allow Respondent to sue because a website's disclosure on enumerated topics is "insufficient" (in some unspecified way) or even because a website did not provide *un*enumerated information. Unrebutted evidence demonstrates that requiring disclosure of the detailed ways websites detect policy-violating expression would enable wrongdoers and "unscrupulous users" to evade detection and harm viewers. R.215; R.226-27; R.237-40. These disclosure mandates—particularly with respect to "algorithms"—would also reveal trade secrets and other competitively sensitive information. Tex. Bus. & Com. Code § 120.051(a)(4); *see* R.215; R.226-27.

HB20's requirement that websites publish an "acceptable use policy" compels websites' speech. Tex. Bus. & Com. Code § 120.052. And throughout this litigation, Respondent has not conceded that Petitioners' members are complying with this provision. It therefore invites arbitrary enforcement and lawsuits over, for instance, what "reasonably inform[s] users." *Id.* § 120.051(b); *see Cal. Chamber*, 29 F.4th at 479 (litigation risks are relevant to burden).

III. The First Amendment issues implicated by the Fifth Circuit's split with the Eleventh Circuit are important questions the Court should resolve now.

As this Court acknowledged in May, the issues in this case are important and worthy of this Court's review. *Paxton*, 142 S. Ct. at 1715-16; *id.* at 1716 (Alito, J., dissenting). Florida and Texas are just the first States to attempt stifling regulation of social media websites' editorial discretion. They will not be the last. *See Moody* Cond. Cross Pet. at 34; *Moody* Resp. Br. at 32. Before these unconstitutional proposals spiral out of control, this Court should reaffirm the First Amendment's centuries-old protections prohibiting government from dictating how private entities must publish or disseminate speech. Accordingly, this Court should grant the already-pending petitions in *Moody v. NetChoice*, Nos. 22-277 & 22-393, to resolve those questions.

Alternatively, the Court could grant this Petition, too. There is no vehicle impediment to reviewing the question presented here. The Fifth Circuit majority below incorrectly concluded that Petitioners brought only an overbreadth challenge. Pet.App9a, 15a. Regardless, the majority's holding presents no vehicle problem. Overbreadth claims are facial challenges, and Petitioners prevail under the overbreadth doctrine. *AFP*, 141 S. Ct. at 2387. Petitioners' First Amendment overbreadth challenges present the legal issues raised by the question presented: HB20 is, at a minimum, "overbroad" because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473, 435

(2010) (citation omitted), assuming for the sake of argument that there is any legitimate sweep.

Moreover, Petitioners *have* also raised a traditional facial challenge that HB20 lacks any "legitimate sweep." *Id.* In the district court, Petitioners argued the challenged provisions "are facially unconstitutional *in all applications*," while raising overbreadth "[i]n the alternative." R.146 (emphasis added) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). And in the court of appeals, Petitioners argued that "whenever HB20 applies, it unconstitutionally abridges editorial judgment and compels speech. *City of L.A. v. Patel*, 576 U.S. 409, 418 (2015)." Appellees' Br., *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 1046833, at *44 n.17 (Apr. 1, 2022).

The exceptionally important First Amendment issues presented in this case are thus cleanly raised by this Petition.

CONCLUSION

The Court should hold this Petition pending resolution of *Moody v. NetChoice*, Nos. 22-277 & 22-393, or alternatively grant this Petition.

Respectfully submitted.

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DECEMBER 2022

APPENDIX

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APPENDIX A — Opinion of the United States Court of Appeals for the Fifth Circuit, Filed September 16, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-51178

NETCHOICE, L.L.C., A 501(C)(6) DISTRICT OF COLUMBIA ORGANIZATION DOING BUSINESS AS NETCHOICE; COMPUTER COMMUNICATIONS INDUSTRY ASSOCIATION, A 501(C)(6) NON-STOCK VIRGINIA CORPORATION DOING BUSINESS AS CCIA,

Plaintiffs-Appellees,

versus

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Defendant-Appellant.

September 16, 2022, Filed

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-cv-840

Before JONES, SOUTHWICK, and OLDHAM, *Circuit Judges.*

Appendix A

ANDREW S. OLDHAM, *Circuit Judge*:[*]

A Texas statute named House Bill 20 generally prohibits large social media platforms from censoring speech based on the viewpoint of its speaker. The platforms urge us to hold that the statute is facially unconstitutional and hence cannot be applied to anyone at any time and under any circumstances.

In urging such sweeping relief, the platforms offer a rather odd inversion of the First Amendment. That Amendment, of course, protects every person's right to "the freedom of speech." But the platforms argue that buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech.

The implications of the platforms' argument are staggering. On the platforms' view, email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business. What's worse, the platforms argue that a business can acquire a dominant market position by holding itself out as open to everyone—as Twitter did in championing itself as "the free speech wing of the free speech party." Blue Br. at 6 & n.4. Then, having cemented itself as the monopolist of "the modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737, 198

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[*] Judge Jones joins all but Part III.E and Part V.B.3 of this opinion.

L. Ed. 2d 273 (2017), Twitter unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community, Oral Arg. at 22:39-22:52.

Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say. Because the district court held otherwise, we reverse its injunction and remand for further proceedings.

I.

A.

This case involves HB 20, a Texas statute that regulates large social media platforms.[1] The law regulates platforms[2] with more than 50 million monthly active users

1. The full text of HB 20 can be viewed here: https://perma.cc/9KF3-LEQX. The portions of HB 20 relevant to this lawsuit are codified at Texas Business and Commerce Code §§ 120.001-151 and Texas Civil Practice and Remedies Code §§ 143A.001-08.

2. HB 20 defines "social media platform" to include "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code § 120.001(1). The definition expressly excludes internet service providers, email providers, and any "online service, application, or website" that "consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider," and "for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of [that] content." *Id.* § 120.001(1)(A)-(C).

("Platforms"), such as Facebook, Twitter, and YouTube. TEX. BUS. & COM. CODE § 120.002(b). In enacting HB 20, the Texas legislature found that the Platforms "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." It further found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance."

Two sections of HB 20 are relevant to this suit. First is Section 7, which addresses viewpoint-based censorship of users' posts. Section 7 provides:

> A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:
>
> (1) the viewpoint of the user or another person;
>
> (2) the viewpoint represented in the user's expression or another person's expression; or
>
> (3) a user's geographic location in this state or any part of this state.

TEX. CIV. PRAC. & REM. CODE § 143A.002(a). "Censor" means "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). For Section 7 to apply, a censored user must reside in Texas, do business in Texas, or share or receive expression in Texas. *Id.* § 143A.004(a)-(b).

This prohibition on viewpoint-based censorship contains several qualifications. Section 7 does not limit censorship of expression that a Platform "is specifically authorized to censor by federal law"; expression that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment"; expression that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge"; or "unlawful expression." *Id.* § 143A.006.

Finally, Section 7 provides a narrow remedial scheme. If a Platform violates Section 7 with respect to a user, that user may sue for declaratory and injunctive relief and may recover costs and attorney's fees if successful. *Id.* § 143A.007. The Attorney General of Texas may also sue to enforce Section 7 and may recover attorney's fees and reasonable investigative costs if successful. *Id.* § 143A.008. Damages are not available.

The other relevant provision of HB 20 is Section 2. It imposes certain disclosure and operational requirements on the Platforms. These requirements fall into three categories. First, Platforms must disclose how they moderate and promote content and publish an "acceptable use policy." Tex. Bus. & Com. Code §§ 120.051-52. This policy must inform users about the types of content allowed on the Platform, explain how the Platform enforces its policy, and describe how users can notify the Platform of content that violates the policy. *Id.* § 120.052(b).

Platforms must also publish a "biannual transparency report." *Id.* § 120.053. This report must contain various high-level statistics related to the Platform's content-moderation efforts, including the number of instances in which the Platform was alerted to the presence of policy-violating content; how the Platform was so alerted; how many times the Platform acted against such content; and how many such actions were successfully or unsuccessfully appealed. *See ibid.*

Last, Platforms must maintain a complaint-and-appeal system for their users. *See id.* §§ 120.101-04. When a Platform removes user-submitted content, it must generally explain the reason to the user in a written statement issued concurrently with the removal. *Id.* § 120.103(a). It also must permit the user to appeal the removal and provide a response to the appeal within 14 business days. *Id.* § 120.104. Section 2 includes various exceptions to these notice-and-appeal requirements. *See id.* § 120.103(b).

Only the Texas Attorney General may enforce Section 2. *Id.* § 120.151. The Attorney General may seek injunctive relief but not damages. *Ibid.*

B.

NetChoice and the Computer & Communications Industry Association are trade associations representing companies that operate Platforms covered by HB 20. They sued the Attorney General of Texas ("Texas") on September 22, 2021, before HB 20 went into effect.

Appendix A

The district court issued a preliminary injunction on December 1, 2021. It first held that Section 7 is facially unconstitutional. The court "start[ed] from the premise that social media platforms are not common carriers." It then concluded that Platforms engage in "some level of editorial discretion" by managing and arranging content, and viewpoint-based censorship is part of that editorial discretion. It further held that this editorial discretion is protected by cases like *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). So according to the district court, HB 20's prohibition on viewpoint-based censorship unconstitutionally interfered with the Platforms' protected editorial discretion. The court did not explain why a facial attack on Section 7 was appropriate, other than asserting that Section 7 is "replete with constitutional defects" and the court believed "nothing . . . could be severed and survive."

The district court then held that Section 2 is facially unconstitutional. It reasoned that "Section 2's disclosure and operational provisions are inordinately burdensome given the unfathomably large numbers of posts on these sites and apps." Moreover, the court reasoned that Section 2 will "chill the social media platforms' speech" by disincentivizing viewpoint-based censorship. Again, the court did not explain why a facial challenge to Section 2 was appropriate, other than stating that it imposes "onerously burdensome disclosure and operational requirements."

The district court also found that HB 20 discriminates based on content and speaker, because it permits

censorship of some content (like specific threats of violence directed at a protected class) and only applies to large social media platforms. It then held that HB 20 fails any level of heightened scrutiny. Finally, it issued a preliminary injunction.

Texas timely appealed. On December 15, 2021, Texas moved for a stay of the preliminary injunction. We granted that motion on May 11, 2022. On May 31, 2022, in a 5-4 decision, the Supreme Court vacated our stay. Justice Kagan noted her dissent. Justice Alito, joined by Justice Thomas and Justice Gorsuch, authored a six-page dissenting opinion to argue that our stay should have remained undisturbed.

II.

We review the district court's preliminary injunction for abuse of discretion. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018). A district court abuses its discretion if it grants an injunction based on clearly erroneous factual findings or erroneous conclusions of law. *Ibid.*

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

III.

The Platforms contend that Section 7 of HB 20 is facially unconstitutional. We disagree. We (A) first reject the Platforms' facial overbreadth challenge because Section 7 does not chill speech; if anything, it chills censorship. Then we (B) turn to the First Amendment's text and history, which offer no support for the Platforms' claimed right to censor. Next, applying Supreme Court precedent, we (C) hold that Section 7 does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct*. Our decision (D) is reinforced by 47 U.S.C. § 230, which reflects Congress's judgment that the Platforms are not "speaking" when they host other people's speech. Our decision (E) is still further reinforced by the common carrier doctrine, which vests the Texas Legislature with the power to prevent the Platforms from discriminating against Texas users. Finally, even if all of that's wrong and Section 7 does regulate the Platforms' speech, it (F) satisfies the intermediate scrutiny that applies to content-neutral rules.

A.

We begin with the First Amendment overbreadth doctrine. It (1) offers a facial constitutional remedy that protects *speech*. It (2) does not apply here because if Section 7 chills anything, it chills *censorship*. And the Platforms' parade of whataboutisms proves their real complaint is a purely speculative one about how HB 20 will be enforced. The Platforms are therefore not entitled to pre-enforcement facial relief against Section 7.

Appendix A

1.

The Platforms have asked a federal court to invalidate HB 20 in its entirety before Texas even tries to enforce it.[3] To put it mildly, pre-enforcement facial challenges to legislative acts are "disfavored for several reasons." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). Three bear emphasis here.

First, the judicial power vested in us by Article III does not include the power to veto statutes. And that omission is no accident: The Founders expressly considered giving judges that power, and they decided not to do so. Several delegates at the Constitutional Convention suggested creating a "Council of Revision" consisting of federal judges and the executive. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 954 (2018). They wanted to empower this Council to veto Congress's legislation, subject to congressional

3. The plaintiff trade associations—which include every Platform subject to HB 20—asked the district court to find the statute could never be constitutionally enforced against them. They did so before the law could be enforced against anyone. *See* 13B Charles Alan Wright et al., Federal Practice and Procedure § 3532.3 (3d ed. Apr. 2022 Update) (stressing the "distinctions between the ripeness of broad attacks on the legitimacy of any regulation and the nonripeness of more particular attacks on more specific applications"). During briefing in the district court, the Platforms characterized their suit as a facial challenge to HB 20. The district court's opinion thus properly treated this suit as a facial challenge, and the Platforms do not object to that characterization on appeal.

override. *Ibid.* A veto would render the legislation "void." *Ibid.* But despite the best efforts of James Wilson and James Madison, the Convention rejected the proposal—three times over. *Id.* at 957-59. That means we have no power to "strike down," "void," or "invalidate" an entire law. *See id.* at 936 (explaining that "federal courts have no authority to erase a duly enacted law from the statute books" but have only the power "to decline to enforce a statute in a particular case or controversy" and "to enjoin executive officials from taking steps to enforce a statute"); *Borden v. United States*, 141 S. Ct. 1817, 1835-36, 210 L. Ed. 2d 63 (2021) (Thomas, J., concurring in the judgment) (noting that "[c]ourts have no authority to strike down statutory text" and that "a facial challenge, if successful, has the same effect as nullifying a statute" (quotations omitted)); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 756 (2010) (explaining that the Founders did not conceive of judicial review as the power to "strike down" legislation).

Second, the judicial power vested in us by Article III is limited to deciding certain "Cases" and "Controversies." U.S. Const. art. III, § 2. A federal court "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L. Ed. 60 (1803). This limitation on federal jurisdiction to "actual controversies" prevents courts from "ancitipat[ing] a question of constitutional law

in advance of the necessity of deciding it." *Liverpool*, 113 U.S. at 39; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."). And it makes pre-enforcement facial challenges a particularly nettlesome affair. Such suits usually do not present "flesh-and-blood legal problems with data relevant and adequate to an informed judgment." *New York v. Ferber*, 458 U.S. 747, 768, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (quotation omitted). Instead, they require the court "to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," forcing courts to deploy the severe power of judicial review "with reference to hypothetical cases." *United States v. Raines*, 362 U.S. 17, 21-22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Third, federalism. Invalidate-the-law-now, discover-how-it-works-later judging is particularly troublesome when reviewing state laws, as it deprives "state courts [of] the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S. at 768. And "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 451. The respect owed to a sovereign State thus demands that we look particularly askance at a litigant who wants unelected federal judges to countermand the State's democratically accountable policymakers.

In accordance with the disfavor that attaches to pre-enforcement facial challenges, the legal standard for them is extraordinarily high. Ordinarily, plaintiffs bringing this sort of "facial challenge to a legislative Act" must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *see also Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387, 210 L. Ed. 2d 716 (2021). "Such a challenge is the most difficult to mount successfully." *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018) (quotation omitted). The Platforms do not even try to show that HB 20 is "unconstitutional in all of its applications." *Wash. State Grange*, 552 U.S. at 449.[4]

Instead, their challenge is premised on First Amendment overbreadth doctrine. Under this doctrine, the Supreme Court has "recognized a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 141 S. Ct. at 2387 (quotation omitted). This doctrine is limited to "the First Amendment context." *Ibid.*

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4. For example, the Platforms do not argue that HB 20's provision restricting censorship based on "a user's geographic location in [Texas]" could not be constitutionally applied to them. TEX. CIV. PRAC. & REM. CODE § 143A.002(a)(3). While they vigorously argue that viewpoint-based censorship is protected speech, they nowhere contend that the First Amendment protects censorship based on geographic location.

"Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression." *Massachusetts v. Oakes*, 491 U.S. 576, 584, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989) (plurality op.); *see generally* Lewis D. Sargentich, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). As the seminal case explained, the overbreadth doctrine addresses "threat[s] to censure comments on matters of public concern." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). The doctrine's rationale is that "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (citation omitted).

Consistent with the overbreadth doctrine's rationale, the Supreme Court has only applied it where there is a substantial risk that the challenged law will chill protected speech or association. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 817-18, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975) (declining to address facial overbreadth challenge where statutory amendment removed risk that statute "will chill the rights of others"); *Law Students C.R. Rsch. Council, Inc. v. Wadmond*, 401 U.S. 154, 167, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971) (denying facial relief where "careful administration" of state regulatory scheme could avoid "chilling effects upon the exercise of constitutional freedoms"). The Court has also instructed that "the overbreadth doctrine is strong medicine" that should

be employed "only as a last resort." *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) (quotation omitted). And the overbreadth doctrine's function "attenuates" as the regulated expression moves from "pure speech toward conduct." *Id.* at 40 (quotation omitted).

2.

The overbreadth doctrine does not apply to Section 7. That's for three reasons.

First, the primary concern of overbreadth doctrine is to avoid chilling *speech*. But Section 7 does not chill *speech*; instead, it chills *censorship*. So there can be no concern that declining to facially invalidate HB 20 will inhibit the marketplace of ideas or discourage commentary on matters of public concern. Perhaps as-applied challenges to speculative, now-hypothetical enforcement actions will delineate boundaries to the law. But in the meantime, HB 20's prohibitions on censorship will cultivate rather than stifle the marketplace of ideas that justifies the overbreadth doctrine in the first place.

The Platforms, of course, argue that their censorship somehow should be construed as speech for First Amendment purposes. We deal with this contention at length in Parts III.B, III.C, III.D, and III.E, *infra*. But even stipulating *arguendo* that censorship can enjoy First Amendment protection, it's a far cry from the "pure speech" that's the core concern of the overbreadth doctrine. *See United Reporting*, 528 U.S. at 40. At most, the Platforms'

censorship is, in the district court's words, a "way that online services express themselves and effectuate their community standards." That is, censorship is at best a form of expressive *conduct*, for which the overbreadth doctrine provides only "attenuate[d]" protection. *Ibid.* (quotation omitted); *see also Broadrick*, 413 U.S. at 614 ("[O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.").

Tellingly, the Platforms have pointed to no case applying the overbreadth doctrine to protect censorship rather than speech. To the contrary, the Platforms principally rely on three cases. *See Miami Herald*, 418 U.S. 241; *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986); and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). But all three involved challenges to concrete applications of an allegedly unconstitutional law, raised by a defendant in state court proceedings. So even if these cases supported the Platforms' argument about their substantive First Amendment rights, they would provide no support for the Platforms' attempt to use the First Amendment as a sword to facially invalidate a law before it has been applied to anyone under any circumstances.

Second, overbreadth adjudication is meant to protect third parties who cannot "undertake the considerable burden" of as-applied litigation and whose speech is therefore likely to be chilled by an overbroad law. *Hicks*,

539 U.S. at 119; *see also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1586, 206 L. Ed. 2d 866 (2020) (Thomas, J., concurring) (explaining that overbreadth doctrine "allow[s] individuals to challenge a statute based on a third party's constitutional rights"). Courts have deemed this chilling effect on third parties particularly worrisome when the overbroad law imposes criminal sanctions. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

This rationale for overbreadth adjudication is wholly inapposite here. First of all, there are no third parties to chill. The plaintiff trade associations represent all the Platforms covered by HB 20. Additionally, unlike individual citizens potentially subject to criminal sanctions—the usual beneficiaries of overbreadth rulings—the entities subject to HB 20 are large, well-heeled corporations that have hired an armada of attorneys from some of the best law firms in the world to protect their censorship rights. And any fear of chilling is made even less credible by HB 20's remedial scheme. Not only are criminal sanctions unavailable; *damages* are unavailable. It's hard to see how the Platforms—which have already shown a willingness to stand on their rights—will be so chilled by the prospect of declaratory and injunctive relief that a facial remedy is justified.

Third, the Platforms principally argue against HB 20 by speculating about the most extreme hypothetical applications of the law. Such whataboutisms further exemplify why it's inappropriate to hold the law facially unconstitutional in a pre-enforcement posture.

Appendix A

Texas enacted HB 20 to address "the Platforms' evolution into internet censors." Explaining the perceived need for the law, Texas and its amici cite numerous instances in which the Platforms have censored what Texas contends is pure political speech. For example, one amicus brief documents the Platforms' censorship of fifteen prominent celebrities and political figures—including five holding federal elected office. *See* Brief for Amici Curiae The Babylon Bee, LLC, et al. at 26-38. Texas also points to the Platforms' "discriminat[ion] against Americans and in favor of foreign adversaries" and censorship of even a congressional hearing that featured disfavored viewpoints.

The Platforms do not directly engage with any of these concerns. Instead, their primary contention—beginning on page 1 of their brief and repeated throughout and at oral argument—is that we should declare HB 20 facially invalid because it prohibits the Platforms from censoring "pro-Nazi speech, terrorist propaganda, [and] Holocaust denial[s]." Red Br. at 1.

Far from justifying pre-enforcement facial invalidation, the Platforms' obsession with terrorists and Nazis proves the opposite. The Supreme Court has instructed that "[i]n determining whether a law is facially invalid," we should avoid "speculat[ing] about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50. Overbreadth doctrine has a "tendency . . . to summon forth an endless stream of fanciful hypotheticals," and this case is no exception. *United States v. Williams*, 553 U.S. 285, 301, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

But it's improper to exercise the Article III judicial power based on "hypothetical cases thus imagined." *Raines*, 362 U.S. at 22; *cf. Sineneng-Smith*, 140 S. Ct. at 1585-86 (Thomas, J., concurring) (explaining the tension between overbreadth adjudication and the constitutional limits on judicial power).

If we focus instead on "the statute's facial requirements," *Wash. State Grange*, 552 U.S. at 450, its language renders implausible many of the Platforms' extreme hypothesized applications of the law. HB 20 expressly permits the Platforms to censor any unlawful expression and certain speech that "incites criminal activity or consists of specific threats"—not to mention any content the Platforms are authorized to censor by federal law. Tex. Civ. Prac. & Rem. Code § 143A.006(a). So at a minimum, we should avoid "determin[ing] the constitutionality of [HB 20] in hypothetical situations where it is not even clear the State itself would consider its law applicable." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). Or as one amicus puts it, the Platforms at this early stage may not use borderline hypotheticals involving vile expression to pretermit consideration of "what actually is at stake—namely, the suppression of domestic political, religious, and scientific dissent." Brief of Amicus Curiae Prof. Philip Hamburger at 21.

In short, Section 7 chills no speech whatsoever. To the extent it chills anything, it chills *censorship*. That is, Section 7 might make censors think twice before removing speech from the Platforms in a viewpoint-discriminatory

manner. But we cannot find any cases, from any court, that suggest a would-be censor can bring a First Amendment overbreadth challenge because a regulation chills its efforts to prohibit others from speaking.

B.

We turn now to the merits of the Platforms' First Amendment claim. As always, we start with the original public meaning of the Constitution's text. We need not tarry long here because the Platforms—by pointing to no evidence whatsoever on this point—do not contend that the First Amendment's history and original understanding provide any basis for invalidating Section 7.

The First Amendment prevents the government from enacting laws "abridging the freedom of speech, or of the press." U.S. Const. amend. I; *see Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) (incorporating this right against the States). At the Founding and "[f]or most of our history, speech and press freedoms entailed two common-law rules—first, a prohibition on prior restraints and, second, a privilege of speaking in good faith on matters of public concern." Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 874-75 (2022). The first rule was central to the Speech Clause as originally understood, because the "core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the 'evils' of the printing press in 16th-and 17-century England." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002). For example,

the Printing Act of 1662 required all printers to obtain a license and then "required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be heretical, seditious, schismatical, or offensive." *Ibid.* (quotation omitted).

Licensing schemes like the Printing Act generated substantial opposition in both England and the American colonies. They disappeared in both places by the 1720s. *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 443-44 (1983). Thus, Blackstone had this to say two decades before the First Amendment's ratification:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. . . . To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

4 WILLIAM BLACKSTONE, COMMENTARIES *151-52. Founding-era Americans similarly viewed the freedom from prior restraints as a central component of the freedoms of speech and the press. *See* Campbell, *Emergence of Neutrality, supra*, at 875-76; *see also, e.g.*, 3 JOSEPH STORY,

COMMENTARIES ON THE CONSTITUTION § 1874 (1833) ("It is plain, then, that the language of [the First A]mendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint . . . .").

As originally understood, the First Amendment's Speech and Press Clauses also protected the freedom to make well-intentioned statements of one's thoughts, particularly on matters of public concern. *See generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 280-87 (2017). States recognized this freedom before the First Amendment's ratification.[5] The Anti-Federalists worked to protect it in the federal Constitution.[6] And even the Federalists—who were

5. For example, in 1788, Chief Justice McKean of the Supreme Court of Pennsylvania explained that "[t]he true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame." *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325, 1 L. Ed. 155, 1 Dall. 319 (Pa. 1788). This statement illustrates both facets of the First Amendment's original public meaning. First, prior restraints were prohibited, full stop: "[E]very man [may] publish his opinions." *Ibid.* Second, whether post-publication liability could be imposed depended on whether an opinion was "meant for use and reformation . . . [or] merely to delude and defame"—to use modern terminology, whether the statement was made in good faith. *Ibid.*

6. *See, e.g.*, Centinel No. 1, *in* 2 THE COMPLETE ANTI-FEDERALIST 136, 136 (Herbert J. Storing ed., 1981) (urging the People to demand constitutional protection for "a right of freedom of speech"). Thomas

generally less friendly to the freedom of speech—recognized that the First Amendment protected this right. *See id.* at 286; *see also, e.g.*, 8 ANNALS OF CONG. 2148 (1798) (statement of Rep. Harrison Gray Otis) (recognizing that the First Amendment protects "the liberty of writing, publishing, and speaking, one's thoughts, under the condition of being answerable . . . for false, malicious, and seditious expressions, whether spoken or written").

The Platforms neither challenge this understanding of the First Amendment's original meaning nor suggest that Section 7 runs afoul of it. This apparent concession is unsurprising. First, Section 7 does not operate as a prior restraint on the Platforms' speech—even if one accepts their characterization of censorship as speech. Recall Blackstone's criticism of prior restraints: that they "subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." 4 BLACKSTONE, *supra*, at *151-52. The Platforms operate "the modern public square," *Packingham*, 137 S. Ct. at 1737, and it is they—not the government—who seek to defend viewpoint-based censorship in this litigation.

Jefferson also wrote to James Madison—who later drafted the Bill of Rights—that he thought the Constitution should ensure "[t]he people shall not be deprived or abridged of their right to speak to write or *otherwise* to publish any thing but false facts affecting injuriously the life, property, or reputation of others or affecting the peace of the confederacy with foreign nations." Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 5 THE FOUNDERS' CONSTITUTION 129, 129-30 (Philip B. Kurland & Ralph Lerner eds., 1987).

Second, Section 7 does not prevent anyone from expressing their good-faith opinions on matters of public concern. Precisely the opposite: Section 7 *protects* Texans' ability to freely express a diverse set of opinions through one of the most important communications mediums used in that State. And it leaves the Platforms free to similarly opine: They can still say whatever they want (or decline to say anything) about any post by any user. Moreover, Section 7's exceptions—where viewpoint-based censorship is still permitted, like certain specific threats of violence—contemplate malicious, bad-faith speech not protected by the First Amendment as originally understood. *See* Campbell, *Emergence of Neutrality, supra*, at 878. So Section 7's carveouts do nothing to impugn its constitutionality under the First Amendment's original meaning.

C.

Rather than mount any challenge under the original public meaning of the First Amendment, the Platforms instead focus their attention on Supreme Court doctrine. And under that doctrine, the Platforms contend, Section 7 somehow burdens their right to *speak*. How so, you might wonder? Section 7 does nothing to prohibit the Platforms from saying whatever they want to say in whatever way they want to say it. Well, the Platforms contend, when a *user* says something using one of the Platforms, the act of hosting (or rejecting) that speech is the *Platforms*' own protected speech. Thus, the Platforms contend, Supreme Court doctrine affords them a sort of constitutional privilege to eliminate speech that offends the Platforms' censors.

We reject the Platforms' efforts to reframe their censorship as speech. It is undisputed that the Platforms want to eliminate speech—not promote or protect it. And no amount of doctrinal gymnastics can turn the First Amendment's protections for free *speech* into protections for free *censoring*. We (1) explain the relevant doctrine and Supreme Court precedent. Then we (2) hold this precedent forecloses the Platforms' argument that Section 7 is unconstitutional.

1.

Supreme Court precedent instructs that the freedom of speech includes "the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). So the State may not force a private speaker to speak someone's else message. *See Wooley*, 430 U.S. at 714.

But the State can regulate conduct in a way that requires private entities to host, transmit, or otherwise facilitate speech. Were it otherwise, no government could impose nondiscrimination requirements on, say, telephone companies or shipping services. *But see* 47 U.S.C. § 202(a) (prohibiting telecommunications common carriers from "mak[ing] any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services"). Nor could a State create a right to distribute leaflets at local shopping malls. *But see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88, 100 S. Ct.

2035, 64 L. Ed. 2d 741 (1980) (upholding a California law protecting the right to pamphleteer in privately owned shopping centers). So First Amendment doctrine permits regulating the conduct of an entity that hosts speech, but it generally forbids forcing the host itself to speak or interfering with the host's own message.

Five Supreme Court cases elucidate this distinction. The first is *Miami Herald*. It involved a Florida law providing that when a newspaper article criticizes the character or record of a political candidate, the newspaper must offer the candidate equal space in the paper to reply to the criticism. 418 U.S. at 244. The Court held that this "right-of-reply" law violated the First Amendment. *Id.* at 258.

The Court explained that the law interfered with the newspaper's speech by imposing a content-based penalty on it. *See id.* at 256 ("The Florida statute exacts a penalty on the basis of the content of a newspaper."). If the newspaper chose to speak about most topics, there was no penalty—but if it spoke critically about a political candidate, it was penalized with the "cost in printing and composing time and materials" necessary to give the candidate a free and equally prominent response column. *Ibid.* Moreover, the reply would "tak[e] up space that could be devoted to other material the newspaper may have preferred to print." *Ibid.* This interference would disincentivize the newspaper's speech: Faced with these penalties, "editors might well conclude that the safe course is to avoid controversy" and reduce coverage of political candidates altogether. *Id.* at 257.

The Court also concluded that the right-of-reply law impermissibly compelled the newspaper to speak messages it opposed. As the Court explained:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The 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—constitute the exercise of editorial control and judgment.

Id. at 258. Because a newspaper prints a curated set of material selected by its editors, everything it publishes is, in a sense, the newspaper's own speech. And the newspaper has a right to "editorial control and judgment" over its speech. *Ibid.* Newspapers thus cannot be compelled to "publish that which reason tells them should not be published." *Id.* at 256 (quotation omitted).

The second case is *PruneYard*. That case involved a group of high school students who sought to distribute pamphlets and solicit signatures at a local shopping mall. The California Supreme Court held that California law protected the right to "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 447 U.S. at 78 (quotation omitted). The mall objected on First Amendment grounds, arguing that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Id.* at 85.

The Supreme Court rejected the shopping mall's challenge. It found the state law exacted no penalty on the basis of the mall's speech, and the mall could "expressly disavow any connection with the [pamphleteers'] message by simply posting signs in the area where the speakers or handbillers st[oo]d." *Id.* at 87-88. Nor did California law impermissibly compel the mall itself to speak. To the contrary, because the mall was open to anyone, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures . . . will not likely be identified with those of the owner." *Id.* at 87. The Court also emphasized California's neutrality among viewpoints: Because "no specific message is dictated by the State to be displayed on appellants' property," there was "no danger of governmental discrimination for or against a particular message." *Ibid.*

The mall relied in part on *Miami Herald*, but the *PruneYard* Court easily found that case inapplicable. The Court stated that *Miami Herald* "rests on the principle that the State cannot tell a newspaper what it must print," and it emphasized the "danger in [*Miami Herald*] that the statute would dampen the vigor and limit the variety of public debate by deterring editors from publishing controversial political statements that might trigger the application of the statute." *Id.* at 88. Those concerns were "obviously . . . not present" in *PruneYard*. *Ibid.*

The third case is *PG&E*. A utility company, PG&E, had a longstanding practice of including a monthly newsletter in its billing envelopes. 475 U.S. at 5 (plurality op.). "In appearance no different from a small newspaper,"

the newsletter included political editorials and stories on matters of public interest alongside tips on energy conservation and information about utility services. *Id.* at 5, 8. Concerned that the expense of PG&E's political speech was falling on customers, the California Public Utilities Commission ("Commission") decided to apportion the billing envelopes' "extra space"—that is, the space occupied by the company's newsletter—and permit a third-party group representing PG&E ratepayers to use that space for its opposing messages four months per year. *Id.* at 5-6. PG&E objected, arguing that the First Amendment prevented the Commission from forcing it to include an adverse party's speech in its billing envelopes.

The Supreme Court ruled for PG&E. A plurality held that the Commission's order both interfered with PG&E's own speech and impermissibly forced it to associate with the views of other speakers. As in *Miami Herald*, the "one-sidedness" of the Commission's order penalized and disincentivized PG&E's expression by awarding space only to those who disagreed with PG&E's speech:

> [B]ecause access is awarded only to those who disagree with appellant's [PG&E's] views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at [a third-party's] discretion—to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free

> flow of information and ideas that the First Amendment seeks to promote.

Id. at 14 (quoting *Miami Herald*, 418 U.S. at 257).

The plurality also found that the Commission's order impermissibly "require[d] [PG&E] to associate with speech with which [it] may disagree." *Id.* at 15. Because the third party could "use the billing envelopes to discuss any issues it chooses," PG&E "may be forced either to appear to agree . . . or to respond." *Ibid.* "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16.

Finally, the *PG&E* plurality found *PruneYard* distinguishable for two reasons. First, *PruneYard* did not involve a concern that the challenged law "might affect the shopping center owner's exercise of his own right to speak." *Id.* at 12. Second, the right of access at issue in *PruneYard* was not content-based. *Ibid.*[7]

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7. Justice Marshall provided the fifth vote to invalidate the Commission's order. *See PG&E*, 475 U.S. at 21 (Marshall, J., concurring in the judgment). He emphasized two ways in which the Commission's order was different from the law upheld in *PruneYard*.

First, the right of access created by the Commission was more intrusive than the one upheld in *PruneYard*. That's because the shopping mall owner in *PruneYard* had voluntarily opened his property up to the public, whereas PG&E "has never opened up its billing envelope to the use of the public." *Id.* at 22.

Second, in *PruneYard*, the speech of the shopping mall owner was not "hindered in the slightest" by the public's pamphleteering right. *Id.* at 24. *PG&E*, by contrast, involved "a forum of inherently

The fourth case is *Hurley*. GLIB, an organization of Irish-American gay, lesbian, and bisexual individuals, sought to march in a St. Patrick's Day parade in Boston. 515 U.S. at 561. The parade was organized by a private group, the South Boston Allied War Veterans Council ("Council"). *Id.* at 560. The Council refused to admit GLIB, citing "traditional religious and social values." *Id.* at 562 (quotation omitted). But the Supreme Judicial Court of Massachusetts held that the parade was a public accommodation under state law, so the Council had to let GLIB participate. *Id.* at 564. The Council argued that this application of Massachusetts's public accommodation law violated the First Amendment, and the Supreme Court agreed. *Id.* at 566.

The Court concluded that the parade was a "form of expression" that receives First Amendment protection. *Id.* at 568. That's because "[r]ather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574. And it didn't matter that the Council was "rather lenient in admitting participants," because "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact

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limited scope," such that the State's appropriation of that forum for a third party's use necessarily curtailed PG&E's ability to speak in that forum. *Ibid.* And this interference with PG&E's speech could not be justified by the State's goal of "subsidiz[ing] . . . another speaker chosen by the State." *Ibid.*

message as the exclusive subject matter of the speech." *Id.* at 569-70.

The cornerstone of the Court's reasoning was that the parade sponsors were "intimately connected" to the message communicated by the parade. *Id.* at 576. This intimate connection was crucial, the Court held, because forcing the sponsors to include a particular float was tantamount to forcing the sponsors to speak: "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576; *see also id.* at 573 (emphasizing that "a speaker has the autonomy to choose the content of his own message," including by "decid[ing] what not to say") (quotation omitted).

The final case that's particularly relevant to our discussion is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). Certain law schools sought to restrict military recruiting on their campuses because of the military's policies on sexual orientation. *Id.* at 51. Congress responded by enacting the Solomon Amendment, which denied federal funding to schools that did not give military recruiters "access to students that is at least equal in quality and scope to the access provided other potential employers." *Id.* at 54 (quotation omitted). An organization of law schools sued, arguing that the Solomon Amendment violated the First Amendment. The Supreme Court disagreed. It unanimously held that "the First Amendment would not prevent Congress from directly

imposing the Solomon Amendment's access requirement," and the statute thus did not place an unconstitutional condition on the receipt of federal funds. *Id.* at 60.

The Court first held that the Solomon Amendment did not impermissibly force the law schools to speak. *Id.* at 61-62. The Court recognized that "recruiting assistance provided by the schools often includes elements of speech"—like sending emails or posting bulletin board notices on the recruiter's behalf. *Id.* at 61. But the Court determined that this speech was "plainly incidental to the Solomon Amendment's regulation of conduct" and was nothing like a "Government-mandated pledge or motto" as in *Barnette* and *Wooley*. *Id.* at 62. Congress could therefore compel this "incidental" speech without violating the First Amendment. *Ibid.*

The Court then held that the Solomon Amendment did not impermissibly interfere with the schools' own speech, distinguishing *Miami Herald, PG&E*, and *Hurley*. *Id.* at 63-65. It acknowledged that those three cases "limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id.* at 63. But it then explained that these "compelled-speech violation[s] . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Ibid.*; *see also id.* at 63-64 (explaining how the challenged laws "interfere[d] with a speaker's desired message" in *Miami Herald, PG&E*, and *Hurley*). In *Rumsfeld*, by contrast, "accommodating the military's message [did] not affect the law schools' speech, because the schools [were] not speaking when they

host interviews and recruiting receptions." *Id.* at 64. That was true despite the risk that students might mistakenly interpret the law schools' conduct as sending the message that they see nothing wrong with the military's policies. *Id.* at 64-65. In sum, even though it required law schools to host and accommodate others' speech, the Solomon Amendment was constitutional because it "neither limit[ed] what law schools may say nor require[d] them to say anything." *Id.* at 60.

2.

Under these precedents, a speech host must make one of two showings to mount a First Amendment challenge. It must show that the challenged law either (a) compels the host to speak or (b) restricts the host's own speech. The Platforms cannot make either showing. And (c) the Platforms' counterarguments are unpersuasive.

a.

Let's start with compelled speech. In *Miami Herald*, the Supreme Court held that Florida's right-of-reply law was unconstitutional because it compelled newspapers to speak. Crucially, the Court emphasized that "[a] newspaper is more than a passive receptable or conduit for news, comment, or advertising." *Miami Herald*, 418 U.S. at 258. Rather, a newspaper curates and publishes a narrow "choice of material" in accordance with the "editorial control and judgment" of its editors. *Ibid.* Thus, when a newspaper affirmatively chooses to publish something, it says that particular speech—at the very

least—should be heard and discussed. So forcing a newspaper to run this or that column is tantamount to forcing the newspaper to speak.

The Platforms are nothing like the newspaper in *Miami Herald*. Unlike newspapers, the Platforms exercise virtually no editorial control or judgment. The Platforms use algorithms to screen out certain obscene and spam-related content.[8] And then virtually everything else is just posted to the Platform with *zero* editorial control or judgment. "Something well north of 99% of th[is] content . . . never gets reviewed further. The content on a site is, to that extent, invisible to the [Platform]." *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021). Thus the Platforms, unlike newspapers, are primarily "conduit[s] for news, comment, and advertising." *Miami Herald*, 418 U.S. at 258. And that's why the Supreme Court has described them as "the modern public square." *Packingham*, 137 S. Ct. at 1737; *see also Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224, 209 L. Ed. 2d 519 (2021) (Thomas, J., concurring) (noting Platforms are also "unlike newspapers" in that they "hold themselves out as organizations that focus on distributing the speech of the broader public").

8. The Platforms have disclosed little about their algorithms in this appeal, other than suggesting that they "often moderate certain policy-violating content before users see it." The Platforms never suggest their algorithms somehow exercise substantive, discretionary review akin to newspaper editors.

The Platforms' own representations confirm this.[9] They've told their users: "We try to explicitly view ourselves as not editors. . . . We don't want to have editorial judgment over the content that's in your feed."[10] They've told the public that they "may not monitor," "do not endorse," and "cannot take responsibility for" the content on their Platforms.[11] They've told Congress that their "goal is to offer a platform for all ideas."[12] And they've

9. To the extent that these representations vary between Platforms, that further cuts against the propriety of this facial, pre-enforcement challenge. *Cf. supra* Part III.A. To establish associational standing, the plaintiff trade associations asserted in the district court that this suit "does not require individualized facts about any particular covered social media platform." ROA.645; *see also Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 377 (5th Cir. 2021) (stating the relevant rule). So the Platforms may not now rely on individualized facts to claim that, for example, one Platform operates like a newspaper even if the others don't.

10. Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. Times, Oct. 26, 2014, https://nyti.ms/3ommZXb.

11. Twitter, Terms of Service § 3, https://twitter.com/en/tos (last visited Aug. 6, 2022) [hereinafter Twitter Terms]; *see also* Facebook, Terms of Service § 4.3, https://www.facebook.com/terms.php (last visited Aug. 6, 2022) [hereinafter Facebook Terms] ("We are not responsible for [users'] actions or conduct . . . or any content they share."); YouTube, Terms of Service, https://www.youtube.com/static?template=terms (last visited Aug. 6, 2022) ("Content is the responsibility of the person or entity that provides it to [YouTube].").

12. *Online Platforms and Market Power, Part 6: Hearing Before the Subcomm. on Antitrust, Com. [*41] and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 33 (2020) (testimony of Mark Zuckerberg, CEO, Facebook, Inc.).

told courts—over and over again—that they simply "serv[e] as conduits for other parties' speech."[13]

It is no answer to say, as the Platforms do, that an observer might construe the act of hosting speech as an expression of support for its message. That was the precise contention the Court rejected in both *PruneYard* and *Rumsfeld*: Neither the shopping mall nor the law schools wanted to endorse the hosted speech. The *Rumsfeld* Court dismissed that concern out of hand because even schoolchildren know the difference between sponsoring speech and allowing it. *See* 547 U.S. at 65 (citing *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990)). That's precisely why even the Platforms concede that "objective observer[s]" would not "conclude that [Platforms] intended . . . to promote terrorism" when they host terrorist content. Motion to Dismiss at 23, *Gonzalez v. Twitter, Inc.*, No. 4:16-cv-03282 (N.D. Cal. Jan. 13, 2017).

Recognizing that their compelled-speech analogy to newspapers is a stretch, the Platforms turn to parades and the *Hurley* case. The Platforms contend that Section 7 forces them to host speech that's inconsistent with their corporate "values." But of course, the Platforms do not contend that they carefully curate users' speech the way a parade sponsor or composer "selects . . . expressive

13. Brief for Appellees at 1, *Klayman v. Zuckerberg*, No. 13-7017 (D.C. Cir. Oct. 25, 2013); *see also, e.g.*, Notice of Motion and Motion to Dismiss at 10 n.5, *Fields v. Twitter, Inc.*, No. 3:16-cv-00213 (N.D. Cal. Apr. 6, 2016) (stating Twitter is "a service provider acting as a conduit for huge quantities of third-party speech").

units . . . from potential participants." *Hurley*, 515 U.S. at 568. Nor do they suggest that they are "intimately connected with the communication" Section 7 requires them to host. *Id.* at 576. The Platforms instead contend that their censorship is protected because *Hurley* creates a freewheeling right for speech hosts to discriminate against messages they don't like.

Hurley said nothing of the sort. The Court instead carefully limited its holding to a speech host (like a parade organizer or composer) who is "intimately connected" with the hosted speech (like a parade or a symphony). *Ibid.* And the Platforms are nothing like such hosts. They don't pick content to "mak[e] some sort of collective point," even an abstract one like "what merits celebration on [St. Patrick's] day." *Id.* at 568, 574. Rather, the Platforms permit any user who agrees to their boilerplate terms of service to communicate on any topic, at any time, and for any reason. And as noted above, virtually none of this content is meaningfully reviewed or edited in any way.

Nor can the Platforms point to the content they *do* censor and claim that makes them akin to parade organizers. In *Rumsfeld*, for example, the law schools argued that their denial of access to military recruiters was protected expressive conduct because it "expressed" the schools' disagreement with the military. 547 U.S. at 66. But the Court held that the denial of access was not *inherently* expressive, because such conduct would only be understood as expressive in light of the law schools' speech explaining it. *See ibid.* Otherwise, observers wouldn't know that the denial of access stemmed from an

ideological disagreement—they might instead conclude, for example, that "the military recruiters decided for reasons of their own that they would rather interview someplace else." *Ibid.*

The same reasoning applies here.[14] If a Platform censors a user's post, the expressive quality of that censorship arises only from the Platform's *speech* (whether on an individualized basis or in its terms of service) stating that the Platform chose to censor the speech and explaining how the censorship expresses the Platform's views. Otherwise, as in *Rumsfeld*, an observer might just as easily infer that the user himself deleted the post and chose to speak elsewhere. In terms of the conduct's inherent expressiveness, there is simply no plausible way to distinguish the targeted denial of access to only military recruiters in *Rumsfeld* from the viewpoint-based

14. To be clear, unlike in *Rumsfeld*, the Platforms in this case never argue that their acts of censorship constitute "expressive conduct." *Cf., e.g., Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (noting that expressive conduct may be protected by the First Amendment if the actor both has "an intent to convey a particularized message" and "the likelihood [is] great that the message would be understood by those who viewed it" (quotation omitted)). In fact, the phrase "expressive conduct" never even appears in their brief before our court. *Compare infra* at 82 n.41 (noting that the Platforms made such an argument before the Eleventh Circuit). But to the extent any such argument is latent in their reliance on *Hurley* or their claim of protected "editorial discretion," it's plainly foreclosed by the Supreme Court's reasoning in *Rumsfeld*. Moreover, the Platforms never suggest that their censorship could "convey a particularized message." *See Johnson*, 491 U.S. at 404.

censorship regulated by HB 20. Section 7 does not compel the Platforms to speak.

b.

Nor does it do anything to prohibit the Platforms from speaking. That's for three independent reasons.

First, the Platforms have virtually unlimited space for speech, so Section 7's hosting requirement does nothing to prohibit the Platforms from saying what they want to say. Contrariwise, both *Miami Herald* and *PG&E* involved "forum[s] of inherently limited scope"—a newspaper and newsletter with significant space constraints. *PG&E*, 475 U.S. at 24 (Marshall, J., concurring in the judgment). So when the State appropriated space in the newspaper or newsletter for a third party's use, it necessarily curtailed the owner's ability to speak in its own forum. *See Miami Herald*, 418 U.S. at 256 ("[T]he compelled printing . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print."); *see also Rumsfeld*, 547 U.S. at 64 (explaining the results in *Miami Herald* and *PG&E* in these terms). Accordingly, when a "speaker's own message [is] affected by the speech it [is] forced to accommodate," the speaker may invoke the First Amendment to protect their own ability to speak. *Rumsfeld*, 547 U.S. at 63. By contrast, "space constraints on digital platforms are practically nonexistent"—unlike with newspapers, cable companies, and many of the other entities the Platforms invoke by analogy. *Knight*, 141 S. Ct. at 1226 (Thomas, J., concurring). For this reason, the Platforms can host users' speech without giving up their power or their right to speak their own message(s).

Second, the Platforms are free to say whatever they want to distance themselves from the speech they host. The Supreme Court has been very careful to limit forced-affiliation claims by speech hosts. After all, *any* speech host could *always* object that its accommodation for speech might be confused for a coerced endorsement of it. But the Court rejected that forced-affiliation argument in *PruneYard*, where the shopping mall owner was not required to affirm the pamphleteers' expression in any way, and was "free to publicly dissociate [himself] from the views of the speakers or handbillers." 447 U.S. at 88. Similarly, in *Rumsfeld*, the law schools argued "that if they treat military and nonmilitary recruiters alike . . . they could be viewed as sending the message that they see nothing wrong with the military's policies." 547 U.S. at 64-65. But the Supreme Court easily rejected this argument, because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. Rather, to win a forced-affiliation claim, the speech host must show that it's "intimately connected with the communication" and hence *cannot* dissociate itself from it. *Hurley*, 515 U.S. at 576. Here, the Platforms remain free to expressly disavow, distance themselves from, or say whatever they want about any expression they host. For example, Platforms can add addenda or disclaimers—containing their own speech—to users' posts. And many of them already do this, thus dramatically underscoring that Section 7 prohibits *none* of their speech.

Third, Section 7 does not impose a content-based penalty on the Platforms' speech. Recall that the right-of-reply law in burdened newspapers with the duty to publish a response column if they published an article questioning the character or record of a political candidate. 418 U.S. at 244. As the *PG&E* plurality explained, this imposed a content-based penalty on the newspaper's speech in two distinct senses: First, the penalty was "triggered by a particular category of newspaper speech"; and second, access "was awarded only to those who disagreed with the newspaper's views." 475 U.S. at 13; *see also id.* at 14 (explaining that the Commission's order in *PG&E* was content-based in the second sense). Here, by contrast, no category of Platform speech can trigger any additional duty—or obviate an existing duty—under Section 7. And Section 7 does not create a special privilege for those who disagree with the Platforms' views. *Cf. id.* at 14 (billing envelope space was awarded only to a single entity formed to oppose PG&E's views). Rather, it gives the exact same protection to all Platform users regardless of their viewpoint.

c.

The Platforms do not seriously dispute any of this. Instead, they argue that Section 7 interferes with their speech by infringing their "right to exercise editorial discretion." They reason as follows. Premise one is that "editorial discretion" is a separate, freestanding category of First-Amendment-protected expression. Premise two is that the Platforms' censorship efforts constitute "editorial discretion." Conclusion: Section 7 burdens the Platforms'

First Amendment rights by obstructing their censorship efforts.

Both premises in that syllogism are flawed. Premise one is faulty because the Supreme Court's cases do not carve out "editorial discretion" as a special category of First-Amendment-protected expression. Instead, the Court considers editorial discretion as one relevant consideration when deciding whether a challenged regulation impermissibly compels or restricts protected speech. Take, for example, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("*Turner I*"). There the Court noted a cable operator "exercis[es] editorial discretion over which stations or programs to include in its repertoire." *Id.* at 636 (quotation omitted). For this reason, among others, the Court concluded that selecting a limited repertoire of cable channels to transmit constitutes First-Amendment-protected speech. *See id.* at 636-37. Similarly, *Miami Herald* emphasized newspapers' "exercise of editorial control and judgment" to support its holding that their close affiliation with the speech they publish gives them the right not to publish "that which reason tells them should not be published." 418 U.S. at 256, 258 (quotation omitted). But both cases treated editorial discretion as a relevant consideration supporting their legal conclusions about the presence or absence of protected *speech*. Neither case implied that editorial discretion is *itself* a freestanding category of constitutionally protected expression.[15]

15. The Platforms' other cases ostensibly supporting premise one are even farther afield. *Manhattan Community Access Corp.*

Accordingly, the Platforms cannot invoke "editorial discretion" as if uttering some sort of First Amendment talisman to protect their censorship. Were it otherwise, the shopping mall in *PruneYard* and law schools in *Rumsfeld* could have changed the outcomes of those cases by simply asserting a desire to exercise "editorial discretion" over the speech in their forums. Instead, the Platforms must show that Section 7 either coerces them to speak or interferes with their speech. Of course, how the Platforms do or don't exercise editorial control is relevant to this inquiry, as it was in *Miami Herald* and *Turner I*. But the Platforms can't just shout "editorial discretion!" and declare victory.[16]

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v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019), discussed the constitutional limits on editorial discretion in *public* forums and described the issue in this case as "[a] distinct question not raised here." *Id.* at 1931 & n.2. And *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998), simply reiterated *Turner I*'s conclusion that cable operators' selection and presentation of programming is speech for First Amendment purposes. *Id.* at 674.

16. Our esteemed colleague in dissent makes a similar argument with a different label. The dissent reads *Miami Herald* to protect "two levels of publisher speech": the published speech itself as well as "the selection process" (or "publishing process") used to choose that speech. *Post*, at 5-6, 11. And it concludes that Section 7 impermissibly interferes with the Platforms' publishing process. *Id.* at 11.

It's of course true that the right to speak generally entails the right to select what to speak. But asserting that Section 7 obstructs the Platforms' "selection process" begs the question whether the Platforms' censorship *is* protected speech at all. If it's not,

Premise two of the Platforms' syllogism is also faulty. Even assuming "editorial discretion" is a freestanding category of First-Amendment-protected expression, the Platforms' censorship doesn't qualify. Curiously, the Platforms never define what they mean by "editorial discretion." (Perhaps this casts further doubt on the wisdom of recognizing editorial discretion as a separate category of First-Amendment-protected expression.) Instead, they simply assert that they exercise protected editorial discretion because they censor some of the content posted to their Platforms and use sophisticated algorithms to arrange and present the rest of it. But whatever the outer bounds of any protected editorial discretion might be, the Platforms' censorship falls outside it. That's for two independent reasons.

First, an entity that exercises "editorial discretion" accepts reputational and legal responsibility for the content it edits. In the newspaper context, for instance, the Court has explained that the role of "editors and editorial employees" generally includes "determin[ing] the news value of items received" and taking responsibility for the accuracy of the items transmitted. *Associated Press v. NLRB*, 301 U.S. 103, 127, 57 S. Ct. 650, 81 L. Ed. 953 (1937). And editorial discretion generally comes with concomitant legal responsibility. For example, because of "a newspaper's editorial judgments in connection with an

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then there's no First Amendment right for censors to select their targets—just as there's no First Amendment right for law schools to select their recruiters, no First Amendment right for shopping malls to select their pamphleteers, and no First Amendment right for telephone companies to select which calls to drop.

advertisement," it may be held liable "when with actual malice it publishes a falsely defamatory" statement in an ad. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 386, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973). But the Platforms strenuously disclaim any reputational or legal responsibility for the content they host. *See supra* Part III.C.2.a (quoting the Platforms' adamant protestations that they have no responsibility for the speech they host); *infra* Part III.D (discussing the Platforms' representations pertaining to 47 U.S.C. § 230).

Second, editorial discretion involves "selection and presentation" of content *before* that content is hosted, published, or disseminated. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); *see also Miami Herald*, 418 U.S. at 258 (a newspaper exercises editorial discretion when selecting the "choice of material" to print). The Platforms do not choose or select material before transmitting it: They engage in viewpoint-based censorship with respect to a tiny fraction of the expression they have already disseminated. The Platforms offer no Supreme Court case even remotely suggesting that *ex post* censorship constitutes editorial discretion akin to *ex ante* selection.[17] They instead baldly assert that "it is constitutionally irrelevant at what point in time platforms

17. The Platforms claim *Horton v. City of Houston*, 179 F.3d 188 (5th Cir. 1999), recognized First Amendment rights for organizations that "do not pre-screen submitted programs." *Id.* at 190. *Horton* is wholly irrelevant. It involved a *public* forum—a public access cable channel—and concerned the First Amendment rights of a different party seeking access to the forum. *See id.* at 190-91.

exercise editorial discretion." Red Br. at 25. Not only is this assertion unsupported by any authority, but it also illogically equates the Platforms' *ex post* censorship with the substantive, discretionary, *ex ante* review that typifies "editorial discretion" in every other context.[18]

In sum, even if "editorial discretion" is a protected legal category, it's far from clear why (even viewpoint-agnostic) content arrangement and (even infrequent and

18. Our esteemed colleague in dissent suggests that the timing of the Platforms' censorship doesn't matter because censorship decisions "can only be made, as a practical matter, after the appearance of the content on the Platform." *Post*, at 13. The dissent's factual premise is incorrect: Online platforms can and do moderate submissions before transmitting them. For example, the *New York Times* moderates online comments on its articles before posting them. *See* The Comments Section, N.Y. Times, https://help.nytimes.com/hc/en-us/articles/115014792387-The-Comments-Section (last visited Aug. 6, 2022). That's arguably the same form of *ex ante* curation that newspapers use for other material they publish and that enjoys constitutional protection under *Miami Herald*.

If the Platforms wanted the same protections, they could've used the same *ex ante* curation process. Early online forums and message boards often preapproved all submissions before transmission. *See, e.g., Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (noting Prodigy's early policy of "manually reviewing all messages prior to posting"). Later on, the Platforms made a judgment that jettisoning editorial discretion to allow instantaneous transmission would make their Platforms more popular, scalable, and commercially successful. The Platforms thus disclaimed *ex ante* curation—precisely because they wanted *users* to speak without editorial interference. That decision has consequences. And it reinforces that the *users* are speaking, not the Platforms.

ex post) censorship should be the criteria for qualification. And in any event, the Supreme Court has never recognized "editorial discretion" as a freestanding category of First-Amendment-protected expression. Rather, the applicable inquiry is whether Section 7 forces the Platforms to speak or interferes with their speech. Section 7 does neither of those things. It therefore passes constitutional muster.

D.

We have no doubts that Section 7 is constitutional. But even if some were to remain, 47 U.S.C. § 230 would extinguish them. Section 230 provides that the Platforms "shall [not] be treated as the publisher or speaker" of content developed by other users. *Id.* § 230(c)(1). Section 230 reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not "speak[ing]" when they host user-submitted content. Congress's judgment reinforces our conclusion that the Platforms' censorship is not speech under the First Amendment.

Congress enacted Section 230 in 1996 to ease uncertainty regarding online platforms' exposure to defamation liability for the content they host. One leading case, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), held that an online platform could not be liable absent knowledge of the defamatory statements, because it was a distributor that did not exercise meaningful editorial control. *See id.* at 139-40. But then a different case, *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup.

Ct. May 24, 1995), accepted an argument very similar to the Platforms' argument here. It noted that Prodigy's online platform had "content guidelines" prohibiting certain obscene and offensive content. 1995 N.Y. Misc. LEXIS 229, [WL] at *2. And Prodigy used an "automatic software screening program" as well as manual review "to delete notes from its computer bulletin boards" that violated the guidelines. 1995 N.Y. Misc. LEXIS 229, [WL] at *4. The court held that this conduct "constitute[d] editorial control" over the platform, so the platform was akin to a newspaper and Prodigy could be held liable for defamation on that basis. *Ibid.*

Congress disagreed with *Stratton Oakmont* and abrogated it by enacting § 230. *See* H.R. REP. No. 104-458, at 194 (1996) ("One of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."). Congress instructed that "No provider or user of an interactive computer service [*i.e.*, online platform] shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Online platforms are thus immune from defamation liability for the content they host, unless they play a part in the "creation or development" of that content. *See id.* § 230(f)(3). And this is true *even if* the online platforms act "in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2).

Section 230 undercuts both of the Platforms' arguments for holding that their censorship of users is protected speech. Recall that they rely on two key arguments: first, they suggest the user-submitted content they host is *their speech*; and second, they argue they are *publishers* akin to a newspaper. Section 230, however, instructs courts *not* to treat the Platforms as "the publisher or speaker" of the user-submitted content they host. *Id.* § 230(c)(1). And those are the exact two categories the Platforms invoke to support their First Amendment argument. So if § 230(c)(1) is constitutional, how can a court recognize the Platforms as First-Amendment-protected speakers or publishers of the content they host?

The Platforms respond that they *in fact* are speakers and publishers, and Congress simply instructed courts to *pretend* they aren't for purposes of publishing-related liability. Moreover, the legislature can't define what constitutes "speech" under the First Amendment—otherwise, for example, it could abrogate *Miami Herald* by simply defining newspapers as "not publishers." Because the legislature may not define what constitutes First-Amendment-protected speech, the Platforms argue § 230 has no bearing on the constitutional questions in this case.

It's obviously true that a legislature can't define what speech is or is not protected by the First Amendment. *Cf. Marbury*, 5 U.S. at 177. It's also irrelevant because that's not what § 230 purports to do. The First Amendment generally precludes liability based on the content of someone's speech or expression. *E.g., Cohen v. California*,

403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). Defamation liability for publishers is one of the several exceptions to this rule. *See generally New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (relationship between defamation liability and the First Amendment). But § 230 creates an *exemption* from that *exception* for the "interactive computer services" that fall within its scope, including the Platforms. And it does so by stating that they should not be treated as publishers. Thus, § 230 is nothing more (or less) than a statutory patch to a gap in the First Amendment's free speech guarantee. Given that context, it's strange to pretend that § 230's declaration that Platforms "shall [not] be treated as . . . publisher[s]" has no relevance in the First Amendment context.

Moreover, Congress's factual determinations do carry weight in constitutional adjudication. As the Supreme Court has explained, Congress's findings on "essentially factual issues . . . are of course entitled to a great deal of deference." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); *see also, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) ("*Turner II*"). And § 230 reflects Congress's factual determination that the Platforms are not "publishers."

Deference to Congress's judgment is particularly appropriate here because the Platforms themselves have extensively affirmed, defended, and relied on that judgment. For example, they've asserted that § 230 "promotes the free exchange of information and ideas over

the Internet and prevents the inevitable chill of speech that would occur if interactive computer services could be held liable merely for serving as conduits for other parties' speech."[19] Consistent with Congress's judgment, they've told courts *repeatedly* that they merely serve as "conduits" for other parties' speech and use "neutral tools" to conduct any processing, filtering, or arranging that's necessary to transmit content to users.[20] They've also repeatedly defended the wisdom of Congress's judgment, arguing that § 230 "made it possible for every major internet service to be built and ensured important values like free expression and openness were part of how platforms operate."[21]

The Platforms' position in this case is a marked shift from their past claims that they are simple conduits for user speech and that whatever might *look* like editorial

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19. Brief for Appellees at 1, *Klayman v. Zuckerberg*, No. 13-7017 (D.C. Cir. Oct. 25, 2013).

20. *E.g.*, Notice of Motion and Motion to Dismiss at 10 n.5, *Fields v. Twitter, Inc.*, No. 3:16-cv-00213 (N.D. Cal. Apr. 6, 2016) ("conduit"); Motion to Dismiss at 10, *Doe v. Twitter, Inc.*, No. 3:21-cv-00485 (N.D. Cal. Mar. 10, 2021) ("neutral tools"); Brief for Defendants-Appellants at 50, *Colon v. Twitter, Inc.*, No. 21-11283 (11th Cir. Aug. 10, 2020) ("neutral tools").

21. *Does Section 230's [*57] Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020) [hereinafter *Senate Hearings*] (statement of Mark Zuckerberg, CEO, Facebook, Inc.); *see also id.* at 1 (statement of Jack Dorsey, CEO, Twitter, Inc.) (arguing that "Section 230 is the internet's most important law for free speech and safety").

control is in fact the blind operation of "neutral tools." Two amici argue that the Platforms are therefore judicially estopped from asserting that their censorship is First-Amendment-protected editorial discretion.[22] *See In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004) ("Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation."). That's a fair point. But in any event, the Platforms' frequent affirmation of Congress's factual judgment underlying § 230 makes us even more skeptical of their radical switcheroo that, in this case, they *are* publishers. *Cf. ibid.* (doctrine of judicial estoppel "protect[s] the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest" (quotation omitted)).

The Platforms' only response is that in passing § 230, Congress sought to give them an unqualified right to control the content they host—including through viewpoint-based censorship. They base this argument on § 230(c)(2), which clarifies that the Platforms are immune from defamation liability even if they remove certain categories of "objectionable" content. But the Platforms' argument finds no support in § 230(c)(2)'s text or context. First, § 230(c)(2) only considers the removal of limited categories of content, like obscene, excessively violent, and similarly objectionable expression.[23] It says nothing

22. *See* Brief for Amici Curiae Heartland Inst. & Am. Principles Project at 12.

23. Section 230(c)(2) refers to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material.

about viewpoint-based or geography-based censorship. Second, read in context, § 230(c)(2) neither confers nor contemplates a freestanding right to censor. Instead, it clarifies that censoring limited categories of content does not remove the immunity conferred by § 230(c)(1). So rather than helping the Platforms' case, § 230(c)(2) further undermines the Platforms' claim that they are akin to newspapers for First Amendment purposes. That's because it articulates Congress's judgment that the Platforms are not like publishers *even when they engage in censorship.*[24]

To the extent the Platforms try to extract an unqualified censorship right from the phrase "otherwise objectionable" in isolation, that's foreclosed by the Supreme Court's repeated instruction that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (quotation omitted); *see also, e.g., Yates v. United States*, 574 U.S. 528, 545, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (plurality op.).

24. The Platforms also suggest, in a single sentence of their brief, that HB 20 is preempted by § 230(c)(2). The district court did not address this argument, so we are reluctant to pass on it. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) ("[W]e are a court of review, not of first view."). Of course, an appellee may urge any ground properly raised below as an alternative basis for affirmance. *See United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435-36, 44 S. Ct. 560, 68 L. Ed. 1087 (1924). But one sentence is insufficient to adequately brief a claim. *See, e.g., United States v. Williams*, 620 F.3d 483, 496 (5th Cir. 2010); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). We therefore hold that the Platforms have forfeited their preemption argument.

In sum, § 230 reflects Congress's judgment that the Platforms are not acting as speakers or publishers when they host user-submitted content. While a statute may not abrogate constitutional rights, Congress's factual judgment about the role of online platforms counsels against finding that the Platforms "publish" (and hence speak) the content that other users post. And that's particularly true here, because the Platforms have long relied on and vigorously defended that judgment—only to make a stark about-face for this litigation. Section 230 thus reinforces our conclusion that the Platforms' censorship is not protected speech under the First Amendment.

E.

The common carrier doctrine is a body of common law dating back long before our Founding. It vests States with the power to impose nondiscrimination obligations on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining. The Platforms are communications firms of tremendous public importance that hold themselves out to serve the public without individualized bargaining. And Section 7 of HB 20 imposes a basic nondiscrimination requirement that falls comfortably within the historical ambit of permissible common carrier regulation.

For this reason, to facially invalidate Texas's nondiscrimination rule would be a remarkable derogation of core principles of federalism. American courts have recognized these principles since the Founding and

only briefly abjured them to serve two unfortunate causes: imposing racial segregation and enforcing a discredited *Lochner*-era vision of property rights. Accepting the Platforms' theory would represent the first time since those ignominious years that federal courts have prevented a State from requiring interstate transportation and communications firms to serve customers without discrimination. Given the firm rooting of common carrier regulation in our Nation's constitutional tradition, any interpretation of the First Amendment that would make Section 7 facially unconstitutional would be highly incongruous. Common carrier doctrine thus reinforces our conclusion that Section 7 comports with the First Amendment.

This section (1) begins with a brief primer on the history of common carrier doctrine. Then it (2) explains why common carrier doctrine permits Texas to impose Section 7's nondiscrimination requirement on the Platforms. And this (3) supports our constitutional holding that the Platforms' viewpoint-based censorship is not First-Amendment-protected speech.

1.

The doctrine's roots lie in the notion that persons engaged in "common callings" have a "duty to serve." This principle has been part of Anglo-American law for more than half a millennium. For early English courts, this principle meant that private enterprises providing essential public services must serve the public, do so without discrimination, and charge a reasonable rate. The

first "carriers" to which this principle was applied were ferries. As Justice Newton of the Court of Common Pleas recounted, a ferry operator is "required to maintain the ferry and to operate it and repair it for the convenience of the common people." *Trespass on the Case in Regard to Certain Mills*, YB 22 Hen. VI, fol. 14 (C.P. 1444).

By the time of the American Founding, the duty to serve had crystallized into a key tenet of the common law. English courts applied this principle to numerous "common callings," like stagecoaches, barges, gristmills, and innkeepers. *See* 3 Blackstone, *supra*, at *164 (discussing the duties of innkeepers, bargemasters, and farriers). For example, Blackstone explained that a public innkeeper offers "an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler." *Ibid.* Or as Sir Matthew Hale explained regarding wharves, when a private person builds the only wharf in a port, "the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only." Matthew Hale, *De Portibus Maris, in* A Collection Of Tracts Relative To The Law Of England 77-78 (Francis Hargrave ed., 1787). The common law thus required the wharf owner to serve the public and not to impose discriminatory or unreasonable rates. *See id.* at 77 (wharf owner may not take "arbitrary and excessive duties for cranage").

The common carrier's duty to serve without discrimination was transplanted to America along with

the rest of the common law. *See* Charles M. Haar & Daniel Wm. Fessler, The Wrong Side Of The Tracks: A Revolutionary Rediscovery Of The Common Law Tradition Of Fairness In The Struggle Against Inequality 109-40 (1986) [hereinafter Haar & Fessler]. It got its first real test with the rise of railroad empires in the second half of the nineteenth century. Rail companies became notorious for using rate differentials and exclusive contracts to control industries dependent on cross-country shipping, often structuring contracts to give allies (like the Standard Oil Company) impenetrable monopolies. *See id.* at 112-15, 129. American courts, however, often found that these discriminatory practices violated the railroads' common carrier obligations. *See, e.g., Messenger v. Pa. R.R. Co.*, 37 N.J.L. 531, 534 (1874) (refusing to enforce rate differentials because "the carrier cannot discriminate between individuals for whom he will render the service"); *New England Express Co. v. Me. Cent. R.R. Co.*, 57 Me. 188, 196 (1869) (rejecting exclusive contract because "[t]he very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences"). And even when courts did not impose common carrier duties, they reaffirmed that state legislatures were vested with the power to do so by statute, as England did with the Railway and Canal Act of 1854. *See* Haar & Fessler, *supra*, at 115-23; *see also, e.g., Fitchburg R.R. Co. v. Gage*, 78 Mass. (12 Gray) 393, 398, 12 Gray 393 (1859) (because railroads are common carriers, unequal rates are "very fully, and reasonably, subjected to legislative supervision and control").

Appendix A

The telegraph was the first communications industry subjected to common carrier laws in the United States. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2320-24 (2021). Invented in 1838, the telegraph revolutionized how people engaged with the media and communicated with each other over the next half century. But by the end of the nineteenth century, legislators grew "concern[ed] about the possibility that the private entities that controlled this amazing new technology would use that power to manipulate the flow of information to the public when doing so served their economic or political self-interest." *Id.* at 2321. These fears proved well-founded. For example, Western Union, the largest telegraph company, sometimes refused to carry messages from journalists that competed with its ally, the Associated Press—or charged them exorbitant rates. *See id.* at 2321-22. And the Associated Press in turn denied its valuable news digests to newspapers that criticized Western Union. *See ibid.* Western Union also discriminated against certain political speech, like strike-related telegraphs. *See id.* at 2322. And it was widely believed that Western Union and the Associated Press "influenc[ed] the reporting of political elections in an effort to promote the election of candidates their directors favored." *Ibid.*; *see, e.g., The Blaine Men Bluffing*, N.Y. TIMES, Nov. 6, 1884, at 5 (accusing them of trying to influence the close presidential election of 1884 by misreporting and delaying the transmission of election returns).

In response, States enacted common carrier laws to limit discrimination in the transmission of telegraph

messages. The first such law, passed by New York, required telegraph companies to "receive d[i]spatches from and for . . . any individual, and on payment of their usual charges . . . to transmit the same with impartiality and good faith." Act of April 12, 1848, ch. 265, § 11, 1848 N.Y. Laws 392, 395. New York further required such companies to "transmit all d[i]spatches in the order in which they [we]re received." *Id.* § 12. Many States eventually passed similar laws, *see* Lakier, *supra*, at 2320, 2322, and Congress ultimately mandated that telegraph companies "operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever." Telegraph Lines Act, ch. 772, § 2, 25 Stat. 382, 383 (1888).

Courts considering challenges to these laws—or requests to impose common carrier duties even in their absence—had to grapple with deciding whether and to what extent the common carrier doctrine applied to new innovations and technologies. For transportation and communications firms, courts focused on two things. *First*, did the carrier hold itself out to serve any member of the public without individualized bargaining? As Justice Story had explained in the transportation context, "[t]o bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation." Joseph Story, Commentaries On The Law Of Bailments § 495 (9th ed. 1878).

Courts applied this same holding-out test to novel communications enterprises. For example, in *State ex rel. Webster v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N.W. 237 (Neb. 1885), a Nebraska lawyer sought a writ of mandamus to compel a telephone company to put a telephone in his office. The Supreme Court of Nebraska granted the writ, explaining that the company "ha[d] undertaken with the public to send messages from its instruments, one of which it propose[d] to supply to each person or interest requiring it." *Id.* at 239. Because the company had "so assumed and undertaken to the public," it could not arbitrarily deny the lawyer a telephone. *Ibid.* Other courts agreed and clarified that telephone companies owed this common carrier obligation even though they also imposed "reasonable rules and regulations" upon their customers. *Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co.*, 66 Md. 399, 7 A. 809, 811 (Md. 1887); *see also, e.g., Walls v. Strickland*, 174 N.C. 298, 93 S.E. 857, 858 (N.C. 1917) (describing this rule as "well settled" by "numerous cases").

Second, drawing on Hale's influential seventeenth-century formulation, courts considered whether the transportation or communications firm was "affected with a public interest." This test might appear unhelpful, but it was "quickened into life by interpretation" over centuries of common law decisions. *See* Walton H. Hamilton, *Affectation with Public Interest*, 39 Yale L.J. 1089, 1090 (1930). Courts applying this test looked to whether a firm's service played a central economic and social role in society. This discussion by the Supreme Court of Indiana is an instructive example:

> The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well-defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel a hundred years ago, or as the steam-boat, the railroad, and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news—a common carrier in the sense in which the telegraph is a common carrier—and impose upon it certain well-defined obligations of a public character.

Hockett v. Indiana, 105 Ind. 250, 5 N.E. 178, 182 (Ind. 1886); *see also, e.g., Webster*, 22 N.W. at 239 ("That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned.").

In determining whether a communications firm was "affected with a public interest," courts also considered the firm's market share and the relevant market dynamics.

In Hale's original formulation, if a wharf owner operated the "only [wharf] licensed by the queen" or if "there [wa]s no other wharf in that port," then the wharf was "affected with a public interest," and the owner acquired a duty to serve without discrimination. Hale, *supra*, at 77-78. Similarly, a railroad, telegraph, or telephone company's status as the only provider in a region heavily suggested it was affected with the public interest. *See, e.g., Webster*, 22 N.W. at 238 ("While there is no law giving [the phone company] a monopoly[,] . . . the mere fact of this territory being covered by the 'plant' of [the company], from the very nature and character of its business, gives it a monopoly of the business which it transacts.").

When state legislatures or state courts imposed new common carrier requirements, affected firms often sought to evade them by bringing constitutional claims in federal court. The landmark case is *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77 (1876). Illinois passed a statute regulating railroads and grain elevators. Among other things, the statute regulated grain elevators' rates and prohibited rate discrimination. *See id.* at 117. Munn & Scott, proprietors of a Chicago grain elevator, brought a litany of constitutional challenges to Illinois's law, arguing that it violated the Commerce and Port Preference Clauses of Article I, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See id.* at 119-20. The thrust of the challenge was that Illinois's law subverted private property rights without compensation and without sufficient justification. *See, e.g., id.* at 133.

The Supreme Court rejected Munn & Scott's claims and held that state legislatures may constitutionally regulate private firms if the service they provide is "affected with a public interest." *Id.* at 130. The Court expounded at length "the doctrine which Lord Hale has so forcibly stated," approving Hale's formulation and tracing its adoption and development in American common law. *See id.* at 126-30. It then explained that the Illinois legislature could have reasonably determined that grain elevators were affected with a public interest. That's because they were enormously important to the agriculture and shipping industries: They stood in the "gateway of commerce" and provided an indispensable link between western grain and eastern markets. *Id.* at 132. And while there were fourteen grain elevators in Chicago, controlled by nine firms, the market was small and interconnected enough to be ripe for abuse if state regulation was wholly prohibited. *See id.* at 131.

After *Munn*, the Supreme Court repeatedly upheld common carrier regulations against constitutional challenges. The same year, for example, it easily rejected a railroad's challenge to rate regulation and nondiscrimination requirements imposed by the Iowa legislature. *See Chicago, B. & Q. R. Co. v. Iowa*, 94 U.S. 155, 161, 24 L. Ed. 94 (1876) (holding that railroads are "engaged in a public employment affecting the public interest, and, under [*Munn v. Illinois*, are] subject to legislative control as to their rates of fare and freight, unless protected by their charters"). It similarly rejected a constitutional challenge to a state legislature's imposition of a duty on telegraph companies to deliver messages with

"impartiality and good faith." *W. Union Tel. Co. v. James*, 162 U.S. 650, 651, 16 S. Ct. 934, 40 L. Ed. 1105 (1896).

The Court deviated from this path only briefly and only during an ignominious period of history marked by racism and the now-discredited theory of *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). Shortly after *Munn*, for example, the Court considered a Louisiana law that required common carriers operating steamboats, railroads, and other vehicles to admit persons equally, without segregating on the basis of race. *Hall v. De Cuir*, 95 U.S. 485, 486, 24 L. Ed. 547 (1877). The Court sustained a constitutional challenge to the law on the ground that it regulated interstate commerce and violated the (negative or dormant) Commerce Clause. *See id.* at 490. Although the law only applied in Louisiana, the Court found it "impose[d] a direct burden upon inter-state commerce" because "[a] passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced." *Id.* at 488-89.

Moreover, during the heyday of *Lochner*'s substantive due process misadventure, the Court repeatedly rejected States' arguments that various industries were "affected with a public interest" and often invalidated state laws that included nondiscrimination rules. *E.g., Chas. Wolff Packing Co. v. Ct. of Indus. Rels.*, 262 U.S. 522, 544, 43 S. Ct. 630, 67 L. Ed. 1103 (1923) (invalidating state law regulating wages in the meat-packing industry); *cf.* Ray A. Brown, *Due Process of Law, Police Power, and the*

Supreme Court, 40 HARV. L. REV. 943, 944 (1927) (noting that the Supreme Court declared more economic and social regulations unconstitutional between 1920 and 1927 than during the preceding 52 years).

The Court has obviously rejected both *Lochner* and the odious racism that infected its decisions in the era of *Hall* and *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). The Platforms have pointed to no case since that time—and we are not aware of any—sustaining a constitutional challenge to a state law imposing nondiscrimination obligations on a common carrier.

2.

Texas permissibly determined that the Platforms are common carriers subject to nondiscrimination regulation. That's because the Platforms are communications firms, hold themselves out to serve the public without individualized bargaining, and are affected with a public interest.

To state the obvious, the Platforms are communications firms. The Platforms halfheartedly suggest that they are not "members of the 'communications industry'" because their mode of transmitting expression differs from what other industry members do. But that's wrong. The whole purpose of a social media platform—as aptly captured in HB 20's definitional provisions—is to "enable[] users to communicate with other users." TEX. BUS. & COM. CODE § 120.001(1). The Platforms' own representations confirm

this—for example, Facebook's Terms of Service indicates its purpose is to enable users to "communicate with friends, family, and others."[25] In that sense, the Platforms are no different than Verizon or AT&T.

The Platforms also hold themselves out to serve the public.[26] They permit any adult to make an account and transmit expression after agreeing to the same boilerplate terms of service. They've thus represented a "willingness to carry [anyone] on the same terms and conditions." *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960).

The Platforms resist this conclusion, arguing that they have not held themselves out to serve the public equally. That's so, they contend, because they are only willing to do business with users who agree to their terms of service. But requiring "compliance with their reasonable rules and regulations" has never permitted a communications firm to avoid common carrier obligations. *Chesapeake*, 7 A. at 811. The relevant inquiry isn't whether a company *has* terms and conditions; it's whether it offers the "*same* terms and conditions [to] any and all groups." *Semon*, 279 F.2d at 739 (emphasis added). Put differently, the test is whether the company "make[s] individualized decisions, in particular cases, whether and on what terms to deal."

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25. Facebook Terms, § 1; *see also* Twitter Terms, § 3 (purpose of Twitter is to host "Content" and "communications").

26. Indeed, one Platform has described its purpose as "to serve the public conversation." *Senate Hearings, supra*, at 1 (statement of Jack Dorsey, CEO, Twitter, Inc.).

FCC v. Midwest Video Corp., 440 U.S. 689, 701, 99 S. Ct. 1435, 59 L. Ed. 2d 692 (1979) (quotation omitted). Here, it's undisputed the Platforms apply the same terms and conditions to all existing and prospective users.

The Platforms also contend they are not open to the public generally because they censor and otherwise discriminate against certain users and expression. To the extent the Platforms are arguing that they are not common carriers because they filter some obscene, vile, and spam-related expression, this argument lacks any historical or doctrinal support. For example, phone companies are privileged by law to filter obscene or harassing expression, and they often do so. 47 U.S.C. § 223; *see, e.g., Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987). Yet they're still regulated as common carriers. Similarly, transportation providers may eject vulgar or disorderly passengers, yet States may nonetheless impose common carrier regulations prohibiting discrimination on more invidious grounds. *E.g., Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).

The Platforms nonetheless contend that they cannot be regulated as common carriers because they engage in viewpoint-based censorship—the very conduct common carrier regulation would forbid. This contention is upside down. The Platforms appear to believe that any enterprise can avoid common carrier obligations by violating those same obligations. That is obviously wrong and would rob the common carrier doctrine of any content.

The Platforms' contention also involves a fair bit of historical amnesia. As discussed earlier, telegraph companies once engaged in extensive viewpoint-based discrimination, but that did not immunize them from common carrier regulation. Rather, for most legislators and courts, it made such regulation all the more urgent. *See* Lakier, *supra*, at 2322-23. And nearly every other industry historically subjected to common carrier regulation initially discriminated against their customers and sought the right to continue to do so. *See, e.g.*, *Messenger*, 37 N.J.L. at 532-33 (railroad); *Munn*, 94 U.S. at 119-20 (grain elevators); *Webster*, 22 N.W. at 238 (telephone); *Portland Nat. Gas & Oil Co. v. State ex rel. Kern*, 135 Ind. 54, 34 N.E. 818, 818 (Ind. 1893) (gas); *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N.E. 118, 121 (Ill. 1899) (water). The Platforms offer no reason to adopt an ahistorical approach under which a firm's existing desire to discriminate against its customers somehow gives it a permanent immunity from common carrier nondiscrimination obligations.

Texas also reasonably determined that the Platforms are "affected with a public interest." Numerous members of the public depend on social media platforms to communicate about civic life, art, culture, religion, science, politics, school, family, and business. The Supreme Court in 2017 recognized that social media platforms "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737. The Court's "modern public square" label

reflects the fact that in-person social interactions, cultural experiences, and economic undertakings are increasingly being replaced by interactions and transactions hosted or facilitated by the Platforms. And if anything, the Platforms' position as the modern public square has only become more entrenched in the four years between *Packingham* and the Texas legislature's finding, as the public's usage of and dependance on the Platforms has continued to increase.[27]

The centrality of the Platforms to public discourse is perhaps most vividly illustrated by multiple federal court of appeals decisions holding that the replies to a public official's Twitter feed constitute a government "public forum" for First Amendment purposes. *See Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated*, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021) (mem.); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 2022 WL 2963453, at *15 (9th Cir. 2022).[28] These decisions reflect the modern intuition that the Platforms are the forum for

27. *See* Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, Pew Research Ctr. (Apr. 7, 2021), https://perma.cc/TR42-LDDT; *see also Daily Time Spent on Social Networking by Internet Users Worldwide from 2012 to 2022*, Statista, https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/ (last visited Aug. 6, 2022) (stating that in 2022, the average American spends 123 minutes per day on social media).

28. *See also Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring) (noting the tension between holding a Platform account to be a government public forum and the notion that the Platforms have no nondiscrimination obligations and may censor a user "at any time for any reason or no reason").

political discussion and debate, and exclusion from the Platforms amounts to exclusion from the public discourse. And for many, the Platforms are also no less central to quotidian discussions about matters like school, family, and business, than they are to debates about politics, science, and religion.

In addition to their social importance, the Platforms play a central role in American economic life. For those who traffic in information—journalists, academics, pundits, and the like—access to the Platforms can be indispensable to vocational success. That's because in the modern economy, the Platforms provide the most effective way to disseminate news, commentary, and other information. The same is true for all sorts of cultural figures, entertainers, and educators, a growing number of whom rely for much or all of their income on monetizing expression posted to the Platforms. Finally, even people and companies who traffic in physical goods often lean heavily on the Platforms to build their brand and market their products to consumers. That's why the Platforms, which earn almost all their revenue through advertising, are among the world's most valuable corporations. Thus, just like the telephone a century ago, the Platforms have become a key "factor in the commerce of the nation, and of a great portion of the civilized world." *Webster*, 22 N.W. at 239. Or at the very least, one cannot say the Texas legislature's judgment to that effect was unreasonable.

It's also true that each Platform has an effective monopoly over its particular niche of online discourse. Many early telephone companies did not have legal

monopolies, but as a practical matter, they monopolized their geographic area due to the nature of the telephone business. *See id.* at 238. Likewise with the Platforms: While no law gives them a monopoly, "network effects entrench these companies" because it's difficult or impossible for a competitor to reproduce the network that makes an established Platform useful to its users. *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Academics have explored this concept in depth,[29] but to those familiar with the Platforms, a few concrete examples can easily demonstrate the point. To effectively monetize, say, carpet cleaning instructional videos (a real niche), one needs access to YouTube. Alternatively, sports "influencers" need access to Instagram. And political pundits need access to Twitter. It's thus no answer to tell the censored athlete, as the Platforms do, that she can just post from a different platform. As Justice Thomas has aptly pointed out, that's like telling a man kicked off the train that he can still "hike the Oregon Trail." *Id.* at 1225. The Platforms' entrenched market power thus further supports the reasonableness of Texas's determination that the Platforms are affected with a public interest. *Cf. Munn*, 94 U.S. at 131 (market dynamics supported state legislature's affectation finding when nine firms controlled the fourteen major grain elevators serving Chicago).

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29. *See* James Alleman, Edmond Baranes & Paul Rappoport, *Multisided Markets and Platform Dominance, in* Applied Economics In The Digital Era (James Alleman et al. eds. 2020); Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 Berkeley Tech. L.J. 1051 (2017).

The Platforms and their amici make three counterarguments that merit additional responses. First, they suggest that common carrier regulations are impermissible—or at least disfavored—unless the government has contributed to a carrier's monopoly, such as by licensing a legal monopoly or acquiring property for the carrier through eminent domain. That's obviously wrong. Recall that in Hale's original formulation, common carrier treatment was appropriate if a proprietor operated the "only [wharf] licensed by the queen" *or* if there was simply "no other wharf in that port." Hale, *supra*, at 77. American courts followed this formulation and did not require a government-conferred monopoly. *E.g.*, *Webster*, 22 N.W. at 238.

Even if the Platforms were right, however, the government *has* conferred a major benefit on the Platforms by enacting § 230. *See supra* Part III.D. As the Platforms have acknowledged, "Section 230 made it possible for every major internet service to be built."[30] By their own admission, the Platforms are just as dependent on § 230's liability shield as the old railroad companies were on the ability to traverse land acquired via eminent domain. Accordingly, the Texas legislature reasonably determined that the Platforms "have enjoyed governmental support in the United States" and that this supports common carrier regulation.[31]

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30. *Senate Hearings*, *supra*, at 2 (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

31. Amicus TechFreedom argues that if common carrier regulations are based on this sort of *quid pro quo* relationship, and

Second, the Platforms rely on a handful of modern precedents. Chief among them is *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 428 U.S. App. D.C. 439 (D.C. Cir. 2017). There, Judge Srinivasan and then-Judge Kavanaugh sparred over the validity of the FCC's net neutrality rule, which purported to use the FCC's authority under the Telecommunications Act of 1996 to impose common carrier obligations on internet service providers. *See id.* at 418 (Kavanaugh, J., dissenting from the denial of rehearing en banc). Because the primary question was one of a federal agency's regulatory authority, *see id.* at 418-26, the case has little relevance to a *State's* invocation of the deeply rooted common carrier doctrine.[32] And while it's true that then-Judge Kavanaugh also argued that the net neutrality

§ 230 is the *quid*, then a *state* government shouldn't be able to exact the *quo*. Even apart from the fact that the common carrier doctrine does not require a *quid pro quo* arrangement, the argument that the *quid* and the *quo* must come from the same government fails on historical terms. For example, nineteenth-century railroads were chartered (the *quid*) by state governments, yet comprehensive common carrier regulations (the *quo*) were imposed by the federal government through the Interstate Commerce Act of 1887 and the Hepburn Amendments of 1906. *See* HAAR & FESSLER, *supra*, at 137-40.

32. The Platforms' contention that federal law does not treat them as common carriers is similarly beside the point. *See* 47 U.S.C. § 223(e)(6) (clarifying that certain provisions of federal law should not "be construed to treat interactive computer services as common carriers"). No party is arguing that the Platforms' common carrier obligations stem from federal law. The question is whether the State of Texas can impose common carrier obligations on the Platforms. And no party has argued that § 223(e)(6) preempts state common carrier regulation.

rule violated the First Amendment, that was because "the FCC ha[d] not even tried to make a market power showing." *See id.* at 418; *see also id.* at 435 (rule would be constitutional upon showing of market power). Here, the Texas legislature found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance," and this finding is reasonable. *See supra* at 57-58.

At any rate, *Turner I* is the closest Supreme Court case from the modern era, and it provides no help to the Platforms. There the Court, by a 5-4 vote, refused to hold unlawful federal regulations requiring cable operators to set aside certain channels for commercial broadcast stations. *See* 512 U.S. at 661-68. Most significant for our purposes, even the four dissenting Justices believed Congress could have permissibly imposed more modest common carrier regulations, rather than singling out broadcasters for preferential treatment as it had done. *Id.* at 684 (O'Connor, J., concurring in part and dissenting in part); *see also ibid.* ("[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.").

Third, the Platforms and their amici argue that they are not engaged in "carriage." They claim that "at its core," the common carrier doctrine is about "the transportation of property"—that is, carrying literal things. But rather than transport some physical *thing*, the Platforms "process" and "manipulate" data in their

users' newsfeeds. They claim this distinction between "processing" and "carriage" puts them outside the realm of the common carrier doctrine.

There is no basis for the Platforms' wooden metaphysical literalism. A distinction between *literal* "carriage" and the processing of data obviously would not fit the doctrine. Were that the case, the telephone and telegraph could never have been regulated as common carriers. So to make the purported distinction work, the Platforms and their amici ask us to conceive of telegraphy and telephony as conveying a "widget of private information" as a discrete "commodity product." Brief for Amicus Curiae TechFreedom at 7-8.

This wordgame defies both law and logic. First, it has no doctrinal support. The Platforms and their amici cite one case asserting that "[t]he transportation of property [is the] business of common carriers," *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 406, 34 S. Ct. 612, 58 L. Ed. 1011 (1914), but they offer no support whatsoever for the proposition that property transportation is the *only* thing that defines common carriers. Second, because the Platforms, telephones, and telegraphs all process data at some level, the Platforms' purported standard collapses into a distinction between "more complicated communications processing" (*e.g.*, social media) and "less complicated communications processing" (*e.g.*, telephony). There's no logical or historical basis to adopt this framework. After all, it would have prevented the common carrier doctrine from ever being applied to a more sophisticated communications medium than the one it began with.

Relatedly, the Platforms argue that even if they can be regulated as common carriers, Section 7 goes beyond the permissible scope of the common carrier doctrine. That's because it requires more than simple "carriage," or hosting. It also prohibits censorship that "den[ies] equal access or visibility to, or otherwise discriminate[s] against expression." TEX. CIV. PRAC. & REM. CODE § 143A.001(1). The Platforms claim this will interfere with how they process the communications they host and transmit.

This is simply another version of the argument that social media is too complicated a medium to bear common carrier nondiscrimination obligations. Common carriers have not normally been able to discharge their duties by hosting or transmitting communications *per se.* Rather, they've been required to do so without discriminating—with "impartiality and good faith," as required by many state laws concerning telegraph transmission. *W. Union*, 162 U.S. at 651. States could even require telegraph companies to "transmit all d[i]spatches in the order in which they are received." Act of April 12, 1848, ch. 265, § 12, 1848 N.Y. LAWS 392, 395. Section 7 thus imposes ordinary common carrier nondiscrimination obligations, drafted to fit the particularities of the Platforms' medium.

At bottom, the Platforms ask us to hold that in the long technological march from ferries and bakeries, to barges and gristmills, to steamboats and stagecoaches, to railroads and grain elevators, to water and gas lines, to telegraph and telephone lines, to social media platforms—that social media marks the point where the underlying technology is finally so complicated that the

government may no longer regulate it to prevent invidious discrimination. But we may not inter this venerable and centuries-old doctrine just because Twitter's censorship tools are more sophisticated than Western Union's. *Cf. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("[B]asic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (quotation omitted)).

3.

The Platforms next argue that even if Section 7 is a valid common carrier regulation, it's still unconstitutional. That's wrong for two reasons.

First, it's instructive that federal courts have been generally skeptical of constitutional challenges to States' common carrier nondiscrimination rules. Indeed, it appears that federal courts have only ever sustained such challenges for the now-discredited purposes of imposing racial segregation and enforcing a *Lochner*-era conception of private property rights. *See supra* Part III.E.1. Significantly, the Platforms rely on the dissenting opinion in *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934), a case in which a majority of the Court began to repudiate *Lochner*. They cite Justice McReynolds's dissent for the proposition that "a state may not by legislative fiat convert a private business into a public utility." Red Br. at 36 (quoting *Nebbia*, 291 U.S.

at 555 (McReynolds, J., dissenting)).[33] Section 7 imposes a nondiscrimination requirement that comes nowhere close to making the Platforms public utilities. But more importantly, the Supreme Court has rejected *Lochner* and Justice McReynolds's position. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). This court may not resurrect it, and the Platforms' arguments provide little reassurance that we could hold Section 7 unconstitutional without doing so.

Second, the fact that the Platforms fall within the historical scope of the common carrier doctrine further undermines their attempt to characterize their censorship as "speech." As discussed at length earlier, the Platforms' primary constitutional argument is that they so closely oversee the speech on their Platforms that they exercise "editorial discretion" akin to a newspaper. But the same characteristics that make the Platforms common carriers—first, holding out their communications medium for the public to use on equal terms; and second, their well-

33. This and other frequent invocations of private property rights suggest the Platforms' real complaint is with the Texas legislature meddling in their right to control their own business. But the Platforms have not brought a regulatory takings claim. *Cf. Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922). Instead, they've asked for the more drastic remedy of invalidation of an economic regulation—a remedy the federal courts have not been in the business of providing since the *Lochner* era. Given the courts' deference to state economic regulations for the last eight decades, "it would be freakish to single out" this historically grounded nondiscrimination requirement "for special treatment." *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2131, 204 L. Ed. 2d 522 (2019) (Alito, J., concurring).

understood social and economic role as facilitators of *other people's* speech—render them not newspapers but instead indispensable conduits for transporting information. Put differently, it's bizarre to posit that the Platforms provide much of the key communications infrastructure on which the social and economic life of this Nation depends, and yet conclude each and every communication transmitted through that infrastructure still somehow implicates the Platforms' own speech for First Amendment purposes.

F.

Suppose Section 7 did implicate the Platforms' First Amendment rights. The Platforms would still not be entitled to facial pre-enforcement relief. That's because (1) it's a content-and viewpoint-neutral law and is therefore subject to intermediate scrutiny at most. And (2) Texas's interests undergirding Section 7 are sufficient to satisfy that standard.

1.

Even if Section 7 burdens the Platforms' First Amendment rights, it does so in a content-neutral way. Such "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" under the First Amendment. *Turner I*, 512 U.S. at 642 (quotation omitted).

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." *Ibid.* Accordingly, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. But "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Ibid.* Or as the Court put it more recently, "the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); *accord City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1471-74, 212 L. Ed. 2d 418 (2022).

Section 7 is content-neutral. Even assuming viewpoint-based censorship is speech, the burden Section 7 imposes on that speech does not depend on "the ideas or views [it] expresse[s]." *Turner I*, 512 U.S. at 643. In other words, Section 7's burden in no way depends on what message a Platform conveys or intends to convey through its censorship. That's because Section 7 applies equally regardless of the censored user's viewpoint, and regardless of the motives (stated or unstated) animating the Platform's viewpoint-based or geography-based censorship.

The Platforms have several responses. First, they argue Section 7 is content-based because its definition of "social media platform" excludes news, sports, and entertainment websites. Specifically, Section 7 does not apply to "an online service, application, or website":

> (i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and
>
> (ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described by Subparagraph (i).

TEX. BUS. & COM. CODE § 120.001(1)(C).

This definition does not render HB 20 content-based because the excluded websites are fundamentally dissimilar mediums. And "the fact that a law singles out a certain medium . . . is insufficient by itself to raise First Amendment concerns." *Turner I*, 512 U.S. at 660 (quotation omitted). HB 20 defines "social media platform" to sweep in websites that exist primarily to host and transmit user-generated speech. Section 120.001(1)(C)(i) does not create a content-based exemption from Section 7's coverage. Rather, it excludes the distinct medium of websites whose primary purpose is not the sharing of user-generated speech but rather the dissemination of information "preselected by the provider." Under *Turner I*, targeting a particular medium does not render Section 7 content-based.

Second, the Platforms argue Section 7 is content-based because it permits certain narrow kinds of censorship. Section 7 permits Platforms to censor, for example, expression directly inciting criminal activity and

specific threats of violence. *See* Tex. Civ. Prac. & Rem. Code § 143A.006(a). But the Platforms offer no evidence whatsoever that Texas permitted these narrow categories of censorship "because of agreement or disagreement with the message [such censorship] conveys." *Turner I*, 512 U.S. at 642 (quotation omitted). Rather, Section 7 permits censorship of expression that's unprotected by the First Amendment. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (incitement unprotected). So it's clear that the narrow permission to censor afforded by § 143A.006 is not "based on hostility—or favoritism—towards the underlying message expressed" by the Platforms' censorship. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Section 143A.006 therefore does not render Section 7 content-based.

Third, the Platforms argue that Section 7 triggers strict scrutiny because it targets only the largest social media platforms: those with more than 50 million users. They contend this alone requires strict scrutiny, relying principally on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987). *Minneapolis Star* involved a challenge to Minnesota's "use tax" on paper and ink products used by the press. 460 U.S. at 577. Because the tax exempted the first $100,000 of paper and ink used, only the largest eleven or so publishers incurred any tax liability in a given year. *Id.* at 578. The Court held that "Minnesota's ink and paper tax violates the First

Amendment not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* at 591. Similarly, in *Arkansas Writers' Project*, the Court held unconstitutional another tax that "target[ed] a small group within the press," this time by imposing a sales tax on magazines but exempting religious, trade, professional, and sports magazines. 481 U.S. at 229; *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 251, 56 S. Ct. 444, 80 L. Ed. 660 (1936) (holding unconstitutional a tax singling out newspapers with weekly circulations above 20,000).

These taxation cases are inapposite. As the Court later explained, *Minneapolis Star* and *Arkansas Writers' Project* "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991). But "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas," as "was the case in *Grosjean, Minneapolis Star*, and *Arkansas Writers' [Project].*" *Id.* at 453. Section 7's focus on a particular subset of firms is not directed at *suppressing* particular ideas or viewpoints, as Minnesota's and Arkansas's discriminatory taxes were. Rather, the law aims at *protecting* a diversity of ideas and viewpoints by focusing on the large firms that constitute "the modern public square." *Packingham*, 137 S. Ct. at 1737. Nor is there any evidence in the record before us that Section 7 could in fact suppress any constitutionally protected speech by anyone. *See supra* Part III.A. *Minneapolis Star*

and *Arkansas Writers' Project* thus provide no basis for subjecting Section 7 to strict scrutiny.

Finally, the Platforms argue that Section 7 impermissibly targeted the largest social media platforms because of the Texas legislature's particular disagreement with those Platforms' partisan censorship efforts. This argument fails on both the facts and the law. On the facts, the Platforms present no real evidence of the Texas legislature's alleged improper motives. Instead, they simply ask us to infer an improper motive from various unexplained amendments to the user threshold number and the fact that HB 20 lacks legislative findings regarding the user threshold. But it's just as plausible to infer that the legislature simply picked a number that would sweep in the largest platforms most salient to public discussion and debate in Texas. And on the law, we may not hold unconstitutional "a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). We thus hold that even if Section 7 regulated the Platforms' speech, intermediate scrutiny would apply.

2.

Section 7 satisfies intermediate scrutiny. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189.

We hold that Section 7's regulation of viewpoint-based censorship meets each of these requirements.

First, Section 7 advances an important governmental interest. HB 20's legislative findings assert that Texas "has a fundamental interest in protecting the free exchange of ideas and information in this state." And Supreme Court precedent confirms that this is "a governmental purpose of the highest order." *Turner I*, 512 U.S. at 663; *see ibid.* ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); *Turner II*, 520 U.S. at 189 ("promoting the widespread dissemination of information from a multiplicity of sources" is an important government interest); *see also Associated Press v. United States*, 326 U.S. 1, 20, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945) ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.").

The Platforms argue *Miami Herald* shows that Section 7 does not further any sufficient government interest to satisfy intermediate scrutiny. That's because the *Miami Herald* Court considered Florida's argument that "the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues" yet found that interest insufficient to justify the right-of-reply law. 418 U.S. at 250. But the *Miami Herald* Court never discussed or applied intermediate scrutiny, and it didn't suggest Florida's interest was unimportant. Rather, Florida's law was unconstitutional because it imposed an

obvious content-based penalty on the newspaper's speech. *Id.* at 256. And at any rate, because it only protected the speech of political candidates the newspaper disfavored, it would have done little to advance the State's broader interest in public debate. *Miami Herald* thus does not bear on the importance of Texas's asserted interest in this case.

The Platforms also rely on *Hurley*, but that case also did not apply intermediate scrutiny or weigh the strength of the governmental interest at stake. And *Hurley* distinguished *Turner I* by invoking the inherently expressive nature of a parade, as compared to "cable's long history of serving as a conduit for broadcast signals." 515 U.S. at 575-77 (quotation omitted). The Platforms do not exercise the same editorial discretion and control that cable operators do—for example, they do not make *ex ante* decisions to select a limited repertoire of expression. *See supra* Part III.C.2.c. So if *Hurley* distinguished *Turner I* on that basis, then *Hurley a fortiori* doesn't fit this case. In sum, the Platforms' cases—none of which even applied intermediate scrutiny—do not undercut the Court's holding that the widespread dissemination of information from a multiplicity of sources is "a governmental purpose of the highest order." *Turner I*, 512 U.S. at 663.

Second, Section 7 is "unrelated to the suppression of free speech" because it aims to protect individual speakers' ability to speak. *Turner II*, 520 U.S. at 189. The Platforms resist this conclusion only by insisting that Section 7 curtails the Platforms' own speech. That conflates the criteria for triggering intermediate scrutiny with the requirements for satisfying it. Intermediate

scrutiny only kicks in when a law curtails speech, so the Platforms' test would mean that no law triggering intermediate scrutiny could ever satisfy that standard. And that would make little sense. Section 7 is plainly unrelated to the suppression of free speech because at most it curtails the Platforms' censorship—which they call speech—and only to the extent necessary to allow Texans to speak without suffering viewpoint discrimination.[34]

Third, Section 7 "does not burden substantially more speech than necessary to further [Texas's] interests." *Ibid.* This is perhaps best illustrated by considering the Platforms' main argument to the contrary: that "[i]f the State were truly interested in providing a viewpoint-

34. In a similar vein, our esteemed colleague in dissent argues that Section 7 does not further the important government interest recognized in the *Turner* cases because it "strives to promote speech by first targeting the content of others' speech." *Post*, at 15. By contrast, according to the dissent, "[t]he *Turner* must-carry rules did not directly target cable-operators' editorial discretion." *Ibid.*

In our view, *Turner* is not so easily distinguishable. In *Turner*, the interference with cable operators' speech was not the point of the regulations, nor was it gratuitous—it was necessary to further the government's interest in "the widespread dissemination of information from a multiplicity of sources." *Turner I*, 512 U.S. at 662. So too here. Section 7 does not "directly target" the Platforms' speech any more than the regulations in *Turner* targeted cable operators' speech. As in *Turner*, the law only obstructs the Platforms' expression to the extent necessary to protect the public's "access to a multiplicity of information sources." *Id.* at 663. The Platforms and the dissent offer no evidence that Section 7 gratuitously targets the Platforms' speech or imposes a burden on the Platforms' speech that doesn't further the goal of protecting Texans' expression.

neutral public forum, the State could have created its own government-run social-media platform." The same network effects that make the Platforms so useful to their users mean that Texas (or even a private competitor) is unlikely to be able to reproduce that network and create a similarly valuable communications medium. *See supra* at 57-58 & n.29. It's almost as absurd to tell Texas to just make its own Twitter as it would have been to tell broadcasters to just make their own cable systems. And aside from this bizarre claim, the Platforms offer no less restrictive alternative that would similarly advance Texas's interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner II*, 520 U.S. at 189.[35]

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35. Our esteemed colleague in dissent argues that "Section 7 burdens substantially more speech than necessary in order to further Texas's legitimate interests" because it prohibits demonetization, de-boosting, and other forms of discrimination in addition to outright bans or content removal. *Post*, at 17 (quotation omitted). We disagree for several reasons.

First, for some speakers who depend on advertising for their livelihoods, demonetization *is* tantamount to an outright ban because it dooms the financial viability of their enterprise and hence their speech. *See, e.g.*, Brief for Amici Curiae The Babylon Bee, LLC, et al. at 4 (explaining amici's reliance on monetization through social media platforms to disseminate speech).

Second, demonetization and de-boosting, in addition to outright bans, also thwart "the widest possible dissemination of information from diverse and antagonistic sources," an interest the Supreme Court has recognized as "essential to the welfare of the public." *Turner I*, 512 U.S. at 663 (quotation omitted). They do so

The Platforms also suggest Section 7 is inadequately tailored because it's under-inclusive. Specifically, they claim Texas could've applied Section 7 to smaller social media platforms too and could've excised the carveouts where the Platforms are still permitted to censor (like specific threats of violence). But Texas reasonably determined that the largest social media platforms' market dominance and network effects make them uniquely in need of regulation to protect the widespread dissemination of information. And regulating smaller platforms would intrude more substantially on private property rights and perhaps create unique constitutional problems of its own. *See PruneYard*, 447 U.S. at 101 (Powell, J., concurring in part and in the judgment) (implying hosting rules would raise additional First Amendment concerns if applied to small entities). With regard to carveouts, the Platforms do not

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by penalizing and disincentivizing the same diversity the Supreme Court has recognized as "essential." The dissent does not dispute the importance of Texas's interest. Yet it's hard to see how Texas can protect its interest in preserving a "multiplicity of information sources" if the Platforms may make them functionally invisible to users. *See ibid.*

Finally, applying intermediate scrutiny, Texas must show only that its "statutory classification [is] substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). It need not be perfect, or even the "least restrictive alternative that can be used to achieve [Texas's] goal." *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). Even if one chooses to nitpick at Texas's enumeration of prohibited discriminatory acts, they are all at least "substantially related" to the furtherance of its concededly important interest. *Clark*, 486 U.S. at 461.

explain how requiring them to host, say, specific threats of violence or direct incitement of criminal activity would have meaningfully advanced Texas's interest in protecting a widespread marketplace of ideas—especially when such speech enjoys no constitutional protection. *See, e.g.*, *Brandenburg*, 395 U.S. at 447-48.

Section 7 thus serves Texas's important interest in protecting the widespread dissemination of information, is unrelated to the suppression of free expression, and does not burden substantially more speech than necessary to advance Texas's interest. Section 7 therefore satisfies intermediate scrutiny and would be constitutional on that basis *even if* its censorship prohibitions implicated the Platforms' First Amendment rights.

IV.

The Platforms next contend that they are entitled to pre-enforcement facial relief against Section 2 of HB 20. Again, we disagree. Section 2 requires the Platforms to make certain disclosures that consist of "purely factual and uncontroversial information" about the Platforms' services. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985). Under the relevant Supreme Court precedent, the Platforms are therefore not entitled to facial relief against Section 2.

Section 2's requirements fall into three categories. First, there are what we will call the "one-and-done" disclosures: requirements to publish an acceptable

use policy and disclose certain information about the Platforms' content management and business practices. *See* Tex. Bus. & Com. Code §§ 120.051-52. Second, there is the biannual transparency-report requirement, which obligates the Platforms to publish a report containing high-level statistics about their content-moderation activities every six months. *See id.* § 120.053. Third, there is the complaint-and-appeal-process requirement, which obligates the Platforms to explain their content removal decisions, permit affected users to appeal such removals, and generally respond to appeals within 14 business days. *See id.* §§ 120.101-04.

Our review of these disclosure requirements is controlled by the Supreme Court's decision in *Zauderer*. That case established that States may require commercial enterprises to disclose "purely factual and uncontroversial information" about their services. 471 U.S. at 651. At the same time, the Court recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Ibid.* And disclosure requirements must be reasonably related to a legitimate state interest, like preventing deception of consumers. *See ibid.* Texas argues—and the Platforms do not dispute—that Section 2 advances the State's interest in "enabl[ing] users to make an informed choice" regarding whether to use the Platforms. Tex. Bus. & Com. Code § 120.051(b). Therefore, the only question is whether the State has carried its burden to show that the three categories of disclosures required by Section 2 are not unduly burdensome. *See Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. 2361, 2377, 201 L. Ed. 2d 835 (2021) ("*NIFLA*").

First, the one-and-done disclosures. Texas contends these impose a minimal burden, in part because the Platforms already largely comply with them. The Platforms respond that the one-and-done disclosures are unduly burdensome because Texas might find the disclosures inadequate and file suit. This argument is flawed on several levels. Most fundamentally, the Platforms do not explain how this concern can justify *pre-enforcement* relief against Section 2. The Platforms all but concede that publishing an acceptable use policy and high-level descriptions of their content and data management practices are not *themselves* unduly burdensome. Instead, they speculate that Texas will use these disclosure requirements to file unduly burdensome *lawsuits* seeking an unreasonably intrusive level of detail regarding, for example, the Platforms' proprietary algorithms. But the Platforms have no authority suggesting the fear of litigation can render disclosure requirements unconstitutional—let alone that the fear of *hypothetical* litigation can do so in a pre-enforcement posture.

Moreover, the Platforms' argument ignores the fact that under *Zauderer*, we must evaluate whether disclosure requirements are "unduly burdensome" by reference to whether they threaten to "chill[] protected commercial speech." 471 U.S. at 651 . That is, *Zauderer* does not countenance a broad inquiry into whether disclosure requirements are "unduly burdensome" in some abstract sense, but instead instructs us to consider whether they unduly burden (or "chill") protected *speech* and thereby

intrude on an entity's First Amendment speech rights.[36] Here, the Platforms do not explain how the one-and-done disclosure requirements—or even the prospect of litigation to enforce those requirements—could or would burden the Platforms' protected speech, even assuming that their censorship constitutes protected speech.

Second, the biannual transparency report. Texas contends this requirement imposes little burden because the Platforms already track many of the statistics required by this report. The Platforms concede this point. They've shared and relied on much of that data in this lawsuit, and they do not dispute that reporting many of the required statistics would impose little burden. But they assert, with no explanation, that other required statistics—like how the Platforms were alerted to policy-violating content—would not be feasible to collect. And they again suggest that Texas will try to enforce this

36. The Supreme Court's recent decision in *NIFLA* further illustrates the *Zauderer* framework. In *NIFLA*, the Court considered a California law requiring unlicensed clinics serving pregnant women to provide certain notices. 138 S. Ct. at 2376-77. The Court held that the law failed First Amendment scrutiny under *Zauderer*—not because it was "unduly burdensome" in some administrative or operational sense, but because it would chill the clinics' protected speech. For example, "a billboard for an unlicensed facility that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages." *Id.* at 2378. This would "drown[] out the facility's own message," and, as a practical matter, preclude it from speaking that message in the first place. *See ibid. NIFLA* confirms that we evaluate whether a law is "unduly burdensome" by considering its burden on protected *speech*.

disclosure requirement in a particularly intrusive manner, such as by "demand[ing] access to platforms' raw data."

These objections suffer from the same defects as the Platforms' arguments against the one-and-done disclosures. At best, they've shown that *some* of the transparency report's disclosures, *if* interpreted in a particularly demanding way by Texas, *might* prove unduly burdensome due to unexplained limits on the Platforms' technical capabilities. But none of these contingencies have materialized. And even if they did, a court would need to evaluate them on a case-by-case basis. Additionally, the Platforms have not explained how tracking the other purportedly more difficult statistics would unduly burden their protected *speech*, as opposed to imposing technical, economic, or operational burdens. So the Platforms are not entitled to facial pre-enforcement relief. *See Zauderer*, 471 U.S. at 651.

Third, the complaint-and-appeal process. Texas again argues that the burden imposed by this requirement is reasonable because the Platforms already do what Section 2 requires for large swaths of content they transmit. And the Platforms again respond that complying with this requirement will prove unduly burdensome and is technically infeasible. But because the Platforms already largely comply with the complaint-and-appeal-process requirement, their only claim of infeasibility is that it'd be difficult to scale up the Platforms' systems so as to provide a complaint-and-appeal process for all the content they host. And they provide just one example: YouTube comments. They emphasize that YouTube removed over

a billion comments in a three-month period in 2020 and that providing an appeal process for comment removals would be substantially more onerous than providing the (existing) system for video removals. The Platforms also argue that the complaint-and-appeal requirement threatens to chill protected speech. That's because, by requiring an explanation and appeal opportunity every time a Platform censors a user, the complaint-and-appeal requirement disincentivizes censorship in the first place.

Even if the Platforms' censorship was speech, and even assuming Section 2 would chill Google from censoring YouTube comments, that would not entitle the Platforms to facial pre-enforcement relief against Section 2. The Platforms only argue that the complaint-and-appeal requirement will chill censorship for one subset of one Platform's content. That falls far short of showing that "a substantial number of [Section 2's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 141 S. Ct. at 2387 (quotation omitted). The Platforms do not allege that any other application of the complaint-and-appeal requirement will chill protected speech. And they couldn't plausibly do so, because they already provide an appeals process substantially similar to what Section 2 requires for most other categories of content they host. One Platform CEO even testified that "[w]e believe that all companies should be required to provide a straightforward process to appeal decisions made by humans or algorithms."[37] That's hardly the stuff of a facial-overbreadth challenge.

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37. *Senate Hearings, supra*, at 2 (statement of Jack Dorsey, CEO, Twitter, Inc.).

Perhaps recognizing that Section 2 easily passes muster under *Zauderer*, the Platforms next contend that case is inapposite. They give two reasons. First, they object that these disclosure requirements are triggered by the same definition of "social media platform" that Section 7 uses—a definition they claim is impermissibly content-and speaker-based. But we've already rejected the argument that HB 20's definition of "social media platform" impermissibly targets particular content or particular speakers. *See supra* Part III.F.1.

Second, the Platforms claim the *Zauderer* standard does not apply to disclosure laws that implicate the editorial process—that is, laws requiring publishers to disclose their editorial policies or explain how they exercise editorial discretion. They rely on dicta from *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979), where the Court suggested a State may not subject a publisher's "editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest." *Id.* at 174. But *Herbert* held that a defamation plaintiff *could* obtain discovery into the editorial processes that allegedly defamed him. *Id.* at 175. And in the course of so holding, the Court rejected the editor's request to create "a constitutional privilege foreclosing direct inquiry into the editorial process." *Id.* at 176. The Platforms offer no authority suggesting we may create a constitutional privilege—akin to the one rejected in *Herbert*—for the disclosures mandated by Section 2.[38]

38. The Platforms also rely on *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), where the Fourth Circuit affirmed a

But the more fundamental problem with the Platforms' reliance on *Herbert* is that they do not have an "editorial process" that looks anything like a traditional publisher's. *See supra* Part III.C.2.c. *Herbert* involved discovery into how an editor selected, composed, and edited a particular story. *See* 441 U.S. at 156-57. But the Platforms, of course, neither select, compose, nor edit (except in rare instances *after* dissemination) the speech they host. So even if there was a different rule for disclosure requirements implicating a newspaper-like editorial process, that rule would not apply here because the Platforms have no such process. Put differently, the question in *Herbert* was whether the Court should craft a rule protecting *activities the Platforms do not even engage in*—and even then, the Court answered "no."

We need not decide whether the Platforms might have meritorious as-applied challenges to particular applications of Section 2. We reiterate, however, that the First Amendment protects the Platforms from unconstitutional burdens *on speech*—not disclosure requirements that are burdensome in the abstract. Here, the Platforms have sought pre-enforcement facial relief primarily by objecting to the technical and operational burdens Section 2 will impose, and by highlighting a

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preliminary injunction against a Maryland disclosure law targeting political campaign advertisements on online platforms. *McManus* is irrelevant for numerous reasons. Among them, Maryland's law burdened a particular topic of speech (and was therefore content-based), *see id.* at 513; singled out political speech, *see ibid.*; compelled speech by *actual* newspapers, *see id.* at 517-18; and violated doctrines related to campaign-finance law, *see id.* at 515-17.

small number of applications that they contend will prove particularly burdensome. We hold that this does not entitle the Platforms to pre-enforcement facial relief against Section 2.

V.

Texas was not the first State to enact a law regulating censorship by large social media platforms. In May 2021, Florida enacted SB 7072, which sought to protect political candidates and journalistic organizations from censorship by large social media platforms. *See* FLA. STAT. §§ 106.072, 501.2041.[39] The Eleventh Circuit recently held that platforms challenging SB 7072 were entitled to a preliminary injunction against most of its provisions. *See NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196 (11th Cir. 2022).

The Platforms urge us to follow the Eleventh Circuit's *NetChoice* opinion. We will not. Most fundamentally, (A) SB 7072 and HB 20 are dissimilar laws in many legally relevant ways. Much of the Eleventh Circuit's reasoning is thus consistent with or irrelevant to our resolution of the Platforms' claims in this case. It's also true, however, that (B) we disagree with the Eleventh Circuit's reasoning at three critical junctures.

39. The full text of SB 7072 can be accessed here: https://perma.cc/6WPF-4WC6.

Appendix A

A.

Florida's and Texas's laws are very different. Three differences bear particular emphasis here.

First, SB 7072 only targets censorship of speech by political candidates and journalistic enterprises, as well as censorship of speech "about" political candidates. *See* FLA. STAT. §§ 106.072(2), 501.2041(2)(h), (2)(j). Under SB 7072, Platforms may not censor speech by or about a political candidate, full stop—no matter whether the speech is obscene or threatening. *See id.* § 501.2041(2)(h). And Platforms may only censor a journalistic enterprise's expression if it is obscene. *Id.* § 501.2041(2)(j). But when it comes to non-journalists' speech that doesn't relate to a political campaign, the Platforms may continue to censor for any reason or no reason.[40]

Thus, to generalize just a bit, SB 7072 prohibits *all* censorship of *some* speakers, while HB 20 prohibits *some* censorship of *all* speakers. Texas's law permits non-viewpoint-based censorship and censorship of certain constitutionally unprotected expression regardless of who the speaker is. And HB 20 applies to all speakers equally, instead of singling out political candidates and journalists for favored treatment. These are of course highly relevant distinctions when deciding whether SB 7072 and HB 20 are impermissibly content-or speaker-based laws and

40. The only provision of SB 7072 arguably limiting censorship outside the realms of political candidates and journalists is § 501.2041(2)(b), which requires covered platforms to apply censorship standards "in a consistent manner." SB 7072 does not define "consistent."

whether they sufficiently tailored to satisfy heightened First Amendment scrutiny. *See NetChoice*, 34 F.4th at 1229 (relying on the absence of exceptions to hold that Florida's absolute ban on censoring political candidates' speech is insufficiently tailored to satisfy intermediate scrutiny).

Second, several of SB 7072's provisions arguably interfere with covered platforms' own speech, instead of merely regulating how they transmit the speech of others. For example, Florida defines censorship to include "post[ing] an addendum to any content or material posted by a user." FLA. STAT. § 501.2041(1)(b). Additionally, the Platforms may not modify their "rules, terms, and agreements" more than once every 30 days. *Id.* § 501.2041(2)(c). These provisions restrict the Platforms' own speech—they can't append a warning to a candidate's or journalist's post, and they can't explain changes to their terms of service if they've already done so in the past month. HB 20, by contrast, does not interfere with the Platforms' own speech in any way; they remain free to say whatever and whenever they want about their terms of service, about any user's post, or about anything else.

Third, SB 7072's remedial scheme markedly differs from HB 20's. Florida may collect fines of up to $250,000 per day for certain violations. *Id.* § 106.072(3). For others, platform users may win up to $100,000 in statutory damages per claim—along with actual and punitive damages. *Id.* § 501.2041(6). On the other hand, HB 20 does not permit the recovery of any damages; it only provides for prospective declaratory and injunctive relief. This distinction is significant when considering whether a pre-

enforcement facial challenge is appropriate, especially given overbreadth doctrine's concern with the chilling effect of challenged laws. *Cf. NetChoice*, 34 F.4th at 1230-31 (noting Florida's law "provides for up to $100,000 in statutory damages per claim and pegs liability to vague terms like 'thorough' and 'precise'" and holding this threatens to chill protected speech).

Because of these and other distinctions between Florida's and Texas's laws, the Eleventh Circuit's reasoning is either inapposite to or consistent with several of our holdings. In particular, our application of heightened First Amendment scrutiny and our evaluation of HB 20's disclosure requirements are reconcilable with the Eleventh Circuit's opinion.

B.

We part ways with the Eleventh Circuit, however, on three key issues. Unlike the Eleventh Circuit, we (1) do not think the Supreme Court has recognized "editorial discretion" as an independent category of First-Amendment-protected expression. And even if it had, we (2) disagree with the Eleventh Circuit's conclusion that the Platforms' censorship is akin to the "editorial judgment" that's been mentioned in Supreme Court doctrine. Finally, we (3) disagree with the Eleventh Circuit's conclusion that the common carrier doctrine does not support the constitutionality of imposing nondiscrimination obligations on the Platforms.[41]

41. The Eleventh Circuit also held, relying on its own precedent, that the Platforms' censorship constitutes protected expressive

Appendix A

1.

The Eleventh Circuit reasoned that the Supreme Court's decisions in *Miami Herald, PG&E, Turner I*, and *Hurley* establish an "editorial-judgment principle" under which a private entity has a First Amendment right to control "whether, to what extent, and in what manner to disseminate third-party-created content to the public." *NetChoice*, 34 F.4th at 1212. But this purported rule is

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conduct. *See NetChoice*, 34 F.4th at 1212-13. As noted earlier, the Platforms have not made an expressive-conduct argument in this case. *See supra* at 31 n.14. Even so, we are perplexed by the Eleventh Circuit's holding that "social-media platforms engage in content moderation that is inherently expressive notwithstanding [*Rumsfeld*]." *NetChoice*, 34 F.4th at 1218.

The Eleventh Circuit suggested that the Platforms' "targeted removal of users' speech" is different from law schools' targeted denial of access to military recruiters because "a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval." *Id.* at 1217; *see also id.* at 1217 n.15. But of course, a reasonable observer watching a law school eject a military recruiter would also infer a message of disapproval. The Supreme Court held that doesn't matter because an observer who merely sees the military recruiting off campus could not know *why* the recruiter was off campus. *See Rumsfeld*, 547 U.S. at 66. Maybe it's more convenient; maybe it's because the law school ejected the military; maybe it's some other reason. Likewise with the Platforms. An observer who merely sees a post on "The Democratic Hub," *NetChoice*, 34 F.4th at 1214, could not know *why* the post appeared there. Maybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason. Without more information, the observer has no basis for inferring a "particularized message" that Twitter disapproved the post. *Johnson*, 491 U.S. at 404. The Eleventh Circuit attempted to thread an eyeless needle.

never mentioned by the cases the Eleventh Circuit relied on. And it's flatly contradicted by other Supreme Court cases that the Eleventh Circuit addressed only as an afterthought.

First, none of the cases the Eleventh Circuit relied on recognize an "editorial-judgment principle" or a distinct category of First Amendment protection for "editorial judgment." Instead, each case explains how the challenged regulation either compelled or restricted *speech*. In *Miami Herald*, for example, Florida's right-of-reply law both forced the *Miami Herald* to implicitly convey an editorial endorsement of speech it opposed and limited its opportunity to engage in other speech it would have preferred. *See* 418 U.S. at 256-58. Likewise in *Turner I*, the Court explained that "must-carry rules regulate cable speech" because they obstruct cable operators' ability to express or convey the particular messages or programs they've chosen. 512 U.S. at 636-37; *see also PG&E*, 475 U.S. at 9-16; *Hurley*, 515 U.S. at 572-77.

If the Eleventh Circuit's rule was the Supreme Court's rule, then all of those cases would have been easy analytical softballs. The Court would have merely needed to explain that the cases involved a private entity that wanted to control—that is, exercise "editorial judgment" over—speech it hosted. And that would have been the end of each case. But that's not the analytical route the Supreme Court took. Instead, it focused on whether the challenged regulation either compelled or restricted the private entity's own speech—and explained at length why the regulations in *Miami Herald, PG&E, Turner I*, and *Hurley* did so.

Second and more importantly, the Eleventh Circuit's "editorial-judgment principle" conflicts with *PruneYard* and *Rumsfeld*. The Eleventh Circuit tries to square its rule with *PruneYard* by noting that there, the forum owner didn't make an editorial-judgment argument. *NetChoice*, 34 F.4th at 1215. Perhaps, although that writes *PruneYard* out of the U.S. Reports by making the precedent irrelevant as long as a speech host chants the magical incantation "editorial judgment!" But then we get to *Rumsfeld*, where the forum owner *did make* the editorial-judgment argument: The law schools claimed a "First Amendment right to decide whether to disseminate or accommodate a military recruiter's message" in their forum. 547 U.S. at 53. Yet the Supreme Court unanimously rejected the claimed right to choose who speaks in the law schools' forum because "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything." *Id.* at 60.

The Eleventh Circuit tried to square its "editorial-judgment principle" with *Rumsfeld* by asserting that "[s]ocial-media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech." *NetChoice*, 34 F.4th at 1216. The Eleventh Circuit thus relied on the fact that social media platforms' *business* is disseminating users' speech, whereas law schools' core business is not disseminating job recruiters' speech. On the Eleventh Circuit's reasoning, the business of disseminating speech is protected editorial judgment even if casual or sporadic dissemination is not.

This distinction turns law, logic, and history on their heads. First, law: The Supreme Court's cases have never stated or implied that this distinction is dispositive. If they had, phone companies and shipping services would be free to discriminate, while PG&E (whose primary business is providing electricity, not disseminating speech) would have no First Amendment right to decline to share its billing envelope space with a third party.

Next, logic: If a firm's core business is disseminating others' speech, then that should weaken, not strengthen, the firm's argument that it has a First Amendment right to censor that speech. In *PruneYard*, for example, the shopping mall was open to the public—but for the purpose of shopping, not sharing expression. So it was perhaps tenuous for the State to use the public nature of the mall to justify a *speech*-hosting requirement. *Cf. PruneYard*, 447 U.S. at 95 (White, J., concurring in part) (noting that California's hosting requirement involved communication "about subjects having no connection with the shopping centers' business"). But here, the Platforms are open to the public *for the specific purpose* of disseminating the public's speech. It's rather odd to say that a business has more rights to discriminate when it's in the speech business than when it's in some altogether non-speech business (like shopping or legal education).

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Last, history: Communications firms have historically been the principal targets of laws prohibiting viewpoint-discriminatory transmission of speech. *See supra* Part III.E. By contrast, if an entity carried speech, people, or other goods only "as a casual occupation," *see* STORY, COMMENTARIES ON THE LAW OF BAILMENTS, *supra*, § 495, common carrier obligations could not be imposed. So there's no basis in history, logic, or law for distinguishing *Rumsfeld* on the ground that law schools' core business is not disseminating speech.

The Eleventh Circuit also distinguished *Rumsfeld* on the ground that social media platforms, unlike law schools, disseminate "curated collections of speech." *NetChoice*, 34 F.4th at 1216. This curation means that social media platforms are engaged in "editorial judgment" while law schools are not. But that's backwards. The law schools in *Rumsfeld* deliberately reviewed the content and viewpoint of bulletin board notices and emails before disseminating

them to students on behalf of employers. But social media platforms, after algorithmic screening to filter obscenity and spam, arrange and transmit expression to users while remaining agnostic as to far more than 99% of that expression's content and viewpoint. *See Moody*, 546 F. Supp. 3d at 1091-92. If either entity is "curating" expression in the ordinary sense—that is, engaging in substantive, discretionary review to decide what merits inclusion in a collection—it's the law schools. A person's social media feed is "curated" in the same sense that his mail is curated because the postal service has used automated screening to filter out hazardous materials and overweight packages, and then organized and affixed a logo to the mail before delivery. And it has never been true that content-agnostic processing, organizing, and arranging of expression generate some First Amendment license to censor. Were it otherwise, not only would *Rumsfeld* have come out the other way, but all sorts of nondiscrimination obligations currently imposed on communications firms and mail carriers would be unconstitutional.

2.

The foregoing explains why the Eleventh Circuit's articulation of its "editorial-judgment principle" conflicts with Supreme Court precedent. But even if editorial judgment was a freestanding category of First-Amendment-protected expression, the Eleventh Circuit's explanation of why the Platforms' censorship falls into that category is unpersuasive.

The Eleventh Circuit did not discuss the glaring distinctions between the Platforms' censorship and the editorial judgment described in *Miami Herald* and *Turner I*. For example, cable operators "exercise substantial editorial discretion in the selection and presentation of their programming"—that is, they select (with great care) *beforehand* a limited repertoire of channels to transmit. *Ark. Educ.*, 523 U.S. at 673. Newspapers similarly publish a narrow "choice of material" that's been reviewed and edited beforehand, and they are subject to legal and reputational responsibility for that material. *See Miami Herald*, 418 U.S. at 258; *see also id.* at 261-62 (White, J., concurring). The Eleventh Circuit did not suggest the Platforms operate similarly.

Instead, the Eleventh Circuit tried to equate the Platforms' censorship with the editorial processes of newspapers and cable operators by reasoning that "Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities." *NetChoice*, 34 F.4th at 1213. For example, YouTube censors some content to create a "welcoming community"; Facebook censors to "foster authenticity, safety, privacy, and dignity"; and Twitter censors "to ensure all people can participate in the public conversation freely and safely." *Ibid.* (quotation omitted). Because the Platforms censor speech to further these amorphous goals, the Eleventh Circuit held, the censorship is protected by the First Amendment. *See ibid.*

Recall that under the Eleventh Circuit's framework, the presence of editorial judgment generates a First

Amendment right to censor. But now, censorship itself—as long as it's explained by a generalized appeal to some attractive value—constitutes editorial judgment. This is circular: The Platforms have a right to censor because they exercise editorial judgment, and they exercise editorial judgment because they censor. The only arguably non-circular part of this framework is the apparent requirement that the censorship be justified by appealing to something like a "welcoming community" (as opposed to, say, an "unwelcoming one"). But the Eleventh Circuit gives this requirement no meaningful content: The Platforms may establish a First Amendment right to censor by invoking any generalized interest, like "fostering authenticity," without even explaining how viewpoint-based censorship furthers that interest. The practical upshot is that telephone companies, email providers, shipping services, or any other entity engaged in facilitating speech can acquire a First Amendment license to censor disfavored viewpoints by merely gesturing towards "safety" or "dignity." That is not the law, as *Miami Herald* and *Turner I* illustrate and *PruneYard* and *Rumsfeld* confirm.

3.

The Eleventh Circuit quickly dismissed the common carrier doctrine without addressing its history or propounding a test for how it should apply. *See id.* at 1219-22. This part of the Eleventh Circuit's opinion is also unpersuasive.

The Eleventh Circuit "confess[ed] some uncertainty" as to whether the State's position was "(a) that platforms are *already* common carriers" or "(b) that the State can, by dint of ordinary legislation, *make* them common carriers." *Id.* at 1220. It then rejected each position in turn. First, it reasoned that the Platforms are not already common carriers because pre-existing law did not already regulate them as such. *See ibid.* Moreover, the Platforms don't currently follow common carrier obligations.[42] And pre-SB 7072 and HB 20 judicial decisions note the lack of government regulation of internet forums.[43] Second, it

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42. In this vein, the Eleventh Circuit found it significant that "social-media platforms have never acted like common carriers" and that users must "accept their terms of service and abide by their community standards." *NetChoice*, 34 F.4th at 1220. Of course, violating common carrier obligations has never been sufficient to exempt a firm from common carrier obligations. The dominant telegraph companies, for example, offered discriminatory services before States regulated them as common carriers. *See supra* Part III.E. Similarly, most or all common carriers have terms of service—for example, one must accept FedEx's terms to ship a package—and common carriers retain the right to remove unruly passengers or obscene transmissions. The Eleventh Circuit presents no authority suggesting this somehow forecloses common carrier regulation.

43. The Eleventh Circuit primarily focused on *Turner I*, analogizing social media platforms to cable broadcasters. But nothing in *Turner I* suggests that regulating social media platforms as common carriers would be unconstitutional. The opposite is true: Even the *Turner I* dissenters—the Justices who were *more* protective of cable operators' speech rights—strongly suggested the First Amendment would not prevent regulating cable operators as common carriers. *See* 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part) ("Congress might also conceivably obligate cable operators to act as common carriers for some of their

reasoned that the State can't regulate them as common carriers because they are not already common carriers: That would give the "government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier." *Id.* at 1221.

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. And it's inconsistent with the common-law history and tradition discussed earlier, where common carrier nondiscrimination obligations were extended from ferries, to railroads, to telegraphy, to telephony, and so on. *See supra* Part III.E. The Eleventh Circuit didn't purport to reconcile its approach with this history. The implication is that history doesn't matter because SB 7072 is unconstitutional under the Eleventh Circuit's "editorial-judgment principle." But the Eleventh Circuit offers no persuasive justification for reading that principle into the Constitution, especially when it would contravene a deeply rooted common law nondiscrimination doctrine that's centuries older than the Constitution itself. *See supra* Part III.E.1.

* * *

The First Amendment protects speech: It generally prevents the government from interfering with people's

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channels . . . . [I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies.").

speech or forcing them to speak. The Platforms argue that because they host and transmit speech, the First Amendment also gives them an unqualified license to invalidate laws that hinder them from censoring speech they don't like. And they say that license entitles them to pre-enforcement facial relief against HB 20.

We reject the Platforms' attempt to extract a freewheeling censorship right from the Constitution's free speech guarantee. The Platforms are not newspapers. Their censorship is not speech. They're not entitled to pre-enforcement facial relief. And HB 20 is constitutional because it neither compels nor obstructs the Platforms' own speech in any way. The district court erred in concluding otherwise and abused its discretion by issuing a preliminary injunction. The preliminary injunction is VACATED, and this case is REMANDED for further proceedings consistent with this opinion.

Appendix A

No. 21-51178, *NetChoice v. Paxton*

EDITH H. JONES, *Circuit Judge*, concurring:

I concur in Judge Oldham's conclusion and reasoning that the business of the regulated large social media platforms is hosting the speech of others. Functioning as conduits for both makers and recipients of speech, the platforms' businesses are closer analytically to the holdings of the Supreme Court in *PruneYard* and *FAIR* than to *Miami Herald, Pacific Gas & Electric*, and *Hurley*. It follows from the first two cases that in arbitrarily excluding from their platforms the makers of speech and preventing disfavored speech from reaching potential audiences ("censoring," in the comprehensive statutory term), they are not themselves "speaking" for First Amendment purposes.

In particular, it is ludicrous to assert, as NetChoice does, that in forbidding the covered platforms from exercising viewpoint-based "censorship," the platforms' "own speech" is curtailed. But for their advertising such "censorship"—or for the censored parties' voicing their suspicions about such actions—no one would know about the goals of their algorithmic magic. It is hard to construe as "speech" what the speaker never says, or when it acts so vaguely as to be incomprehensible. Further, the platforms bestride a nearly unlimited digital world in which they have more than enough opportunity to express their views in many ways other than "censorship." The Texas statute regulates none of their verbal "speech." What the statute does, as Judge Oldham carefully explains, is ensure that

a multiplicity of voices will contend for audience attention on these platforms. That is a pro-speech, not anti-free speech result.

Another way to look at this case, however, is through the *Turner I* decision, in which the Supreme Court held that cable TV companies are to some extent engaged in First Amendment-covered "speech" when, as they "operate" their systems, they determine which cable channels to host.[1] Using intermediate scrutiny, the Court did not reject federal must-carry regulations requiring hosting of certain preferred channels. Instead, the Court distinguished both *Pacific Gas & Electric* and *Miami Herald* for three reasons. First, the must-carry regulations were content neutral. Second, they did not force cable operators to modify their own speech, nor were viewers likely to associate the mandatory hosted speech with that of the operators. And third, a cable operator's selection of channels controlled the flow of information into subscribers' households, and could "thus silence the voice of competing speakers with the mere flick of a switch." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. at 656, 114 S. Ct. at 2466. I find all of these points compellingly applicable to analyzing the regulations imposed on large social media platforms by the Texas statute before us.[2]

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1. I do not believe it necessary to determine whether the Texas statute survives this facial attack on the theory of common carrier regulation and therefore do not subscribe to that portion of Judge Oldham's opinion. *Turner I*, in my view, is applicable irrespective of overarching common carrier theory.

2. And as Judge Oldham notes, the dissenters in *Turner I* did not disavow the possibility of some regulation in the monopolistic context in which most cable companies then operated.

Finally, even if there is a legitimate basis to argue that the Texas statute may chill the platforms' "speech," it is not sufficient to sustain a facial attack, as Judge Oldham explains. Case by case adjudication is a small burden on the Goliaths of internet communications if they contend with Davids who use their platforms.

Appendix A

LESLIE H. SOUTHWICK, *Circuit Judge*, *concurring in part and dissenting in part*:

The central question in this case is whether social media platforms engage in First Amendment-protected expression when they moderate their users' content. The erudite opinion of my colleagues in the majority says no. Although there are parts of the opinion I join, I write separately because, fundamentally, I conclude the answer to the question is yes.

First, some points of agreement. As to the discussion of the First Amendment, the majority is certainly correct that a successful facial challenge to a state law is difficult. Consequently, I agree that a facial challenge to the Disclosure and Operations provisions in Section 2 of HB 20 is unlikely to succeed on the merits. These portions of the law ought not to be enjoined at the preliminary injunction stage.

I also agree with my colleagues that the social media Platforms represented by NetChoice are "firms of tremendous public importance." The part they have chosen to play in modern public discourse is at times detrimental to the healthy exchange of competing ideas. The argument here is that the Platforms blatantly censor the views of those with whom they disagree, leaving no equivalent platform available to the speakers they scorn. The Platforms certainly have taken aggressive, inconsistent positions before legislative, regulatory, and now judicial bodies about the relevance of the First Amendment to their actions. They pursue maximum freedom to shape

discourse while accepting no liability for the content they host.

The legal issues before us, though, must be separated from any disquiet irrelevant to the application of the First Amendment. My disagreement with my colleagues lies in the application of First Amendment principles to the anti-discrimination provisions of Section 7. The majority frames the case as one dealing with conduct and unfair censorship. The majority's rejection of First Amendment protections for *conduct* follows unremarkably. I conclude, though, that the majority is forcing the picture of what the Platforms do into a frame that is too small. The frame must be large enough to fit the wide-ranging, free-wheeling, unlimited variety of expression — ranging from the perfectly fair and reasonable to the impossibly biased and outrageous — that is the picture of the First Amendment as envisioned by those who designed the initial amendments to the Constitution. I do not celebrate the excesses, but the Constitution wisely allows for them.

The majority no doubt could create an image for the First Amendment better than what I just verbalized, but the description would have to be similar. We simply disagree about whether speech is involved in this case. Yes, almost none of what others place on the Platforms is subject to any action by the companies that own them. The First Amendment, though, is what protects the curating, moderating, or whatever else we call the Platforms' interaction with what others are trying to say. We are in a new arena, a very extensive one, for speakers and for those who would moderate their speech. None of the

precedents fit seamlessly. The majority appears assured of their approach; I am hesitant. The closest match I see is caselaw establishing the right of newspapers to control what they do and do not print, and that is the law that guides me until the Supreme Court gives us more.

What follows is my effort to work with the same material the majority analyzed. My desire is to explain why the Platforms' moderating third-party-content is speech, where that speech fits into the broader body of First Amendment jurisprudence, and how I analyze the effect of Section 7 of HB 20 on that speech.

I. Content moderation and the First Amendment

The critical question is whether the anti-discrimination provisions in Section 7 of HB 20 regulate non-expressive conduct or whether they regulate First Amendment-protected activity. The majority concludes that "Section 7 does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct*." Maj. Op. at 7. The majority's perceived censorship is my perceived editing. The Platforms can act with obvious bias. The lack of First Amendment protection for their biases is not so obvious.

The majority has discussed the careful work of another circuit on the same essential questions. In assessing a similar law, the Eleventh Circuit held "a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First

Amendment" and that "social-media platforms' content-moderation decisions constitute the same sort of editorial judgments and thus trigger First Amendment scrutiny." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022). I agree.

The question we must answer is similar. In explaining my answer, I begin with an overview of what the Platforms currently do with content and a reminder of the obligations imposed by Section 7. The Platforms admit they take an active role in determining which pieces of content reach individual users: "Platforms compile, curate, and disseminate a combination of user-submitted expression, platform-authored expression, and advertisements." To varying degrees, the Platforms all "control[] who can access their platforms, what kinds of content [are] available, and how that content is presented to users."

Section 7 limits the ability of Platforms to engage in these activities by imposing anti-discrimination policies. Platforms "may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented . . . ; or (3) a user's geographic location." TEX. CIV. PRAC. & REM. CODE § 143A.002(a). "Censor" is a defined term that reaches many of the Platforms' core activities. *See id.* § 143A.001. The Platforms may engage in the activities in varying frequency, but when the Platforms engage in any content moderation based on the views represented in the content, they "deny equal access or visibility to, or otherwise discriminate against expression" and violate the statute. *Id.*

These activities native to the digital age have no clear ancestral home within our First Amendment precedent. Their closest relative may be what the Supreme Court held newspapers were permitted to do in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). I see the Platforms' curating or moderating as the current equivalent of a newspaper's exercise of editorial discretion. This view requires me to consider many of the same authorities reviewed by the majority and explain where my conclusions diverge from those of my colleagues.[1]

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1. The majority analyzes several authorities when distinguishing between regulations on "hosting" speech and either requiring the "host" to speak or interfering with the host's own message. I add one more. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("*Turner I*"); *see* Maj Op. Part III.C.1. Although I think *Miami Herald* is the case closest to the matter at hand, I discuss *Turner I* here because it interpreted *Miami Herald* and served as a basis for the decision in the *Hurley* case. *See Turner I*, 512 U.S. at 636-41, 653-57; *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). Additionally, as discussed below, *Turner I* emphasizes that, in the modern communications context, an entity may "host" the speech of others while simultaneously engaging in First Amendment activity of its own. *See* 512 U.S. at 636-37.

Further, I will not engage with the majority's analysis of the history of prior restraint. It is certainly a detailed review, with debatable points along the way. I limit my analysis to the extent needed to explain why I believe the Platforms are engaged in First Amendment-protected activity.

I start with *Miami Herald*, which considered a Florida statute that "grant[ed] a political candidate a right to equal space to reply to criticism . . . by a newspaper." 418 U.S. at 243. The Miami newspaper sought declaratory relief that the law was unconstitutional.[2] The majority recounts the basic facts of the case, then quotes the following passage:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The 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 — constitute the exercise of editorial control and judgment.

Id. at 258. I wish to add, though, what the Court stated in the next sentence: "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

The majority sees the Court as having held that "[b]ecause a newspaper prints a curated set of material selected by its editors, everything it publishes is, in a sense, the newspaper's own speech," and that newspapers "cannot be compelled to 'publish that which reason tells them should not be published.'" *See* Maj. Op. at 22 (quoting

2. 418 U.S. at 245; *contra* Maj. Op. at 13 (including *Miami Herald* in the contention that all of NetChoice's cases "involved challenges to concrete applications of an allegedly unconstitutional law, raised by a defendant in state court proceedings").

Miami Herald, at 256). The majority does not, though, understand the Court to have recognized the selection process itself as First Amendment expression. *See* Maj. Op. at 83. I do. There were at least two levels of publisher speech involved. Certainly, a traditional publisher cannot be forced to adopt speech with which they disagree. That was the first premise that underlay the *Miami Herald* holding. 418 U.S. at 256. The Court went further, though. It recognized that "[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 — constitute the exercise of editorial control and judgment" and that the Court did not see "how governmental regulation of this crucial process" was consistent with the First Amendment. *Id.* at 258. I read this as establishing the selection process itself as First Amendment-protected activity.

Six years later, the Court considered the right of high school students to engage in their own First Amendment activity at a local shopping mall. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). After mall security told the students to stop distributing political literature, the students sued the shopping mall owner in state court for infringing on their speech rights under the California state constitution. *Id.* The students succeeded in state courts. *Id.* at 78. At the Supreme Court, the owner of the shopping mall argued that being forced to host the students' speech by the State of California violated both the owner's property rights under the Fifth and Fourteenth Amendments

and free speech rights under the First and Fourteenth Amendments. *Id.* at 76-77.

In considering the shopping center owner's assertion that *Miami Herald* controlled the case, the Court stated that the precedent "rests on the principle that the State cannot tell a newspaper what it must print," and that the concerns present in *Miami Herald* — forced speech, chilling of debate — were not present because the plaintiffs sought "to exercise state-protected rights of expression and petition." *PruneYard*, 447 U.S. at 88. The Court, though, made clear in a previous section of its opinion that the rights needed to be exercised in a situation where those "activities [did] not interfere with normal business operations." *Id.* at 78.

The Supreme Court qualified *PruneYard* just six years later in *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (plurality op.) ("*PG&E*"). As the majority in our present case discusses, a plurality of the *PG&E* Court held that the California Public Utilities Commission's order to allocate space in PG&E's newsletter to third party groups that opposed PG&E's own messages at certain times throughout the year violated PG&E's First Amendment rights. *Id.* at 20-21. In doing so, the plurality explained the limits of *PruneYard*: "notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speech." *Id.* at 12. Justice Marshall, who contributed the fifth vote and concurred in the judgment, agreed, observing that the *PruneYard* mall's owner did

not want speech by the students, but "he nowhere alleged that his own expression was hindered in the slightest." *Id.* at 24 (Marshall, J., concurring in the judgment). The regulations infringed on PG&E's speech, though; the order, affording rebuttal space to opposing parties could chill speech if PG&E found that "the safe course [was] to avoid controversy," and the regulations would "abridge [PG&E's] own rights in order to enhance the relative voice of its opponents." *Id.* at 14 (plurality op.).

The Court subsequently applied the principles outlined in those precedents in the context of cable television. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("*Turner I*"). The Court considered federal regulations requiring cable operators to set aside certain channels for commercial broadcast stations. *See id.* at 630; *id.* at 674 (Stevens, J., concurring in the judgment). Most obviously, these rules burdened cable *programmers* "by reducing the number of channels for which they [could] compete." *Id.* at 645. Writing for a majority of the Court, though, Justice Kennedy further explained that cable *operators* also "engage in and transmit speech" when, "[t]hrough 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Id.* at 636 (quoting *Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 494, 106 S. Ct. 2034, 90 L. Ed. 2d 480 (1986) (establishing the same)).[3] In other words, the

3. Although the four dissenting Justices did not join this part of the opinion, they agreed that the must-carry rules implicated the

must-carry provisions "interfere[d] with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," even though they did so in a way that did "not depend upon the content of the cable operators' programming." *Id.* at 643-44.

As is relevant to Part II of this opinion, the *Turner I* majority then considered the level of scrutiny appropriate for the must-carry rules and whether the laws met that level of scrutiny. *Id.* at 641-61. The majority rejected the Government's argument that rational basis scrutiny should apply, but also decided against the cable operators' contention that *Miami Herald* and *PG&E* dictated strict scrutiny. *Id.* at 640-41, 661-62. As part of its scrutiny analysis, the majority found three considerations present in *Turner I* that were not present in *Miami Herald* and *PG&E* : (1) the rules were "content neutral" because they were "not activated by any particular message spoken by cable operators"; (2) the rules would not "force cable operators to alter their own messages to respond to the broadcast programming they are required to carry"; and (3) there was "physical control" by the cable operators over a piece of communications infrastructure. *Id.* at 655-57. These factors, together, suggested a lower tier of scrutiny should be applied. *Id.* at 661-62.

In sum, First Amendment rights were exercised in two ways in *Turner I*: (1) the speech of cable programmers

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First Amendment rights of cable operators. *Id.* at 675 (O'Connor, J., dissenting). They would have labeled the rules as unconstitutional content-based restrictions on the cable operators' speech. *Id.* at 685.

when they transmitted their own message, and (2) the exercise of "editorial discretion." *Id.* at 636. The regulations were held to be content neutral regulations — though unquestionably regulations on First Amendment-protected expression — and the case was remanded for further factfinding to determine whether summary judgment for the Government was appropriate. *Id.* at 662-63; *id.* at 669 (Stevens, J., concurring in the judgment).[4] The must-carry rules were then upheld under the intermediate scrutiny standard for content neutral regulations on speech when the case returned to the Supreme Court. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224-25, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) ("*Turner II*").

The very next term, the Supreme Court decided *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). In considering whether a parade, recognized by Massachusetts's highest court as a public accommodation but organized by a private party, could be forced under state law to include participation by an organization of gay, lesbian, and bisexual individuals, the Court held that a parade was "a form of expression." *Id.* at 568. In

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4. The majority gleans a separate insight from *Turner I*: "Most significant for our purposes, even the four dissenting Justices believed Congress could have permissibly imposed more modest common carrier regulations." *See [*136]* Maj. Op. at 60. I discuss common carrier treatment below. Most significant for me, though, is that all Justices — in the majority and dissent — understood that some degree of First Amendment scrutiny attended the must-carry rules. *See* 512 U.S at 675 (O'Connor, J., dissenting).

identifying protected expression, the *Hurley* Court did not stop there: "The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." *Id.* at 569. The Court analyzed *Turner I* and *Miami Herald*, reiterating that "[c]able operators . . . are engaged in protected speech activities even when they only select programming originally produced by others," and that "the presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First Amendment security . . . as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper." *Id.* at 570 (citing *Turner I*, 512 U.S. at 636; *Miami Herald*, 418 U.S. at 258; *New York Times v. Sullivan*, 376 U.S. 254, 265-66, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). This selection needed not be based on any particular theme, as the Court pointed out that one "does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70. This constituted the Court's clear statement that protected expression lies not merely in the message or messages transmitted but in the process of collecting and presenting speech.

Finally, there is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("*FAIR*"). In *FAIR*, the Court analyzed *Miami Herald, PG&E*, and *Hurley* in the context of a group of law schools seeking a declaratory judgment against the enforcement of the Solomon Amendment, a

law that denied federal funding to schools that did not give military recruiters "access to students that is at least equal in quality and scope to the access provided other potential employers." *Id.* at 54, 63 (quotation marks and citation omitted). In upholding the constitutionality of the Solomon Amendment, the Court held that "[t]he compelled speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. "[B]ecause the schools are not speaking when they host interviews and recruiting receptions," the regulation did "not affect the law schools' speech." *Id.* at 64. This was because "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive" and "recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Id.* Further, as in *PruneYard*, there was "little likelihood that the views of those engaging in expressive activity would be identified with the [property] owner" because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65.

This review of the authorities provides the material for my conclusion that the *Miami Herald* opinion is the most comparable to what is before us in this appeal. When the Platforms curate their users' feeds, which are the behaviors prohibited in Section 7 of HB 20, they are exercising their editorial discretion. That is a type of First Amendment-protected activity recognized in

Miami Herald, PG&E, Turner, and *Hurley*. The majority disagrees that editorial discretion is a category, instead asserting that the Supreme Court has merely "treated editorial discretion as a factual consideration supporting their legal conclusions about the presence or absence of protected speech." Further, the majority concludes that "[n]either [*Miami Herald* nor *Turner I*] implied that editorial discretion is itself a freestanding category of constitutionally protected expression." Maj. Op. at 35 (emphasis omitted). Respectfully, such an interpretation disregards the Supreme Court's recognition that there may be more than one type of First Amendment activity occurring by the same speaker when, for instance, an article is selected and printed in a newspaper — or, in our context, a tweet posted or video listed. If anything, the majority's research and reasoning supports the Platforms' contention that First Amendment protections attend the publishing *process* as well as the actual published *content*.

I do not read *PruneYard* and *FAIR* to suggest anything to the contrary. The hosting mandate upheld by the *PruneYard* Court did not interfere with speech published and adopted by the shopping mall, nor did it interfere with a selection process for determining which speech was permitted. As the Eleventh Circuit recently remarked, "the only First Amendment interest that the mall owner asserted was the right 'not to be forced by the state to use [its] property as a forum for the speech of others.'" *NetChoice*, 34 F.4th at 1215 (quoting *PruneYard*, 447 U.S. at 85)). *PG&E* and *Hurley* both suggest that this lack of alleged speech activity by the *PruneYard* proprietor was operative in the analysis. *See PG&E*, 475 U.S. at 11-12; *Hurley*, 515 U.S. at 580.

FAIR also demonstrates this distinction. In that case, the law schools attempted to draw an analogy to *Hurley*, arguing that hosting military recruiters unconstitutionally compelled the schools to accommodate the military's message. *FAIR*, 547 U.S. at 63. The *FAIR* Court distinguished *Hurley* by making clear that "the expressive nature of a parade was central to [the] holding," and that because "'every participating unit affects the message conveyed by the . . . organizers,'" a law dictating inclusion of a particular group "alters the expressive content of the parade." *Id.* (quoting *Hurley*, 515 U.S. at 572-73). There was no "inherently expressive" nature to a law school's decision to allow recruiters on campus, though. *Id.* at 64. The Court explained that "a law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Id.* The same simply cannot be said for the Platforms. Expression is the very core of their identity and existence.

In short, although *PruneYard* and *FAIR* establish situations in which the Supreme Court has "upheld government regulations that effectively compelled private actors to 'host' others' speech," in neither case did the Supreme Court uphold regulations that interfered with the private actors' own speech. *See NetChoice*, 34 F.4th at 1215-16.

I see no importance to the fact that the Platforms' moderation will usually follow actual publication. *Contra* Maj. Op. at 37-38. In the Platforms' world, it is usually the only practical means to moderate content. Certainly, in those instances in which a particular speaker is

barred entirely, the discretion is exercised in advance. Platforms may also use technology to screen out content they believe does not match their terms of service. Unlike traditional publications, though, where editorial discretion will precede publishing, the majority of decisions on moderating what has been posted can only be made, as a practical matter, after the appearance of the content on the Platform. As discussed later, Congress recognized this reality through the passage of Section 230. I am aware of no authority that denies First Amendment rights to otherwise-protected speech based on similar questions about timing. Editorial discretion is exercised when it is sensible and, in many situations, even possible to do so. The First Amendment fits new contexts and new technologies as they arise.

II. Implications of content moderation as speech

With the understanding that the Platforms are in fact engaging in First Amendment expression, I turn to the task of determining whether it is likely that HB 20 impermissibly infringes on that expression.

As the Supreme Court discussed in a compelled-speech case last term, plaintiffs bringing facial challenges usually "must establish that no set of circumstances exists under which the [law] would be valid or show that the law lacks a plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387, 210 L. Ed. 2d 716 (2021) (quotation marks and citation omitted). "[T]he First Amendment context," though, implicates "a second type of facial challenge, whereby a law may

be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)). Overbreadth analysis is proper in challenges to compelled speech as in *Bonta* and in challenges to statutory limitations on speech as was the case in *Stevens*, where the Court considered a law criminalizing the creation, sale, or possession of depictions of animal cruelty, widely defined. *See Stevens*, 559 U.S. at 464, 474.

I join the majority in concluding that the overbreadth doctrine is the proper mode of analysis for this case. *See* Maj. Op. Part III.A. The question is whether "a substantial number of [HB 20's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 141 S. Ct. at 2387.

Because the First Amendment applies, we must decide the applicable level of scrutiny. I do not have confidence about the level of scrutiny that the Supreme Court will one day apply to activities such as those engaged in by these platforms. It is sufficient now to accept the majority's conclusion that intermediate scrutiny applies to Section 7.[5] I can agree because Section 7's restrictions on the Platforms' speech do not survive such scrutiny.

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5. *See also Netchoice LLC*, 34 F.4th at 1223-27 (acknowledging that strict scrutiny may apply to several provisions of a similar law but analyzing those provisions under intermediate scrutiny since the provisions were unlikely to withstand even the lower tier of scrutiny). I also question whether at least some of Section 7's provisions are content neutral.

Appendix A

Intermediate scrutiny analysis in the First Amendment context allows content neutral regulations upon the finding of three elements:

> A content-neutral regulation will be sustained . . . [1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Turner I, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)).

Texas can satisfy the first two elements if it establishes that Section 7 of HB 20 serves an important or substantial government interest unrelated to the suppression of free expression. Certainly, this does not mean Texas must adopt the "least restrictive alternative," a test for a different level of scrutiny, but these elements are significant demands. In *Turner II*, a plurality of the Court referred to three substantial governmental interests: "1) preserving the benefits of free, over-the-air local broadcast television, 2) promoting the widespread dissemination of information from a multiplicity of sources, and 3) promoting fair competition in the market for television programming." 520 U.S. at 189 (quotation marks and citation omitted); *see id.* at 226 (Breyer, J., concurring in part) (accepting rationales 1 and 2 but

recognizing that must-carry regulation "extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming.").

My able colleagues in the majority argue the second interest applies here — "promoting the widespread dissemination of information from a multiplicity of sources." Unlike in *Turner*, though, the Texas statute strives to promote speech by first targeting the content of others' speech, *i.e.*, it prohibits Platform "censorship" on the basis of viewpoint. (I acknowledge that, yet again, the fundamental division between my view and that of the majority is whether the Platforms are "speaking" when they exercise their editorial discretion.) Texas argues this satisfies the interest recognized in the *Turner* opinions because it will increase the multiplicity of views on the Platforms — arguably a good result. That justification, though, alters the interest that *Turner* actually recognized.

The *Turner* must-carry rules did not directly target cable-operators' editorial discretion. Instead, the must-carry rules supported the interest of the non-cable subscribing public in accessing information without needing to use the cable operators' platforms. The regulations sought to improve the viability of traditional commercial broadcast media in order "to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public." *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (adding

the fifth vote to affirm the Government's interest in "promoting widespread dissemination of information from a multiplicity of sources"). Indeed, any interference with the cable operators' speech to promote the traditional broadcaster's ability to speak was the "price" and not the purpose of the regulation. *Id.* Here, of course, interference with expressing views is both the purpose and the price. HB 20 directly interferes with the editorial choices the Platforms make — which I consider First Amendment expression — as both a means and end. In *Turner*, the cable operators could displace any programming they wanted in order to make room for local commercial broadcast media, thereby helping local broadcast stations survive that new technology. *See Turner I*, 512 U.S. at 636-37 (acknowledging the set-aside for local broadcasters and that it would be "more difficult for cable programmers to compete for carriage on the limited channels remaining").

Had the justification for the must-carry rules been only a governmental interest of having cable operators express additional views, the rules should have been struck down because of *Miami Herald*. The Court has recognized that the state "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011); *see also Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612, 46 L. Ed. 2d 659 (recognizing that there is no interest in "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others" as the First Amendment "was designed to secure the widest possible dissemination of information from diverse and antagonistic sources" (quotation marks and citation omitted)).

I agree with the Eleventh Circuit when it reiterated the message from *Miami Herald*: "preventing unfairness to certain users or points of view isn't a substantial government interest; rather private actors have a First Amendment right to be 'unfair' — which is to say, a right to have and express their own points of view." *NetChoice*, 34 F.4th at 1228 (quotation marks and citation omitted). That is the case here.

Further regarding the relevance of unfairness, the majority considers it extraordinary that counsel for one of the Platforms at oral argument answered a question from the court by agreeing a Platform could, as the majority opinion states, "ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community." Maj. Op. at 2. Extreme hypotheticals necessarily lead to extreme answers when a First Amendment right is involved. The First Amendment does not moderate its protections based on the content of the speech, with irrelevant exceptions.

In no manner am I denying the reasonableness of the governmental interest. When these Platforms, that for the moment have gained such dominance, impose their policy choices, the effects are far more powerful and widespread than most other speakers' choices. The First Amendment, though, is not withdrawn from speech just because speakers are using their available platforms unfairly or when the speech is offensive. The asserted governmental interest supporting this statute is undeniably related to the suppression of free expression. The First Amendment bars the restraints.

Setting aside that the purpose of Texas's law is related to suppressing First Amendment activity, I also believe there is a strong likelihood that Section 7 burdens "substantially more speech than necessary in order to further [Texas's] legitimate interests." *See Turner I*, 512 U.S. at 662. The scope of conduct prohibited by Section 7 is broad:

> A social media platform may not [block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against] a user, a user's expression, or a user's ability to receive the expression of another person based on [the user's viewpoint, the viewpoint represented, or geographic location].

Tex. Civ. Prac. & Rem. Code, §§ 143A.001-002.

If Texas's interest is in "protecting the free exchange of ideas and information in this state," prohibitions (for example) on demonetization, de-boosting, "denying equal access or visibility to" or "otherwise discriminat[ing] against," likely go too far. If the goal is only to make more speech available, there is no reason that the Platforms should have to publish — as an extreme example — pro-Nazi expression, while monetizing, recommending, and giving equal treatment to such content as might be given to anti-Nazi expression. When Platforms elevate certain third-party content above other third-party content, they engage in their own First Amendment expression, and the broad-based prohibition against engaging in this editorial

discretion whenever "viewpoint" is at issue is hardly narrow tailoring that "does not burden substantially more speech than necessary" to further a legitimate interest. *See Turner I*, 512 U.S. at 662.

III. Common carrier designation, Section 230, and other rationales for abrogating First Amendment rights

One of my colleagues concludes that common carrier classification of the Platforms and Section 230 provide further support for the constitutionality of HB 20. I address both arguments.

A common carrier designation, which I doubt is appropriate, would not likely change any of my preceding analysis. Few of the cases cited in the discussion on common carrier law concern the intersection of common carrier obligations and First Amendment speech rights. The only precedents that do discuss this intersection reinforce the idea common carriers retain their First Amendment protections for their own speech. *See id.* at 636.

Section 230 also does not affect the First Amendment right of the Platforms to exercise their own editorial discretion through content moderation. My colleague suggests that "Congress's judgment" as expressed in 47 U.S.C. § 230 "reinforces our conclusion that the Platforms' censorship is not speech under the First Amendment." Maj. Op. at 39. That opinion refers to this language: "No provider or user of an interactive computer service"

— interactive computer service being a defined term encompassing a wide variety of information services, systems, and access software providers — "shall be treated as the publisher or speaker of any information provided by another content provider." 47 U.S.C. § 230(c)(1). Though I agree that Congressional fact-findings underlying enactments may be considered by courts, the question here is whether the Platforms' barred activity is an exercise of their First Amendment rights. If it is, Section 230's characterizations do not transform it into unprotected speech.

The Platforms also are criticized for what my colleague sees as an inconsistent argument: the Platforms analogize their conduct to the exercise of editorial discretion by traditional media outlets, though Section 230 by its terms exempts them from traditional publisher liability. This may be exactly how Section 230 is supposed to work, though. Contrary to the contention about inconsistency, Congress in adopting Section 230 never factually determined that "the Platforms are not 'publishers.'" Maj. Op. at 41. As one of Section 230's co-sponsors — former California Congressman Christopher Cox, one of the amici here — stated, Section 230 merely established that the platforms are not to be treated as the publishers of pieces of content when they take up the mantle of content moderation, which was precisely the problem that Section 230 set out to solve: "content moderation . . . is not only consistent with Section 230; its protection is the very *raison d'etre* of Section 230." In short, we should not force a false dichotomy on the Platforms. There is no reason "that a platform must be classified for all purposes as *either* a publisher or a

mere conduit." In any case, as Congressman Cox put it, "because content moderation is a form of editorial speech, the First Amendment more fully protects it beyond the specific safeguards enumerated in § 230(c)(2)." I agree.

IV. Other preliminary injunction factors

In reviewing the grant of a preliminary injunction, this court considers three other factors in addition to the likelihood of success on the merits: the substantial threat of irreparable harm should the injunction not be granted, the balance of harms, and the public interest. *See Atchafalaya Basinkeeper v. United States Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018). "Loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury." *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Accordingly, to prevent the Platforms from establishing that the balance of such harms weighs in their favor, Texas "would need to present powerful evidence of harm to its interests." *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012). Further, "[i]njunctions protecting First Amendment freedoms are always in the public interest." *Id.* (quotation marks and citation omitted). Because I see the enforcement of the anti-discrimination provisions of Section 7 of HB 20 as likely unconstitutional infringements on First Amendment freedoms, these factors would also favor preliminary relief against those provisions.

V. Conclusion

This is a difficult case. We are seeking the closest analogies among the precedents. The Supreme Court will, as always, have the final word. For now, I conclude Section 7's anti-discrimination provisions are an unconstitutional infringement on the Plaintiffs' rights to edit or remove, after the fact, speech that appears on their private Platforms. My understanding of their rights does not mean that "email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate or business," as suggested by the majority. It does mean that when the social media Platforms who are in the business of speech make decisions about which speech is permitted, featured, promoted, boosted, monetized, and more, they are engaging in activity to which First Amendment protection attaches. Balance and fairness certainly would be preferable, but the First Amendment does not require it.

I concur with the judgment in Part IV of the majority's opinion. I respectfully dissent from the remainder.

APPENDIX B — Order of the United States District Court for the Western District of Texas, Austin Division, Filed December 1, 2021

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:21-CV-840-RP

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION, AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6)
NON-STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF TEXAS,

Defendant.

December 1, 2021, Decided
December 1, 2021, Filed

ORDER

Before the Court is Plaintiffs NetChoice, LLC d/b/a NetChoice ("NetChoice"), a 501(c)(6) District of Columbia organization, and Computer & Communications

Industry Association d/b/a CCIA ("CCIA"), a 501(c)(6) non-stock Virginia corporation's ("Plaintiffs") Motion for Preliminary Injunction, (Dkt. 12), Defendant Texas Attorney General Ken Paxton's (the "State") response in opposition, (Dkt. 39), and Plaintiffs' reply, (Dkt. 48). The Court held the preliminary injunction hearing on November 29, 2021. (Dkt. 47). After considering the parties' briefs and arguments, the record, and the relevant law, the Court denies the motion to dismiss and grants the preliminary injunction.

I. BACKGROUND

A. The Challenged Legislation: HB 20

In the most recent legislative session, the State sought to pass a bill that would "allow Texans to participate on the virtual public square free from Silicon Valley censorship." Senator Bryan Hughes (@SenBryanHughes), TWITTER (Mar. 5, 2021, 10:48 PM), https://twitter.com/SenBryanHughes/status/1368061021609463812. Governor Greg Abbott voiced his support, tweeting "[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas." Greg Abbott (@GregAbbott_TX), TWITTER (Mar. 5, 2021, 8:35 PM), https://t.co/JsPam2XyqD. After a bill failed to pass during the regular session or the first special session, Governor Abbott called a special second legislative session directing the Legislature to consider and act on legislation "protecting social-media and email users from being censored." (Proclamation by the Governor of the State of Texas (Aug. 5, 2021), https://gov.texas.gov/uploads/files/

press/PROC_second_called_session_87th_legislature_IMAGE_08-05-21.pdf. The Legislature passed House Bill 20 ("HB 20"), and Governor Abbott signed it into law on September 9, 2021. (Prelim. Inj. Mot., Dkt. 12, at 16).

HB 20 prohibits large social media platforms from "censor[ing]" a user based on the user's "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002 ("Section 7"). Specifically, Section 7 makes it unlawful for a "social media platform" to "censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in this state or any part of this state." *Id.* § 143A.002(a)(1)-(3). The State defines social media platforms as any website or app (1) with more than 50 million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other "for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code §§ 120.001(1), 120.002(b); Tex. Civ. Prac. & Rem. Code § 143A.003(b). HB 20 applies to sites and apps like Facebook, Instagram, Pinterest, TikTok, Twitter, Vimeo, WhatsApp, and YouTube. (Prelim. Inj. Mot., Dkt. 12, at 11); (*see* CCIA Decl., Dkt. 12-1, at 3-4; NetChoice Decl., Dkt. 12-2, at 3-4). HB 20 excludes certain companies like Internet service providers, email providers, and sites and apps that "consist[] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider" and user comments are "incidental to" the content. Tex. Bus.

& Com. Code § 120.001(1)(A)-(C). HB 20 carves out two content-based exceptions to Section 7's broad prohibition: (1) platforms may moderate content that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment," and (2) platforms may moderate content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)-(3).

HB 20 also requires social media platforms to meet disclosure and operational requirements. Tex. Bus. & Com. Code § 120.051, 120.101-.104 ("Section 2"). Section 2 requires platforms to publish "acceptable use policies," set up an "easily accessible" complaint system, produce a "biannual transparency report," and "publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding how the social media platform: (i) curates and targets content to users; (ii) places and promotes content, services, and products, including its own content, services, and products; (iii) moderates content; (iv) uses search, ranking, or other algorithms or procedures that determine results on the platform; and (v) provides users' performance data on the use of the platform and its products and services." *Id.* § 120.051(a).

If a user believes a platform has improperly "censored" their viewpoint under Section 7, the user can sue the platform, which may be enjoined, and obtain attorney's fees. Tex. Civ. Prac. & Rem. Code § 143A.007(a), (b). Lawsuits can be brought by any Texan and anyone doing business in the state or who "shares or receives expression in this state." *Id.* §§ 143A.002(a), 143A.004(a), 143A.007. In addition, the Attorney General of Texas may "bring an action to enjoin a violation or a potential violation» of HB 20 and recover their attorney›s fees. *Id.* § 143A.008. Failure to comply with Section 2's requirement also subjects social media platforms to suit. The Texas Attorney General may seek injunctive relief and collect attorney's fees and "reasonable investigative costs" if successful in obtaining injunctive relief. Tex. Bus. & Com. Code § 120.151.

Finally, HB 20 contains a severability clause. Tex. Civ. Prac. & Rem. Code § 143A.008(a). "If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Id.* § 143A.008(b).

HB 20 goes into effect on December 2, 2021. *Id.* § 143A.003-143A.008 (noting that the effective date is December 2, 2021).

Plaintiffs recently challenged a similar Florida law in the Northern District of Florida in *NetChoice v. Moody*, successfully obtaining a preliminary injunction to halt the enforcement of that law. The district court in that case

described the Florida legislation as "an effort to rein in social-media providers deemed too large and too liberal." No. 4:21CV220-RH-MAF, 546 F. Supp. 3d 1082, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *12 (N.D. Fla. June 30, 2021). The Florida court concluded that

> Balancing the exchange of ideas among private speakers is not a legitimate governmental interest. And even aside from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny. It is also subject to strict scrutiny because it discriminates on its face among otherwise-identical speakers: between social-media providers that do or do not meet the legislation's size requirements and are or are not under common ownership with a theme park. The legislation does not survive strict scrutiny. Parts also are expressly preempted by federal law.

Id. The court's preliminary injunction has been appealed to the Eleventh Circuit.

B. Procedural Background

Plaintiffs are two trade associations with members that operate social media platforms that would be affected by HB 20. (Compl., Dkt. 1, at 1-2); (Prelim. Inj. Mot., Dkt. 12, at 11). Plaintiffs filed their lawsuit on September 22, 2021, challenging HB 20 because it violates the First Amendment; is void for vagueness; violates the commerce

clause, full faith and credit clause, and the Fourteenth Amendment's due process clause; is preempted under the supremacy clause by the Communications Decency Act, 47 U.S.C. § 230; and violates the equal protection clause of the Fourteenth Amendment. (Compl., Dkt. 1, at 31, 35, 38, 41, 44). In their motion for preliminary injunction, Plaintiffs request that this Court preliminarily enjoin the Texas Attorney General from enforcing Sections 2 and 7 of HB 20 against Plaintiffs and their members. (Dkt. 12, at 54).

In response to the motion for preliminary injunction, the State requested expedited discovery, (Mot. Discovery, Dkt. 20), which Plaintiffs opposed, (Dkt. 22). The Court granted the State's request, in part, permitting "narrowly-tailored, expedited discovery" before the State would be required to respond to the preliminary injunction motion. (Order, Dkt. 25, at 3). The Court expressed its confidence in the State to "significantly tailor its discovery requests . . . to obtain precise information without burdening Plaintiffs' members." (*Id.* at 4). Several days later, Plaintiffs filed a motion for protective order, (Dkt. 29), which the Court granted, (Order, Dkt. 36). In that Order, the Court allowed the State to depose Plaintiffs' declarants, request documents relied on by those declarants, and serve interrogatories directed to Plaintiffs. (*Id.* at 2).

Additionally, the State filed a motion to dismiss about to two weeks after Plaintiffs filed their motion for preliminary injunction. (Mot. Dismiss, Dkt. 23). The State argues that Plaintiffs lack associational or organizational standing. (*Id.*). Plaintiffs respond that they

have associational standing to represent their members covered by HB 20 and also have organizational standing. (Resp. Mot. Dismiss, Dkt. 28).

Finally, Plaintiffs filed a motion to strike the expert report of Adam Candeub, which was attached to the State's opposition to the preliminary injunction motion. (Mot. Strike, Dkt. 43). Plaintiffs challenge the report by Candeub, who is a law professor at Michigan State University, for being a "second legal brief" that offers "nothing more than (incorrect) legal conclusions." (*Id.* at 2). Plaintiffs argue that it is well-established that an expert may not render conclusions of law. (*Id.*). They also argue that his "methodology" is unreliable because his tests are simply legal standards. (*Id.* at 4-5). Immediately before this Court issued this opinion, the State filed an opposition brief. (Dkt. 50). Because the Court does not rely on Candeub's report, the Court will dismiss Plaintiffs' motion to strike without prejudice as moot.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited subject matter jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to

adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960, 122 S. Ct. 2665, 153 L. Ed. 2d 839 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

Appendix B

III. DISCUSSION

A. Plaintiffs Have Standing To Bring This Suit

In its motion to dismiss, the State asserts that Plaintiffs lack associational and organizational standing and their complaint should be dismissed. (Dkt. 23). Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. art. III, 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). A key element of the case-or-controversy requirement is that a plaintiff must establish standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). To establish Article III standing, a plaintiff must demonstrate that she has "(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 560-61. "[W]hen standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.'" *Pennell v. City of San Jose*, 485 U.S. 1, 7, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

1. Plaintiffs Have Associational Standing

"Associations may assert the standing of their own members." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 377 (5th Cir. 2021). An association must meet three elements to

establish associational standing: (1) "its members would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* Plaintiffs easily meet these requirements for associational standing. The Court steps through each of the three requirements below.

a. Plaintiffs' Members Have Standing to Sue in Their Own Right

Plaintiffs' members include social media platforms like "Facebook, Google, YouTube, [and] Twitter," as recognized by the State, (Mot. Dismiss, Dkt. 23, at 3), that would be subject to regulation by the State through HB 20. Despite the State's contention otherwise, (Mot. Dismiss, Dkt. 23, at 3-4), Plaintiffs show that their members would suffer an injury-in-fact if HB 20 goes into effect. "[A] plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). In their complaint, Plaintiffs allege that their members are "directly subject to and regulated by H.B. 20 because they qualify as 'social media platforms' within H.B. 20's definition of the term," "exercise editorial judgments that are prohibited by H.B. 20," and will "face serious legal

consequences for failing to comply with" HB 20. (Compl, Dkt. 1, at 5-6). Plaintiffs state that some of its members, like Facebook and YouTube, would be compelled to publish content that violates their policies and otherwise would be removed through their exercise of editorial judgment. (Compl., Dkt. 1, at 6). Plaintiffs' members do not resemble "'passive receptacle[s]' where users are free to share their speech without review or rebuke unless unlawful," as the State claims. (Mot. Dismiss, Dkt. 23, at 5). Plaintiffs also allege that "Paxton has given every indication that he intends to use all legally available enforcement tools against Plaintiffs' members" and support that allegation with Paxton's press releases and posts. (*Id.* at 10) ("In a January 9, 2021, tweet criticizing Twitter, Facebook, and Google for allegedly targeting 'conservative' speech, Defendant Paxton vowed, 'As AG, I will fight them with all I've got.'").

Additionally, Plaintiffs have alleged that HB 20 threatens their members with classic economic harms. "[E]conomic injury is a quintessential injury upon which to base standing." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). In their Complaint, Plaintiffs allege that their members "will incur significant costs to comply with the provisions in Sections 2 and 7 of H.B. 20. The statute will force members to substantially modify the design and operation of their platforms. The necessary modifications will impose onerous burdens upon members' respective platforms and services, interfering with their business models and making it more difficult for them to provide high quality services to their users." (Compl., Dkt. 1, at 7). Furthermore, Plaintiffs allege their members

will suffer damage to their brands and goodwill, (*id.* at 8), and their members will be forced to disclose technical information that will cost them competitive advantage and make it harder to block content, (*id.* at 7-8). Based on these detailed allegations, the complaint sufficiently alleges the injuries to Plaintiffs' members caused by HB 20.

b. The Interests at Stake Are Germane to the Members' Purpose

The State does not dispute this prong of the standing analysis. As Plaintiffs note in their opposition brief: "Defendant does not dispute Plaintiffs satisfy the second prong. Nor could he. H.B. 20's intrusion on the rights of Internet websites and applications is germane to Plaintiffs' respective interests." (Resp. Mot. Dismiss, Dkt. 28, at 11 n.3).

c. This Lawsuit Does Not Require the Participation of Plaintiffs' Members

The State argues that Plaintiffs' claims require the participation of Plaintiffs' members. (Mot. Dismiss, Dkt. 23, at 14). Plaintiffs seek to block the State's enforcement of the provisions of HB 20 that are facially unconstitutional. A facial challenge generally is not fact intensive and does not require individual members to participate. *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 580 (W.D. Tex. 2020) (recognizing associational standing to bring "facial" "content-based," "vagueness," "overbreadth," and "preemption" challenges). Plaintiffs assert facial challenges "based on the doctrines of compelled

speech, infringing editorial discretion, a 'content-based' and speaker-based law, 'vagueness, 'overbreadth,' 'preemption,' and extraterritorial regulation." (Resp. Mot. Dismiss, Dkt. 28, at 21). Each doctrine forms the basis for finding HB 20 facially invalid. (*See id.*) (citing *Nat'l Press*, 504 F. Supp. 3d at 580; *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378, 201 L. Ed. 2d 835 (2018) (sustaining content-based facial challenge based on compelled speech); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (sustaining content-based facial challenge based on infringing editorial discretion); *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 668 (4th Cir. 2018) (a "state law violates the extraterritoriality principle if it [] expressly applies to out-of-state commerce") (emphasis added); *Garza v. Wyeth LLC*, 2015 U.S. Dist. LEXIS 9292, 2015 WL 364286, at *4 (S.D. Tex. Jan. 27, 2015) ("The preemption decision is not evidence-based but is rather a question of law.")). While the State argues the Court cannot determine whether Plaintiffs' members are common carriers, which the State argues is a crucial step in this Court's First Amendment analysis, without the participation of Plaintiffs' members, (Mot. Dismiss, Dkt. 23, at 15), the Court finds that it can determine, if necessary, whether Plaintiffs' members are common carriers. Likewise, the Court can rule on Plaintiffs' other facial challenges, like their commerce clause claim, and conduct the proper level of scrutiny analysis on Plaintiffs' First Amendment claim. Additionally, Plaintiffs' requested relief—enjoining Paxton from enforcing Sections 2 and 7 of HB 20 against them and their members—is a proper and tailored remedy that would not necessarily require

the individual participation of their members. "Injunctive relief 'does not make the individual participation of each injured party indispensable to proper resolution[.]'" *Texas Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 505 (5th Cir. 2021) (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

2. Plaintiffs Have Organizational Standing

Independent of their associational standing on behalf of their members, Plaintiffs have organizational standing to challenge HB 20. In their complaint, Plaintiffs allege the "already incurred costs and will continue to divert their finite resources—money, staff, and time and attention—away from other pressing issues facing their members to address compliance with and the implications of H.B. 20 for Internet companies." (Compl., Dkt. 1, at 5). Plaintiffs continue that they would "no longer divert those finite resources to address H.B. 20" if it were declared unlawful and enjoined. (*Id.*). Plaintiffs' injury as an organization need not be "large" or "substantial." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) ("[I]t need not measure more than an 'identifiable trifle.' This is because 'the injury in fact requirement under Article III is qualitative, not quantitative, in nature.'") (quoting *Association of Community Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999)). Plaintiffs sufficiently allege that they have diverted resources and incurred expenses as an organization to prepare for HB 20's effects on Plaintiffs' members. *See id.* at 611-14.

Having considered the State's arguments and having found that Plaintiffs have both associational standing to challenge HB 20 on behalf of their members and organizational standing to challenge it based on their own alleged injuries, the Court denies the State's motion to dismiss. This Court's ruling is supported by the fact that the Northern District of Florida enjoined a similar Florida law that was challenged by these same exact Plaintiffs, and there was no dispute in that case—in which the State of Texas filed an amicus brief—that Plaintiffs lacked standing to assert the rights of their members to challenge that state law.

B. Plaintiffs Have Shown Likelihood of Success on the Merits

Plaintiffs bring several claims against the State, and the Court focuses on Plaintiffs' claim that HB 20 violates the First Amendment.[1] To succeed on their motion for a preliminary injunction, then, Plaintiffs must show that HB 20 compels private social media platforms to "disseminate third-party content and interferes with their editorial discretion over their platforms."[2] (Prelim. Inj. Mot., Dkt. 12, at 23).

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1. The Court need not and does not reach the issues of whether HB 20 is void for vagueness, preempted by the Communications Decency Act, or violates the Commerce Clause.

2. Findings and conclusions about the merits of this case should be understood only as statements about Plaintiffs' likelihood of success based on the record and law currently before this Court.

Appendix B

1. Social Media Platforms Exercise Editorial Discretion Protected by the First Amendment

The parties dispute whether social media platforms are more akin to newspapers that engage in substantial editorial discretion—and therefore are entitled to a higher level of protection for their speech—or a common carrier that acts as a passive conduit for content posted by users—and therefore are entitled to a lower level of protection, if any. Plaintiffs urge the Court to view social media platforms as having editorial discretion to moderate content, and the State advocates that social media platforms act as common carriers that may be compelled by the government to publish speech that is objectionable. Before the Court attempts to settle that debate, the Court evaluates whether the First Amendment guarantees social media platforms the right to exercise editorial discretion.

More than twenty years ago, the Supreme Court recognized that "content on the Internet is as diverse as human thought," allowing almost any person to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). The *Reno* Court concluded that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* Disseminating information is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001)

("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.")) (cleaned up).

Social media platforms have a First Amendment right to moderate content disseminated on their platforms. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932, 204 L. Ed. 2d 405 (2019) (recognizing that "certain private entities[] have rights to exercise editorial control over speech and speakers on their properties or platforms"). Three Supreme Court cases provide guidance. First, in *Tornillo*, the Court struck down a Florida statute that required newspapers to print a candidate's reply if a newspaper assailed her character or official record, a "right of reply" statute. 418 U.S. at 243. In 1974, when the opinion was released, the Court noted there had been a "communications revolution" including that "[n]ewspapers have become big business . . . [with] [c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns [being] the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 248-49. Those concerns echo today with social media platforms and "Big Tech" all the while newspapers are further consolidating and, often, dying out. Back to 1974, when newspapers were viewed with monopolistic suspicion, the Supreme Court concluded that newspapers exercised "editorial control and judgment" by selecting the "material to go into a newspaper," deciding the "limitations on the size and content of the

paper," and deciding how to treat "public issues and public officials—whether fair or unfair." *Id.* at 258. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, the Supreme Court held that a private parade association had the right to exclude a gay rights group from having their own float in their planned parade without being compelled by a state statute to do otherwise. 515 U.S. 557, 572-73, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). The Massachusetts law at issue—which prohibited discrimination in any public place of "public accommodation, resort[,] or amusement"—did not "target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals." *Id.* at 572. The Court reasoned that the state's equal-access law "alter[ed] the expressive content" of the private organization. *Id.* "[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The Court clarified: "Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.*

Finally, the Supreme Court ruled that California could not require a private utility company to include a third

party's newsletters when it sent bills to customers in *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 20-21, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986). There, for decades, the private utility company sent a newsletter to its customers with monthly bills, and California required it to include the third-party newsletter, a newsletter the private utility company disagreed with. *Id.* at 4-5. Relying on *Tornillo*, the Court analogized that "[j]ust as the State is not free to tell a newspaper in advance what it can print and what it cannot, the State is not free either to restrict [the private utility company's] speech to certain topics or views or to force [it] to respond to views that others may hold." *Id.* at 11 (internal quotation marks and citations omitted). "[A] forced access rule that would accomplish these purposes indirectly is similarly forbidden." *Id.* The private utility company had the "right to be free from government restrictions that abridge its own rights in order to enhance the relative voice of its opponents." *Id.* at 14 (internal quotation marks omitted). That was because a corporation has the "choice of what not to say" and cannot be compelled to "propound political messages with which they disagree." *Id.* at 16.

The Supreme Court's holdings in *Tornillo*, *Hurley*, and *PG&E*, stand for the general proposition that private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content. That proposition has repeatedly been recognized by courts. (*See* Prelim. Inj. Mot., Dkt. 12, at 26) (collecting cases). Satisfied that such editorial discretion is protected

from government-compelled speech, the Court turns to whether social media platforms engage in protectable editorial discretion.

This Court starts from the premise that social media platforms are not common carriers.[3] "Equal access obligations . . . have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 740, 423 U.S. App. D.C. 183 (D.C. Cir. 2016). Little First Amendment concern exists because common carriers "merely facilitate the transmission of speech of others." *Id.* at 741. In *United States Telecom*, the Court added broadband providers to its list of common carriers. *Id.* Unlike broadband providers and telephone companies, social media platforms "are not engaged in indiscriminate, neutral transmission of any and all users' speech." *Id.* at 742. User-generated content on social media platforms is screened and sometimes moderated or curated. The State balks that the screening is done by an algorithm, not a person, but whatever the method, social media platforms are not mere conduits. According to the State, our inquiry could end here, with Plaintiffs not needing to prove more to show they engage in protected editorial discretion. During the hearing, the Court asked the State, "[T]o what extent does a finding that these entities are common carriers, to what extent is that important from your perspective in the bill's ability to survive a First Amendment challenge?" (*See*

3. HB 20's pronouncement that social media platforms are common carriers, Tex. H.B. No. 20, 87th Leg., 2nd Sess. § 1(4) (2021), does not impact this Court's legal analysis.

Minute Entry, Dkt. 47). Counsel for the State responded, "[T]he common carriage doctrine is essential to the First Amendment challenge. It's why it's the threshold issue that we've briefed . . . . It dictates the rest of this suit in terms of the First Amendment inquiry." (*Id.*). As appealing as the State's invitation is to stop the analysis here, the Court continues in order to make a determination about whether social media platforms exercise editorial discretion or occupy a purgatory between common carrier and editor.

Social media platforms "routinely manage . . . content, allowing most, banning some, arranging content in ways intended to make it more useful or desirable for users, sometimes adding their own content." *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *7. Making those decisions entails some level of editorial discretion, *id.*, even if portions of those tasks are carried out by software code. While this Court acknowledges that a social media platform's editorial discretion does not fit neatly with our 20th Century vision of a newspaper editor hand-selecting an article to publish, focusing on whether a human or AI makes those decisions is a distraction. It is indeed new and exciting—or frightening, depending on who you ask—that algorithms do some of the work that a newspaper publisher previously did, but the core question is still whether a private company exercises editorial discretion over the dissemination of content, not the exact process used. Plaintiffs' members also push back on the idea that content moderation does not involve judgment. For example, Facebook states that it makes decisions about "billions of pieces of content" and "[a]ll such decisions are unique and context-specific[] and

involve some measure of judgment." (Facebook Decl., Dkt. 12-4, at 9).

This Court is convinced that social media platforms, or at least those covered by HB 20, curate both users and content to convey a message about the type of community the platform seeks to foster and, as such, exercise editorial discretion over their platform's content. Indeed, the text of HB 20 itself points to social media platforms doing more than transmitting communication. In Section 2, HB 20 recognizes that social media platforms "(1) curate[] and target[] content to users, (2) place[] and promote[] content, services, and products, including its own content, services, and products, (3) moderate[] content, and (4) use[] search, ranking, or other algorithms or procedures that determine results on the platform." Tex. Bus. & Com. Code § 120.051(a)(1)-(4). Finally, the State's own basis for enacting HB 20 acknowledges that social media platforms exercise editorial discretion. "[T]here is a dangerous movement by social media companies to silence conservative viewpoints and ideas." *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, Office Of The Tex. Governor (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship. "Texans must be able to speak without being censored by West Coast oligarchs." Bryan Hughes (@SenBryanHughes), TWITTER (Aug. 9, 2021, 4:34 PM), https://twitter.com/SenBryanHughes/status/1424846466183487492 Just like the Florida law, a "constant theme of [Texas] legislators, as well as the Governor . . . , was that the [platforms'] decisions on what to leave in or take out and how to present the surviving

material are ideologically biased and need to be reined in." *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *7. Without editorial discretion, social media platforms could not skew their platforms ideologically, as the State accuses of them of doing. Taking it all together, case law, HB 20's text, and the Governor and state legislators' own statements all acknowledge that social media platforms exercise some form of editorial discretion, whether or not the State agrees with how that discretion is exercised.

2. HB 20 Violates Plaintiffs' Members' First Amendment Rights

a. HB 20 Compels Social Media Platforms to Disseminate Objectionable Content and Impermissibly Restricts Their Editorial Discretion

HB 20 prohibits social media platforms from moderating content based on "viewpoint." Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), 143A.002. The State emphasizes that HB 20 "does not prohibit content moderation. That is clear from the fact that [HB 20] has an entire provision dictating that the companies should create acceptable use policies . . . [a]nd then moderate their content accordingly." (*See* Minute Entry, Dkt. 47). The State claims that social media platforms could prohibit content categories "such as 'terrorist speech,' 'pornography,' 'spam,' or 'racism'" to prevent those content categories from flooding their platforms. (Resp. Prelim. Inj. Mot., Dkt. 39, at 21). During the hearing,

the State explained that a social media platform "can't discriminate against users who post Nazi speech . . . and [not] discriminate against users who post speech about the anti-white or something like that." (*See* Minute Entry, Dkt. 47). Plaintiffs point out the fallacy in the State's assertion with an example: a video of Adolf Hitler making a speech, in one context the viewpoint is promoting Nazism, and a platform should be able to moderate that content, and in another context the viewpoint is pointing out the atrocities of the Holocaust, and a platform should be able to disseminate that content. (*See id.*). HB 20 seems to place social media platforms in the untenable position of choosing, for example, to promote Nazism against its wishes or ban Nazism as a content category. (Prelim. Inj. Mot., Dkt. 12, at 29). As YouTube put it, "YouTube will face an impossible choice between (1) risking liability by moderating content identified to violate its standards or (2) subjecting YouTube's community to harm by allowing violative content to remain on the site." (YouTube Decl., Dkt. 12-3, at 22).

HB 20's prohibitions on "censorship" and constraints on how social media platforms disseminate content violate the First Amendment. The platforms have policies against content that express a viewpoint and disallowing them from applying their policies requires platforms to "alter the expressive content of their [message]." *Hurley*, 515 U.S. at 572-73. HB 20's restrictions on actions that "de-boost" and "deny equal access or visibility to or otherwise discriminate against expression" impede platforms' ability to place "post[s] in the proper feeds." Tex. Civ. Prac. & Rem. Code § 143A.001(1); *NetChoice*,

2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *3. Social media platforms "must determine how and where users see those different viewpoints, and some posts will necessarily have places of prominence. *See NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *3. HB 20 compels social media platforms to significantly alter and distort their products. Moreover, "the targets of the statutes at issue are the editorial judgments themselves" and the "announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*, *Hurley*, and *PG&E*." *Id.* HB 20 also impermissibly burdens social media platforms' own speech. 2021 U.S. Dist. LEXIS 121951, [WL] at *9 ("[T]he statutes compel the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites."). For example, if a platform appends its own speech to label a post as misinformation, the platform may be discriminating against that user's viewpoint by adding its own disclaimer. HB 20 restricts social media platforms' First Amendment right to engage in expression when they disagree with or object to content.[4]

4. The Court notes that two other Supreme Court cases address this topic, but neither applies here. *PruneYard Shopping Center v. Robins* is distinguishable from the facts of this case. 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). In *PruneYard*, the Supreme Court upheld a California law that required a shopping mall to host people collecting petition signatures, concluding there was no "intrusion into the function of editors" since the shopping mall's operation of its business lacked an editorial function. *Id.* at 88. Critically, the shopping mall did not engage in expression and "the [mall] owner did not even allege that he objected to the content of the

Furthermore, the threat of lawsuits for violating Section 7 of HB 20 chills the social media platforms' speech rights. HB 20 broadly prohibits content moderation based on "viewpoint," authorizing the Texas Attorney General to sue for violations—and even "potential" violations—of Section 7's "censorship" restrictions. Tex. Civ. Prac. & Rem Code §§ 143A.002; 143A.008. In response to the State's interrogatories, NetChoice explained that the "threat of myriad lawsuits based on individual examples of content moderation threaten and chill the broad application of those [content moderation] policies, and thus H.B. 20's anti-moderation provisions interfere with Plaintiff's members' policies and practices. . . . Using YouTube as an example, hate speech is necessarily 'viewpoint'-based, as abhorrent as those viewpoints may be. And removing such hate speech and assessing penalties against users for submitting that content is 'censor[ship]' as defined by H.B. 20." (NetChoice Interrogatory Responses, Dkt. 44-3, at 25).

[speech]; nor was the access right content based." *PG&E*, 475 U.S. at 12. Similarly, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* has no bearing on this Court's holding because it did not involve government restrictions on editorial functions. 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The challenged law required schools that allowed employment recruiters on campus to also allow military employment recruiters on campus—a restriction on "conduct, not speech." *Id.* at 62, 65. As the Supreme Court explained, "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when the host interviews and recruiting receptions." *Id.* at 64.

b. HB 20's Disclosure and Operational Requirements Burden Social Media Platforms' Editorial Discretion

HB 20 additionally violates Plaintiffs' members' First Amendment rights with its Section 2 requirements. First, under Section 2, a social media platform must provide "public disclosures" about how the platform operates in a manner "sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform." Tex. Bus. & Com. Code § 120.051(b). HB 20 states that each platform must disclose how it "(1) curates and targets content to users; (2) places and promotes content, services, and products, including its own content, services, and products; (3) moderates content; [and] (4) uses search, ranking, or other algorithms or procedures that determine results on the platform[.]" *Id.* § 120.051(a)(1)-(4). Second, a social media platform must "publish an acceptable use policy" that explains what content the platform will allow, how the platform will ensure compliance with the policy, and how users can inform the platform about noncompliant content. *Id.* § 120.052. Third, a social media platform must publish a "biannual transparency report" that requires information about the platform's enforcement of their policies. *Id.* § 120.053(a).

Specifically, social media platforms must provide:

- "the total number of instances in which the social media platform was alerted to illegal content, illegal activity, or potentially policy-violating

content" and by what means (i.e., by users, employees, or automated processes);

- how often the platform "took action" with regard to such content including "content removal," "content demonetization," "content deprioritization," "the addition of an assessment to content," "account suspension," "account removal," and "any other action" that accords with the acceptable use policy, "categorized by" "the rule violated" and "the source for the alert";

- "the country of the user who provided the content for each instance described" above;

- "the number of coordinated campaigns;"

- "the number of instances in which a user appealed the decision to remove the user's potentially policy-violating content;"

- "the percentage of appeals . . . that resulted in the restoration of content;" and

- "a description of each tool, practice, action, or technique used in enforcing the acceptable use policy."

Id. § 120.053(a)(1)-(7), (b).

Fourth, a social media platform must provide a "complaint system to enable a user to submit a complaint in

good faith and track the status of the complaint" regarding either a report of violative content or "a decision made by the social media platform to remove content posted by the user." *Id.* § 120.101. For reports of illegal content, the covered platform must "make a good faith effort to evaluate the legality of the content or activity within 48 hours of receiving the notice," excluding weekends. *Id.* § 120.102.

Fifth, a social media platform must offer a notice and appeal system for any content that it decides to remove. Subject to limited exceptions, every time a covered platform "removes" content, it must give the user (1) a notice of the removal; (2) an opportunity to appeal; and (3) a written explanation of the decision on appeal, including an explanation for any reversal. *Id.* § 120.103. During the appeal process, a social media platform must "review the [removed] content," "determine whether the content adheres to the platform's acceptable use policy," and "take appropriate steps" within 14 days (excluding weekends). *Id.* § 120.104.

To pass constitutional muster, disclosure requirements like these must require only "factual and noncontroversial information" and cannot be "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2372. Section 2's disclosure and operational provisions are inordinately burdensome given the unfathomably large numbers of posts on these sites and apps. For example, in three months in 2021, Facebook removed 8.8 million pieces of "bullying and harassment content," 9.8 million pieces of "organized hate content," and 25.2 million pieces of "hate

speech content." (CCIA Decl., Dkt. 12-1, at 15). During the last three months of 2020, YouTube removed just over 2 million channels and over 9 million videos because they violated its policies. (*Id.* at 16). While some of those removals are subject to an existing appeals process, many removals are not. For example, in a three-month-period in 2021, YouTube removed 1.16 billion comments. (YouTube Decl., Dkt. 12-3, at 23-24). Those 1.16 billion removals were not appealable, but, under HB 20, they would have to be. (*Id.*). Over the span of six months in 2018, Facebook, Google, and Twitter took action on over 5 billion accounts or user submissions—including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech. (NetChoice Decl., Dkt. 12-2, at 8). During the State's deposition of Neil Christopher Potts ("Potts"), who is Facebook's Vice President of Trust and Safety Policy, Potts stated that it would be "impossible" for Facebook "to comply with anything by December 1, [2021]. . . [W]e would not be able to change systems in that nature. . . . I don't see a way that we would actually be able to go forward with compliance in a meaningful way." (Potts Depo., Dkt. 39-2, at 2, 46). Plaintiffs also express a concern that revealing "algorithms or procedures that determine results on the platform" may reveal trade secrets or confidential and competitively-sensitive information. (*Id.* at 34) (quoting Tex. Bus. & Com. Code § 120.051(a)(4)).

The Section 2 requirements burden First Amendment expression by "forc[ing] elements of civil society to speak when they otherwise would have refrained." *Washington*

Post v. McManus, 944 F.3d 506, 514 (4th Cir. 2019). "It is the presence of compulsion from the state itself that compromises the First Amendment." *Id.* at 515. The provisions also impose unduly burdensome disclosure requirements on social media platforms "that will chill their protected speech." *NIFLA*, 138 S. Ct. at 2378. The consequences of noncompliance also chill the social media platforms' speech and application of their content moderation policies and user agreements. Noncompliance can subject social media platforms to serious consequences. The Texas Attorney General may seek injunctive relief and collect attorney's fees and "reasonable investigative costs" if successful in obtaining injunctive relief. *Id.* § 120.151.

3. HB 20 Discriminates Based on Content and Speaker

HB 20 additionally suffers from constitutional defects because it discriminates based on content and speaker. First, HB 20 excludes two types of content from its prohibition on content moderation and permits social media platforms to moderate content: (1) that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment," and (2) that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)-(3). When considering a city

ordinance that applied to "'fighting words' that . . . provoke violence[] 'on the basis of race, color, creed, religion[,] or gender,'" the Supreme Court noted that those "who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or []sexuality—are not covered." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). As Plaintiffs argue, the State has "no legitimate reason to allow the platforms to enforce their policies over threats based only on . . . favored criteria but not" other criteria like sexual orientation, military service, or union membership. (Prelim. Inj. Mot., Dkt. 12, at 35-36); *see id.*

HB 20 applies only to social media platforms of a certain size: platforms with 50 million monthly active users in the United States. Tex. Bus. & Com. Code § 120.002(b). HB 20 excludes social media platforms such as Parler and sports and news websites. (*See* Prelim. Inj. Mot., Dkt. 12, at 17). During the regular legislative session, a state senator unsuccessfully proposed lowering the threshold to 25 million monthly users in an effort to include sites like "Parler and Gab, which are popular among conservatives." Shawn Mulcahy, *Texas Senate approves bill to stop social media companies from banning Texans for political views*, Tex. Tribune (Mar. 30, 2021), https://www.texas tribune.org/2021/03/30/texas-social-media-censorship/. "[D]iscrimination between speakers is often a tell for content discrimination." *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *10. The discrimination between speakers has special significance in the context of media because

"[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). The record in this case confirms that the Legislature intended to target large social media platforms perceived as being biased against conservative views and the State's disagreement with the social media platforms' editorial discretion over their platforms. The evidence thus suggests that the State discriminated between social media platforms (or speakers) for reasons that do not stand up to scrutiny.

4. HB 20 Is Unconstitutionally Vague

Plaintiffs argue that HB 20 contains many vague terms, some of which the Court agrees are prohibitively vague. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012). "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253-54 (internal citation omitted).

First, Plaintiffs take issue with HB 20's definition for "censor:" "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." Tex. Civ. Prac. & Rem. Code § 143A.001(1). Plaintiffs argue that requiring social media platforms to require "equal access or visibility to" content is "hopelessly indeterminate." (Prelim. Inj. Mot., Dkt. 12, at 37) (quoting *id.*). The Court agrees. A social media platform is not static snapshot in time like a hard copy newspaper. It strikes the Court as nearly impossible for a social media platform—that has at least 50 million users—to determine whether any single piece of content has "equal access or visibility" versus another piece of content given the huge numbers of users and content. Moreover, this requirement could "prohibit[] a social media platform from" displaying content "in the proper feeds" *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *3.

Second, Plaintiffs argue that the definition of "social media platform" is unclear. Under HB 20, social media platform means an "Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code § 120.001(1). Plaintiffs argue that it is unclear which websites and applications "enable[] users to communicate with other users for the primary purpose of posting information, comments, messages, or images." *Id.* Without more, the Court is not persuaded that that phrase is impermissibly vague.

Appendix B

The definition for "social media platform" excludes "an online service, application, or website: (i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and (ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described by Subparagraph (i)." *Id.* § 120.001(1)(C)(i), (ii). Plaintiffs object to the word "primarily" used to define excluded companies whose sites "primarily" consist of "news, sports, entertainment . . . ." § 120.001(1)(C)(i). "Even if 'primarily' means 'greater than 50%,' a person of ordinary intelligence would have no idea what 'primarily' refers to as the relevant denominator." (Prelim. Inj. Mot., Dkt. 12, at 38). In this context, "primarily" is too indeterminate to enable companies with a website, application, or online service to determine whether they are subject to HB 20's prohibitions and requirements. Plaintiffs also contend that "[o]rdinary people would further have no idea what makes a chat or comment section 'incidental to, directly related to, or dependent on' a platform's preselected content." (Prelim. Inj. Mot., Dkt. 12, at 38) (quoting Tex. Bus. & Com. Code § 120.001(1)(C)(ii)). Plaintiffs have not established that that terminology is impermissibly vague.

Third, HB 20 empowers the Texas Attorney General to seek an injunction not just against violations of the statute but also "potential violations." Tex. Civ. Prac. & Rem. Code § 143A.008. Unlike other statutes that specify that the potential violation must be imminent, HB 20 includes no such qualification. *See, e.g.*, Tex. Occ.

Code § 1101.752(a) (authorizing the attorney general to seek injunctive relief to abate a potential violation "if the commission determines that a person has violated or is about to violate this chapter"). Subjecting social media platforms to suit for potential violations, without a qualification, reaches almost all content moderation decisions platforms might make, further chilling their First Amendment rights. (Prelim. Inj. Mot., Dkt. 12, at 39).

Fourth, Plaintiffs contend that Section 2's disclosure and operational requirements are overbroad and vague. "For instance, H.B. 20's non-exhaustive list of disclosure requirements grants the Attorney General substantial discretion to sue based on a covered platform's failure to include unenumerated information." (*Id.*). While the Court agrees that these provisions may suffer from infirmities, the Court cannot at this time find them unconstitutionally vague on their face.

5. HB 20 Fails Strict Scrutiny and Intermediate Scrutiny

HB 20 imposes content-based, viewpoint-based, and speaker-based restrictions that trigger strict scrutiny. Strict scrutiny is satisfied only if a state has adopted '"the least restrictive means of achieving a compelling state interest."' *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383, 210 L. Ed. 2d 716 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)). Even under the less rigorous intermediate scrutiny, the State must prove that HB 20 is '"narrowly tailed to serve a significant government

interest.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273 (2017) (quoting *McCullen*, 573 U.S. at 477). The proclaimed government interests here fall short under both standards.

The State offers two interests served by HB 20: (1) the "free and unobstructed use of public forums and of the information conduits provided by common carriers" and (2) "providing individual citizens effective protection against discriminatory practices, including discriminatory practices by common carriers." (Resp. Prelim. Inj. Mot., Dkt. 39, at 33-34) (internal quotation marks and brackets omitted). The State's first interest fails on several accounts. First, social media platforms are privately owned platforms, not public forums. Second, this Court has found that the covered social media platforms are not common carriers. Even if they were, the State provides no convincing support for recognizing a governmental interest in the free and unobstructed use of common carriers' information conduits.[5] Third, the Supreme Court

5. In *PG&E*, the Supreme Court did not recognize such a governmental interest; rather, it held that a private utility company retained editorial discretion and could not be compelled to disseminate a third-party's speech. 475 U.S. at 16-18. The Supreme Court's narrow reasoning in *Turner* does not alter this Court's analysis. There, the Court applied "heightened First Amendment scrutiny" because the law at issue "impose[d] special obligations upon cable operators and special burdens upon cable programmers." *Turner Broad. Sys., Inc.*, 512 U.S. at 641. The law, on its face, imposed burdens without reference to the content of speech, yet "interfere[d] with cable operators' editorial discretion" by requiring them to carry some broadcast stations. *Id.* at 643-44, 662. When it held that cable operators must abide by the law and carry some broadcast

rejected an identical government interest in *Tornillo*. In *Tornillo*, Florida argued that "government has an obligation to ensure that a wide variety of views reach the public." *Tornillo*, 418 U.S. at 247-48. After detailing the "problems related to government-enforced access," the Court held that the state could not commandeer private companies to facilitate that access, even in the name of reducing the "abuses of bias and manipulative reportage [that] are . . . said to be the result of the vast accumulations of unreviewable power in the modern media empires." *Id.* at 250, 254. The State's second interest—preventing "discrimination" by social media platforms—has been rejected by the Supreme Court. Even given a state's general interest in anti-discrimination laws, "forbidding acts of discrimination" is "a decidedly fatal objective" for the First Amendment's "free speech commands." *Hurley*, 515 U.S. at 578-79.

Even if the State's purported interests were compelling and significant, HB 20 is not narrowly tailored. Sections 2 and 7 contain broad provisions with far-reaching, serious consequences. When reviewing the similar statute passed in Florida, the Northern District of Florida found that that statute was not narrowly tailored "like prior First Amendment restrictions." *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *11 (citing *Reno*, 521 U.S. at 882; *Sable Commc'n of Cal., Inc. v. FCC*, 492

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channels, the Court's rationale turned on preventing "40 percent of Americans without cable" from losing "access to free television programming." *Id.* at 646. The analysis applied to the regulation of broadcast television has no bearing on the analysis of Internet First Amendment protections. *See Reno*, 521 U.S. at 870.

U.S. 115, 131, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989)). Rather, the court colorfully described it as "an instance of burning the house to roast a pig." *Id.* This Court could not do better in describing HB 20.

Plaintiffs point out that the State could have created its own unmoderated platform but likely did not because the State's true interest is divulged by statements made by legislators and Governor Abbott: the State is concerned with "West Coast oligarchs" and the "dangerous movement by social media companies to silence conservative viewpoints and ideas." Bryan Hughes (@SenBryanHughes), TWITTER (Aug. 9, 2021, 4:34 PM), https://twitter.com/SenBryanHughes/status/1424846466183487492; *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, OFFICE OF THE TEX. GOVERNOR (Sept. 9, 2021), https://gov.texas.gov/news/post/ governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship; (*see* Reply, Dkt. 48, at 27) ("H.B. 20's true interest is in promoting conservative speech on platforms that legislators perceive as 'liberal.'"). In the State's opposition brief, the State describes the social media platforms as "skewed," saying social media platforms' "current censorship practices" lead to "a skewed exchange of ideas in the Platforms that prevents such a search for the truth." (Resp. Prelim. Inj. Mot., Dkt. 39, at 30).

6. HB 20's Severability Clause

HB 20's severability clause does not save HB 20 from facial invalidation. This Court has found Sections 2 and 7 to

be unlawful. Both sections are replete with constitutional defects, including unconstitutional content- and speaker-based infringement on editorial discretion and onerously burdensome disclosure and operational requirements. Like the Florida statute, "[t]here is nothing that could be severed and survive." *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *11.

C. Remaining Factors Favor a Preliminary Injunction

The remaining factors all weigh in favor of granting Plaintiffs' request for a preliminary injunction. "There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality op.)). Absent an injunction, HB 20 would "radically upset how platforms work and the core value that they provide to users." (Prelim. Inj. Mot., Dkt. 12, at 52). HB 20 prohibits virtually all content moderation, the very tool that social medial platforms employ to make their platforms safe, useful, and enjoyable for users. (*See, e.g.*, CCIA Decl., Dkt. 12-1, at 9, 13) ("[M]any services would be flooded with abusive, objectionable, and in some cases unlawful material, drowning out the good content and making their services far less enjoyable, useful, and safe.") ("Content moderation serves at least three distinct vital functions. First, it is an important way that online services express themselves and effectuate their community standards,

thereby delivering on commitments that they have made to their communities. . . . Second, content moderation is often a matter of ensuring online safety. . . . Third, content moderation facilitates the organization of content, rendering an online service more useful."). In addition, social media platforms would lose users and advertisers, resulting in irreparable injury. (Prelim. Inj. Mot., Dkt. 12, at 53-54); (*see, e.g.*, NetChoice Decl., Dkt. 12-2, at 5-6 ("Not only does the Bill impose immediate financial harm to online businesses, it risks permanent, irreparable harm should any of those users or advertisers decide never to return to our members' sites based on their past experience or the detrimental feedback they have heard from others.").

The irreparable harm to Plaintiffs' members outweighs any harm to the State from a preliminary injunction. *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *11. Since the State lacks a compelling state interest for HB 20, the State will not be harmed. *See Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). Finally, courts have found that "'injunctions protecting First Amendment freedoms are always in the public interest.'" *Id.* at 539 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). In this case, content moderation and curation will benefit users and the public by reducing harmful content and providing a safe, useful service. (*See, e.g.*, CCIA Decl., Dkt. 12-1, at 9, 13). Here, an "injunction will serve, not be adverse to, the public interest." *NetChoice*, 2021 U.S. Dist. LEXIS 121951, 2021 WL 2690876, at *11.

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that the State's motion to dismiss, (Dkt. 23), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' motion for preliminary injunction, (Dkt. 12), is **GRANTED**. Until the Court enters judgment in this case, the Texas Attorney General is **ENJOINED** from enforcing Section 2 and Section 7 of HB 20 against Plaintiffs and their members. Pursuant to Federal Rule of Civil Procedure 65(c), Plaintiffs are required to post a $1,000.00 bond.

IT IS FINALLY ORDERED that Plaintiffs' motion to strike, (Dkt. 43), is **DISMISSED WITHOUT PREJUDICE AS MOOT**.

SIGNED on December 1, 2021.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C — Relevant Constitutional and Statutory Provisions

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

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.

Appendix C

Chapter 3

H.B. No. 20

AN ACT

relating to censorship of or certain other interference with digital expression, including expression on social media platforms or through electronic mail messages.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that:

(1) each person in this state has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information;

(2) this state has a fundamental interest in protecting the free exchange of ideas and information in this state;

(3) social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and

(4) social media platforms with the largest number of users are common carriers by virtue of their market dominance.

Appendix C

SECTION 2. Subtitle C, Title 5, Business & Commerce Code, is amended by adding Chapter 120 to read as follows:

CHAPTER 120. SOCIAL MEDIA PLATFORMS

SUB CHAPTER A. GENERAL PROVISIONS

Sec. 120.001. DEFINITIONS. In this chapter:

(1) "Social media platform" means an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images. The term does not include:

(A) an Internet service provider as defined by Section 324.055;

(B) electronic mail; or

(C) an online service, application, or website:

(i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and

(ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described by Subparagraph (i).

(2) "User" means a person who posts, uploads, transmits, shares, or otherwise publishes or receives content through a social media platform. The term includes a person who has a social media platform account that the social media platform has disabled or locked.

Sec. 120.002. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a user who:

(1) resides in this state;

(2) does business in this state; or

(3) shares or receives content on a social media platform in this state.

(b) This chapter applies only to a social media platform that functionally has more than 50 million active users in the United States in a calendar month.

Sec. 120.003. CONSTRUCTION OF CHAPTER. This chapter may not be construed to limit or expand intellectual property law.

SUBCHAPTER B. DISCLOSURE REQUIREMENTS

Sec. 120.051. PUBLIC DISCLOSURES. (a) A social media platform shall, in accordance with this subchapter, publicly disclose accurate information regarding its data management, and business practices, information regarding the manner in which content management, including specific the social media platform:

(1) curates and targets content to users;

(2) places and promotes content, services, and products, including its own content, services, and products;

(3) moderates content;

(4) uses search, ranking, or other algorithms or procedures that determine results on the platform; and

(5) provides users' performance data on the use of the platform and its products and services.

(b) The disclosure required by Subsection (a) must be sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform.

(c) A social media platform shall publish the disclosure required by Subsection (a) on an Internet website that is easily accessible by the public.

Sec. 120.052. ACCEPTABLE USE POLICY. (a) A social media platform shall publish an acceptable use policy in a location that is easily accessible to a user.

(b) A social media platform's acceptable use policy must:

(1) reasonably inform users about the types of content allowed on the social media platform;

(2) explain the steps the social media platform will take to ensure content complies with the policy;

(3) explain the means by which users can notify the social media platform of content that potentially violates the acceptable use policy, illegal content, or illegal activity, which includes:

(A) an e-mail address or relevant complaint intake mechanism to handle user complaints; and

(B) a complaint system described by Subchapter C; and

(4) include publication of a biannual transparency report out lining act ions taken to enforce the policy.

Sec. 120.053. BIANNUAL TRANSPARENCY REPORT. (a) As part of a social media platform's acceptable use policy under Section 120.052, the social media platform shall publish a biannual transparency report that includes, with respect to the preceding six-month period:

(1) the total number of instances in which the social media platform was alerted to illegal content, illegal activity, or potentially policy-violating content by:

(A) a user complaint;

(B) an employee of or person contracting with the social media platform; or

(C) an internal automated detection tool;

(2) subject to Subsection (b), the number of instances in which the social media platform took action with respect to illegal content, illegal activity, or potentially policy-violating content known to the platform due to the nature of the content as illegal content, illegal activity, or potentially policy-violating content, including:

(A) content removal;

(B) content demonetization;

(C) content deprioritization;

(D) the addition of an assessment to content;

(E) account suspension;

(F) account removal; or

(G) any other action taken in accordance with the platform's acceptable use policy;

(3) the country of the user who provided the content for each instance described by Subdivision (2);

(4) the number of coordinated campaigns, if applicable;

(5) the number of instances in which a user appealed the decision to remove the user's potentially policy-violating content;

(6) the percentage of appeals described by Subdivision (5) that resulted in the restoration of content; and

(7) a description of each tool, practice, action, or technique used in enforcing the acceptable use policy.

(b) The information described by Subsection (a)(2) must be categorized by:

(1) the rule violated; and

(2) the source for the alert of illegal content, illegal activity, or potentially policy-violating content, including:

(A) a government;

(B) a user;

(C) an internal automated detection tool;

(D) coordination with other social media platforms; or

(E) persons employed by or contracting with the platform.

(c) A social media platform shall publish the information described by Subsection (a) with an open license, in a machine-readable and open format, and in a location that is easily accessible to users.

Appendix C

SUBCHAPTER C. COMPLAINT PROCEDURES

Sec. 120.101. COMPLAINT SYSTEM. A social media platform shall provide an easily accessible complaint system to enable a user to submit a complaint in good faith and track the status of the complaint, including a complaint regarding:

(1) illegal content or activity; or

(2) a decision made by the social media platform to remove content posted by the user.

Sec. 120.102. PROCESSING OF COMPLAINTS. A social media platform that receives notice of illegal content or illegal activity on the social media platform shall make a good faith effort to evaluate the legality of the content or activity within 48 hours of receiving the notice, excluding hours during a Saturday or Sunday and subject to reasonable exceptions based on concerns about the legitimacy of the notice.

Sec. 120.103. REMOVAL OF CONTENT; EXCEPTIONS. (a) Except as provided by Subsection (b), if a social media platform removes content based on a violation of the platform's acceptable use policy under Section 120.052, the social media platform shall, concurrently with the removal:

(1) notify the user who provided the content of the removal and explain the reason the content was removed;

(2) allow the user to appeal the decision to remove the content to the platform; and

(3) provide written notice to the user who provided the content of:

(A) the determination requested under Subdivision (2); and regarding an appeal

(B) in the case of a reversal of the social media platform's decision to remove the content, the reason for the reversal.

(b) A social media platform is not required to provide a user with notice or an opportunity to appeal under Subsection (a) if the social media platform:

(1) is unable to contact the user after taking reasonable steps to make contact; or

(2) knows that the potentially policy-violating content relates to an ongoing law enforcement investigation.

Sec. 120.104. APPEAL PROCEDURES. If a social media platform receives a user complaint on the social media platform's removal from the platform of content provided by the user that the user believes was not potentially policy-violating content, the social media platform shall, not later than the 14th day, excluding Saturdays and Sundays, after the date the platform receives the complaint:

(1) review the content;

(2) determine whether the content adheres to the platform's acceptable use policy;

(3) take appropriate steps based on the determination under Subdivision (2); and

(4) notify the user regarding the determination made under Subdivision (2) and the steps taken under Subdivision (3).

SUBCHAPTER D. ENFORCEMENT

Sec. 120.151. ACTION BY ATTORNEY GENERAL. (a) The attorney general may bring an action against a social media platform to enjoin a violation of this chapter.

(b) If an injunction is granted in an action brought under Subsection (a), the attorney general may recover costs incurred in bringing the action, including reasonable attorney's fees and reasonable investigative costs.

SECTION 3. The heading to Chapter 321, Business & Commerce Code, is amended to read as follows:

CHAPTER 321. REGULATION OF [~~CERTAIN~~] ELECTRONIC MAIL

SECTION 4. Section 321.001, Business & Commerce Code, is amended by adding Subdivision (4-a) to read as follows:

(4-a) "Malicious computer code" means an unwanted computer program or other set of instructions inserted into a computer's memory, operating system, or program that:

(A) is specifically constructed with the ability to replicate itself or to affect the other programs or files in the computer by attaching a copy of the unwanted program or other set of instructions to one or more computer programs or files; or

(B) is intended to perform an unauthorized process that will adversely impact the confidentiality of information contained in or the integrity or availability of the computer's memory, operating system, or program.

SECTION 5. Subchapter B, Chapter 321, Business & Commerce Code, is amended by adding Section 321.054 to read as follows:

Sec. 321.054. IMPEDING ELECTRONIC MAIL MESSAGES PROHIBITED. An electronic mail service provider may not intentionally impede the transmission of another person's electronic mail message based on the content of the message unless:

(1) the provider is authorized to block the transmission under Section 321.114 or other applicable state or federal law; or

(2) the provider has a good faith, reasonable belief that the message contains malicious computer code,

obscene material, material depicting sexual conduct, or material that violates other law.

SECTION 6. Section 321.105(a), Business & Commerce Code, is amended to read as follows:

(a) In lieu of actual damages, a person injured by a violation of this chapter arising from the transmission of an unsolicited or commercial electronic mail message or by a violation of Section 321.054 may recover an amount equal to the lesser of:

(1) $10 for each unlawful message or each message unlawfully impeded, as applicable; or

(2) $25,000 for each day the unlawful message is received or the message is unlawfully impeded, as applicable.

SECTION 7. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 143A to read as follows:

CHAPTER 143A. DISCOURSE ON SOCIAL MEDIA PLATFORMS

Sec. 143A.001. DEFINITIONS. In this chapter:

(1) "Censor" means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.

(2) "Expression" means any word, music, sound, still or moving image, number, or other perceivable communication.

(3) "Receive," with respect to an expression, means to read, hear, look at, access, or gain access to the expression.

(4) "Social media platform" has the meaning assigned by Section 120.001, Business & Commerce Code.

(5) "Unlawful expression" means an expression that is unlawful under the United States Constitution, federal law, the Texas Constitution, or the laws of this state, including expression that constitutes a tort under the laws of this state or the United States.

(6) "User" means a person who posts, uploads, transmits, shares, or otherwise publishes or receives expression, through a social media platform. The term includes a person who has a social media platform account that the social media platform has disabled or locked.

Sec. 143A.002. CENSORSHIP PROHIBITED. (a) A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:

(1) the viewpoint of the user or another person;

(2) the viewpoint represented in the user's expression or another person's expression; or

(3) a user's geographic location in this state or any part of this state.

(b) This section applies regardless of whether the viewpoint is expressed on a social media platform or through any other medium.

Sec. 143A.003. WAIVER PROHIBITED. (a) A waiver or purported waiver of the protections provided by this chapter is void as unlawful and against public policy, and a court or arbitrator may not enforce or give effect to the waiver, including in an action brought under Section 143A.007, notwithstanding any contract or choice-of-law provision in a contract.

(b) The waiver prohibition described by Subsection (a) is a public-policy limitation on contractual and other waivers of the highest importance and interest to this state, and this state is exercising and enforcing this limitation to the full extent permitted by the United States Constitution and Texas Constitution.

Sec. 143A.004. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a user who:

(1) resides in this state;

(2) does business in this state; or

(3) shares or receives expression in this state.

(b) This chapter applies only to expression that is shared or received in this state.

(c) This chapter applies only to a social media platform that functionally has more than 50 million active users in the United States in a calendar month.

(d) This chapter applies to the maximum extent permitted by the United States Constitution and the laws of the United States but no further than the maximum extent permitted by the United States Constitution and the laws of the United States.

Sec. 143A.005. LIMITATION ON EFFECT OF CHAPTER. This chapter does not subject a social media platform to damages or other legal remedies to the extent the social media platform is protected from those remedies under federal law.

Sec. 143A.006. CONSTRUCTION OF CHAPTER. (a) This chapter does not prohibit a social media platform from censoring expression that:

(1) the social media platform is specifically authorized to censor by federal law;

(2) is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment;

(3) directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge; or

(4) is unlawful expression.

(b) This chapter may not be construed to prohibit or restrict a social media platform from authorizing or facilitating a user's ability to censor specific expression on the user's platform or page at the request of that user.

(c) This chapter may not be construed to limit or expand intellectual property law.

Sec. 143A.007. USER REMEDIES. (a) A user may bring an action against a social media platform that violates this chapter with respect to the user.

(b) If the user proves that the social media platform violated this chapter with respect to the user, the user is entitled to recover:

(1) declaratory relief under Chapter 37, including costs and reasonable and necessary attorney's fees under Section 37.009; and

(2) injunctive relief.

(c) If a social media platform fails to promptly comply with a court order in an action brought under this section, the court shall hold the social media platform in contempt and shall use all lawful measures to secure immediate compliance with the order, including daily penalties sufficient to secure immediate compliance.

(d) A user may bring an action under this section regardless of whether another court has enjoined the

attorney general from enforcing this chapter or declared any provision of this chapter unconstitutional unless that court decision is binding on the court in which the action is brought.

(e) Nonmutual issue preclusion and nonmutual claim preclusion are not defenses to an action brought under this section.

Sec. 143A.008. ACTION BY ATTORNEY GENERAL. (a) Any person may notify the attorney general of a violation or potential violation of this chapter by a social media platform.

(b) The attorney general may bring an action to enjoin a violation or a potential violation of this chapter. If the injunction is granted, the attorney general may recover costs and reasonable attorney's fees incurred in bringing the action and reasonable investigative costs incurred in relation to the action.

SECTION 8. (a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other.

(b) If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining

applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone.

(c) If any court declares or finds a provision of this Act facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution.

(d) The legislature further declares that it would have enacted this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional.

(e) If any provision of this Act is found by any court to be unconstitutionally vague, the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(f) No court may decline to enforce the severability requirements of Subsections (a), (b), (c), (d), and (e) of this section on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

SECTION 9. Chapter 143A, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act.

SECTION 10. This Act takes effect on the 91st day after the last day of the legislative session.

Appendix C

/s/_____
President of the Senate

/s/_____
Speaker of the House

I certify that H.B. No. 20 was passed by the House on August 30, 2021, by the following vote: Yeas 77, Nays 49, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 20 on September 2, 2021, by the following vote: Yeas 78, Nays 42, 1 present, not voting.

/s/_____
Chief Clerk of the House

I certify that H.B. No. 20 was passed by the Senate, with amendments, on August 31, 2021, by the following vote: Yeas 17, Nays 14.

/s/_____
Secretary of the Senate

APPROVED: 9-7-21
Date

/s/_____
Governor