No. 21A720

In the Supreme Court of the United States

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

Applicants,

v.

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

RESPONDENT'S OPPOSITION TO APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

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INTRODUCTION

Last week, after two full rounds of briefing and expedited oral argument, the Fifth Circuit stayed a preliminary injunction facially prohibiting the Attorney General of Texas from enforcing HB 20, a law designed to guarantee all Texans equal access to the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Applicants—whose members, as relevant here, include Facebook, YouTube, and Twitter (the platforms)[1]—assert a First Amendment right to refuse service to their customers based on the viewpoints those customers profess. This Court has never recognized such a right, and it should not do so now to vacate a stay.

The First Amendment generally protects a private party from governmental interference with that party's speech. The government therefore may not compel a private actor to profess an unwanted message, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943), forbid a given message through prior restraint, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 709-14 (1931), or inhibit forms of inherently expressive conduct, *Texas v. Johnson*, 491 U.S. 397, 404 (1989). But this right against governmental interference with one's own speech is not coterminous with "the degree to

[1] Applicants are two trade associations, Netchoice, LLC, and the Computer and Communications Industry Association; however, applicants represented below that only Facebook, YouTube, and Twitter are likely affected by the Texas law at issue here. App.258a. Respondents therefore refer to applicants interchangeably as "plaintiffs" or "the platforms."

which the First Amendment protects private entities … from government legislation or regulation requiring those private entities to open their property for speech by others." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 n.2 (2019) (emphasis omitted). HB 20 does exactly that: it prohibits the platforms from closing their property to disfavored speech or speakers.

This antidiscrimination requirement does not violate the First Amendment. As this Court has twice recognized, a rule that requires a host to equally treat all comers regulates that host's "conduct, not speech." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006) ("*FAIR*"); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). That remains true even when the *conduct* to which such a rule applies affects or relates to others' underlying *speech*. *FAIR*, 547 U.S. at 60; *PruneYard*, 447 U.S. at 88. The platforms cannot convert their conduct, namely their choices to restrict access to their property, into speech by recharacterizing those restrictions as editorial discretion. *PruneYard*, 447 U.S. at 88.

Assuming the platforms' refusals to serve certain customers implicated First Amendment rights, Texas has properly denominated the platforms common carriers. Imposing common-carriage requirements on a business does not offend the First Amendment; indeed, this Court has upheld far greater intrusions into a communications platform's business—for example, requiring cable companies to leave open certain channels for specific potential users. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994) (*Turner I*). The platforms are the twenty-first century descendants of telegraph and

telephone companies: that is, traditional common carriers. "The First Amendment's command that government not impede the freedom of speech does not disable the government from" keeping the platforms' communications pathways open through common-carriage requirements. *Id.* This analysis does not change even for enterprises exercising conventional "editorial discretion." *Id.* at 636.

But the platforms' invocation of their "editorial discretion" rings hollow. They have repeatedly claimed that they exercise nothing of the sort when relying on section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230(c). *E.g.*, Br. for Facebook at *1, *Klayman v. Zuckerberg*, No. 13-7017, 2013 WL 5371995 (D.C. Cir. Sept. 25, 2013) (characterizing services protected by section 230 as mere "conduits for other parties' speech"). While the platforms compare their business policies to classic examples of First Amendment speech, such as a newspaper's decision to include an article in its pages, the platforms have disclaimed any such status over many years and in countless cases. This Court should not accept the platforms' good-for-this-case-only characterization of their businesses.

This Court should reject applicants' extraordinary request on the merits, but the platforms misstate the demanding standard they must meet as well. This Court will vacate a stay only when it finds it "very likely would" grant review of a case following "final disposition in the court of appeals," that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay," and "the rights of the parties . . . may

be seriously and irreparably injured by the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). Moreover, "[r]espect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). Here, the Fifth Circuit not only expedited consideration of the merits: it waited to stay the district court's preliminary injunction until *after* briefing and argument on the merits was complete. This Court should at a minimum withhold relief until the Fifth Circuit has had an opportunity to explain its reasoning and applicants have challenged that court's decision in a petition for a writ of certiorari.

STATEMENT

I. Factual Background

This Court has recognized, and Texas agrees, that the platforms have made themselves the gatekeepers of a digital "modern public square." *Packingham*, 137 S. Ct. at 1737. Though they are not themselves news outlets, they have "enormous influence over the distribution of news." *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting). And they "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737.

The platforms are open to the public and provide a means for users worldwide to communicate with one another. App.113a, 135a, 146a. The

platforms allow users to share videos with one another, have conversations, and integrate social lives. "For the first decade or so, online intermediaries" including the platforms "were avowedly laissez faire about user-generated content." Evelyn Douek, *Governing Online Speech: From 'Posts-as-Trumps' to Proportionality and Probability*, 121 COLUM. L. REV. 759, 769 (2021) (quotation marks omitted). For example, Twitter promised for years it would remove user content only in "limited circumstances" to "comply with legal requirements."[2] The platforms also disclaimed any interest in editing or otherwise taking responsibility for the content that others posted to their spaces. As Facebook said in 2014: "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. You've made your friends, you've connected to the pages that you want to connect to[,] and you're the best decider for the things that you care about."[3]

Once these businesses became "dominant digital platforms," *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring), they began to deny access to their services based on

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[2] *See* Twitter, *The Twitter Rules*, THE INTERNET ARCHIVE WAYBACK MACHINE, (Jan. 18, 2009), https://bit.ly/31UlaJx (archived version of Twitter rules); *see also, e.g.*, Brian Stelter, *Twitter's Jack Dorsey: 'We Are Not' Discriminating Against Any Political Viewpoint*, CNN (Aug. 20, 2018), https://tinyurl.com/fe8jw9e8 (insisting that policies "look at behavior," not speech).

[3] Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, THE NEW YORK TIMES (Oct. 27, 2014), https://nyti.ms/3ommZXb.

their customers' viewpoints. A few representative examples suffice. Opening Br. at 6-10, *Netchoice v. Paxton*, No. 21-51178 (5th Cir. Mar. 2, 2022). For example, for over a year Facebook censored Americans who suggested that the COVID-19 pandemic originated in China's Wuhan laboratory.[4] Meanwhile, the platforms allowed Chinese Communist Party officials to claim that *America* started the virus.[5] Iran's Ayatollah Khamenei has been allowed to advocate genocide against Israel on the platforms, while U.S. politicians have been denied service. Twitter rationalized that Khamenei's advocacy for genocide was mere "foreign policy saber rattling" and acceptable "commentary on political issues of the day."[6]

Federal officials have expressed concerns regarding the platforms' efforts to control private-party speech. The platforms' representatives have been asked to testify before both the House and Senate—under Republican and Democratic control—about their practices. *See, e.g.*, *Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants:*

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[4] *See, e.g.*, Thomas Barrabi, *Facebook Ends Ban on Posts Claiming COVID-19 is Man-made*, FOX BUSINESS (May 26, 2021), https://fxn.ws/3y0L8qD.

[5] *See, e.g.*, Marisa Fernandez, *Twitter Fact-Checks Chinese Official's Claims that Coronavirus Originated in U.S.*, AXIOS (May 28, 2020), https://bit.ly/3lFWfjM.

[6] *See* Raphael Ahren, *Twitter to MKs: Unlike Trump Tweets, Khamanei's 'Eliminate Israel' Posts Are OK*, TIMES OF ISRAEL (July 30, 2020), https://bit.ly/336th6V; John Hendel, *Twitter CEO: Iranian Leader's 'Saber Rattling' Doesn't Violate Our Policies*, POLITICO (Oct. 28, 2020), https://politi.co/3GzTdpG.

Hearing Before the H. Comm. on the Judiciary, 115th Cong. (July 17, 2018); *Stifling Free Speech: Technological Censorship and the Public Discourse: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution*, 116th Cong. (Apr. 10, 2019); *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 117th Cong. (Oct. 20, 2020); *Breaking the News: Censorship, Suppression, and the 2020 Election: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (Nov. 17, 2020); *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation: Hearing Before the H. Comm. on Energy & Commerce, Subcomms. on Communications & Technology*, 117th Cong. (Mar. 25, 2021).

The platforms have now partnered with federal officials to exclude or censor certain customers these officials deem undesirable. The White House, for example, admitted in July 2021 that it is "in regular touch with these social media platforms" and that it "flag[s] problematic posts for Facebook" to censor. White House, *Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy* (July 15, 2021). In response to this admission, the White House was asked the next day if it found "sufficient" the fact that Facebook had "removed 18 million pieces of COVID misinformation." White House, *Press Briefing by Press Secretary Jen Psaki* (July 16, 2021). The White House responded: "Clearly not," (*i.e.*, that the platforms had not censored enough). *Id.*

II. Statutory Background

A. Section 230 of the Communications Decency Act

Both the platforms' initial rise to prominence as leading fora for public discourse and their subsequent efforts to control that discourse occurred in the shadow of section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230. Section 230 protects the platforms (among other online services) from legal liability in three primary ways. *First*, it distinguishes between "interactive computer service[s]," like the platforms, which "provide[] or enable[] computer access by multiple users to a computer server," and "information content provider[s]," which "[are] responsible, in whole or part, for the creation or development of information provided through the Internet." *Id.* § 230(f)(2)-(3). *Second*, it directs that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1). *Third*, it reinforces this distinction between interactive computer services and either speakers or publishers by preventing "provider[s] or user[s] of an interactive computer service" from incurring traditional publisher liability "on account of" either "any action voluntarily taken in good faith to restrict access to or availability of material . . . consider[ed] . . . objectionable," or "any action taken to enable or make available . . . the technical means to restrict access to" such objectionable material. *Id.* § 230(c)(2), (c)(2)(A)-(B).

Congress enacted section 230 in the wake of two cases addressing platform liability for third-party speech. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (describing the history). In the first, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), a court held that a platform was not liable for transmitting a third party's defamatory speech. But in the second, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a court held that a platform could be liable for transmitting defamatory third-party speech where, unlike in *Cubby*, the platform filtered some (but not all) third-party speech. The *Stratton Oakmont* court concluded that a platform that filters user speech exercises discretion materially the same as that exercised by a newspaper editor, and thus the platform should be subject to the same legal liability. *Id.* at *3, *5.

Congress disagreed with the *Stratton Oakmont* court and responded by codifying *Cubby* through section 230, particularly by directing that an "interactive computer service" cannot be "treated as the publisher or speaker of any information provided by another," 47 U.S.C. § 230(c)(1), and by eliminating publisher liability for removing user content accordingly, *id.* § 230(c)(2). But section 230 abrogated platforms' common-law publisher status only where they were not "responsible, in whole or in part," *id.* § 230(f)(3), for given content. They remain liable for "speech that is properly attributable to them." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

In an attempt to maximize the scope of their protections under section 230, the platforms have repeatedly assured courts, legislatures, and the general public that they are "interactive computer services" that cannot be treated as the "publisher" of their users' speech and are not "responsible" for it. For example, they have successfully asserted section 230 as a defense against claims for aiding Hamas and ISIS terrorists, even though those groups openly use the platforms to advance their deadly missions. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65-66 (2d Cir. 2019); *Gonzalez v. Google LLC*, 2 F.4th 871, 882 (9th Cir. 2021). More commonly, the platforms rely on section 230 to defeat tort claims by insisting that they cannot be treated as the publisher of tortious content, and that they have no role in the "creation or development" of that content. *See, e.g.*, Br. for Facebook at 1, 22, *Klayman*, *supra*. In those cases, the platforms insist that they mere "conduit[s] for others' speech," *id.*; *see also infra* at 37 (collecting examples), not editors of it.

B. HB 20

Texas has grown concerned that the platforms' selective refusals to deal with disfavored consumers has implicated the State's "fundamental interest in protecting the free exchange of ideas and information" within its borders. App.39a. It therefore passed HB 20 to ensure that the platforms both forthrightly disclose their content-moderation practices and continue to serve the public without refusing to deal with potential customers due to their viewpoints.

Contrary to the platforms' solemn intonation of far-reaching consequences for the Internet, Appl. 2 (predicting Texas will "inflict a massive change [on] leading global websites"), *id.* at 17 (accusing Texas of "transform[ing] the Internet"), HB 20 narrowly applies to only the largest platforms: "social media platform[s]" with 50 million monthly users in the United States, Tex. Bus. & Com. Code § 120.002; Tex. Civ. Prac & Rem. Code § 143A.004(c), which HB 20 deems common carriers. Act of Sept. 2, 2021, 87th Leg. 2d C.S., ch. 3 § 1(3). Similar to traditional common carriers, a "social media platform" is an Internet website or application that is "open to the public" and primarily facilitates users sharing content with each other. Tex. Bus. & Com. Code § 120.001. HB 20's definition of "social media platform" does not include Internet service providers, email providers, or news websites. *See id.*

The platforms have facially challenged two of HB 20's provisions.

1. The Hosting Rule

The platforms primarily challenge the "Hosting Rule," which prohibits the platforms from censoring a customer based on his viewpoint or location in Texas. Tex. Civ. Prac. & Rem. Code § 143A.002. To prevent less obvious forms of censorship, the Hosting Rule also forbids platforms from "deny[ing] equal access" to users or "otherwise discriminat[ing]" against users on either of those bases. *Id.* § 143A.001(1).

The Hosting Rule does not, however, prohibit the platforms from removing entire categories of content. So, for example, the platforms can decide to eliminate pornography without violating HB 20. *Contra* Appl. 8. The

platforms can also ban foreign government speech without violating HB 20, so they are not required to host Russia's propaganda about Ukraine. *Contra id.* at 1. They likewise can ban spam—which, according to the platforms, constitutes 60% of the content they currently remove, *id.* at 9. They can also in any event ban illegal, including tortious, content.

Moreover, HB 20 expressly allows the platforms to remove content falling within any number of statutory exclusions even when doing so would discriminate against users or content on the basis of viewpoint. For example, platforms can ban content that incites violence, Tex. Civ. Prac. & Rem. Code 143A.006(a)(3), so the platforms are not required to host "ISIS propaganda claiming that extremism is warranted," *contra* Appl. 1. HB 20 further expressly allows the platforms to use "tools" to direct content to users that are specific to users' preferences, even if those tools could be seen as resulting in viewpoint discrimination. Tex. Civ. Prac. & Rem. Code § 143A.006(b); *contra* Appl. 9. The platforms may therefore moderate what a user sees on the platform so long as that user has assented to having content restricted in the ways the platforms intend to restrict it. *Contra* Appl. 5. Finally, the platforms may remove any content "specifically authorized" by federal law, content that is unlawful or tortious, content concerning the sexual exploitation of children or the harassment of sexual abuse survivors, or content inciting criminal activity. Tex. Civ. Prac. & Rem. Code §§ 143A.001(5), 143A.006(a).

The Hosting Rule applies "only to expression that is shared or received in" Texas, *id.* § 143A.004(b), and thus does not apply to expression neither shared

nor received within the State. It also does not apply to any of the platforms' own speech, such as when they recommend that a user view specific content, or when they warn users against specific content. Users and the Attorney General can enforce the Hosting Rule but cannot seek damages. *Id.* §§ 143A.007(a), 143A.008.[7]

2. Disclosure and Operational Rules

In addition to the Hosting Rule, HB 20 imposes disclosure and operational requirements on the platforms. Specifically, the platforms must: (a) describe how they manage data and their spaces in a way "sufficient to enable users to make an informed choice regarding . . . use of" the platform, Tex. Bus. & Com. Code § 120.051(b); (b) publish an "acceptable use policy" informing users what content is permitted and why content is removed, *id.* § 120.052; (c) publish a biannual transparency report documenting certain facts about how the platform managed content during the preceding time period, *id.* § 120.053; and (d) maintain a complaint-and-appeal system regarding illegal content and content users challenge as wrongfully removed, *id.* §§ 120.101-104. Only the Attorney General can enforce these requirements, and he cannot seek damages. *Id.* § 120.151.

[7] While applicants complain (at 11) that HB 20 allows courts to impose "daily penalties sufficient to secure immediate compliance," they neglect to mention that a court may only do so if a platform "fails to promptly comply with a court order" and is subsequently held in contempt. Tex. Civ. Prac. & Rem. Code § 143A.007(c).

III. Procedural Background

HB 20 was scheduled to go into effect on December 2, 2021. On September 22, 2021, in a reversal of their longstanding section 230 position that they neither edit nor publish user content, the platforms sued the Texas Attorney General, claiming that HB 20 limits their editorial discretion over user content in violation of the First Amendment. App.103a. Though any "user may bring an action" to enforce HB 20 "regardless of whether another court has enjoined the attorney general," Tex. Civ. Prac. & Rem. Code § 143A.007(d), the platforms sued the Attorney General alone, App.57a. The complaint brought both facial and as-applied challenges under a number of constitutional doctrines, App.103a, but the platforms sought a pre-enforcement preliminary injunction on only their facial First Amendment claim, App.14a.

On December 1, after sharply limiting discovery, the district court preliminarily enjoined the Attorney General, the only defendant, from enforcing the challenged provisions of HB 20 under any circumstances. App.35a. The district court concluded that HB 20's Hosting Rule likely violated the First Amendment by infringing the platforms' ability to "exercise editorial discretion over their platform's content." App.21a. And that court concluded the disclosure and operational requirements were "inordinately burdensome" under the First Amendment. App.26a. The court also concluded the law improperly discriminated on speaker- and content-based grounds because the Hosting Rule contains exemptions and does not apply to smaller Internet entities. App.31a-33a. Finally, the court concluded that HB 20 failed

strict scrutiny because "the State could have" more narrowly tailored its response to the platforms' discriminatory conduct by "creat[ing] its own unmoderated platform." App.33a.

Two weeks later and following a similar motion in the district court, the Attorney General moved the Fifth Circuit to stay the preliminary injunction pending appeal. Appellant's Motion to Stay Preliminary Injunction Pending Appeal, *Netchoice v. Paxton*, No. 21-51178 (Dec. 15, 2021). The Fifth Circuit's motions panel carried that motion with the case, expedited the case to the next available oral argument panel, and preemptively declared it would not grant any extensions of briefing deadlines in the case. App.4a. The motions panel left the injunction in place, however, expressly providing that the merits panel would be "free, in its discretion, to rule immediately on the motion to stay or await oral argument." *Id.* The merits panel chose the latter, hearing oral argument on May 9. On May 11, the panel granted the motion to stay. App.2a.

Though the Fifth Circuit's merits ruling remains pending—and the platforms do not seek a writ of certiorari before that court's judgment—the platforms now ask this Court to vacate the Fifth Circuit's stay to preserve an "orderly appellate process." Appl. 17.

ARGUMENT

This Court is appropriately cautious before taking the extraordinary step of vacating a lower court's stay. For good reason: "when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for orderly

disposition of cases on its docket." *Moore v. Brown*, 448 U.S. 1335, 1341 n.9 (1980) (Powell, J., in chambers).

To justify such relief and the attendant disruption of the orderly appellate process, an applicant must make a threefold showing. *First*, the applicant must show that the case "could and very likely would be reviewed" in this Court "upon final disposition in the court of appeals." *Coleman*, 424 U.S. at 1304. *Second*, the applicant must show that the lower court was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Id.* *Third*, the applicant must show that his rights "may be seriously and irreparably injured by the stay." *Id.* And this Court is especially reluctant to vacate a lower court's stay when, as here, the court of appeals expedites its consideration of the stayed order. *Doe*, 546 U.S. at 1309.

The application fails to make any of the required showings—let alone demonstrate "extraordinary" cause to "justify this Court's intervention in advance of the expeditious determination of the merits toward which the [Fifth] Circuit is swiftly proceeding." *Id.*

I. This Court Is Not Likely to Grant Review of the Fifth Circuit's Forthcoming Decision.

Applicants cannot show that this Court is likely to grant a writ of certiorari to review the Fifth Circuit's judgment regarding the district court's preliminary injunction. That is always a difficult showing to make. *See Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (describing a case satisfying factor as

"exceptional"). Applicants cannot meet that burden here for two reasons: (1) review is premature due to this case's interlocutory posture, and (2) although this case undoubtedly concerns an important issue, further percolation is necessary before this Court's review will be warranted.

First, this Court is unlikely to grant review because this case's interlocutory posture renders any potential question presented a poor candidate for review. This Court's "normal practice [is to] deny[] interlocutory review," even when a case presents a significant statutory or constitutional question. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting).[8] To be sure, this Court has departed from this settled practice in a small set of "extraordinary cases." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 283 (10th ed. 2013) (collecting cases). But such cases are "very rare[] indeed." *Am. Constr. Co. v. Jacksonville T & K.W. Ry. Co.*, 148 U.S. 372, 385 (1893). This Court overlooks an interlocutory posture when, for example, an important question would be "effectively unreviewable" on final judgment, *Will v. Hallock*, 546 U.S. 345, 349-50 (2006), such as when an immunity from suit, rather than a mere defense to liability, is implicated, *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). But nothing in this case will

[8] *See also, e.g.*, *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., respecting denial of certiorari); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J.); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J.); *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (Stevens, J.); *accord Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

become effectively unreviewable if this Court were to take its ordinary course by waiting until after final judgment to review any remaining issues.

Second, this Court is unlikely to grant review because, as the platforms acknowledge (at 18), there is no "square circuit split[]" regarding whether the States may prevent social-media platforms from discriminating against users on the basis of their viewpoints. But that concession understates matters. There is, at present, *no* circuit decision on that novel question—including from the Fifth Circuit. And this Court has recognized that "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). This is particularly so in instances where "other courts" may need to fully consider the "substantive and procedural ramifications of the problem" and thus allow this Court "to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., respecting denial of certiorari).

Applicants' only argument that this Court should abandon its normal practices and address the merits of their arguments without even an explanation by the Fifth Circuit of why it granted a stay is that issues in this case implicate First Amendment interests. But the existence of a First Amendment issue is far from a guarantee that an issue is worthy of this

Court's review, let alone ripe for it.[9] And this Court routinely denies premature requests for review of even important First Amendment disputes either to allow further development in the courts below, *compare Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (Mem.) (denying certiorari), *with Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 857 (2022) (Mem.) (granting certiorari), or to allow further percolation in courts around the country, *compare Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014) (Mem.) (denying certiorari), *with 303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (Mem.) (granting certiorari). Following such an approach would be especially appropriate in this case, where applicants continue to press numerous other claims, including as-applied First Amendment challenges to the same provisions they challenge here.

II. The Fifth Circuit Correctly Issued a Stay.

Applicants have similarly failed to demonstrate that the Fifth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304. Because the platforms seek vacatur of a one-line order while the Fifth Circuit's opinion and judgment remain

[9] *See, e.g.*, *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Mem.); *Bruni v. City of Pitt.*, 141 S. Ct. 578 (2021) (Mem.); *Kansas v. Boettger*, 140 S. Ct. 1956 (2020) (Mem.); *Jarchow v. State Bar of Wisc.*, 140 S. Ct. 1720 (2020) (Mem.); *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198 (2020) (Mem.); *Nat. Review, Inc. v. Mann*, 140 S. Ct. 344 (2019) (Mem.); *Dahne v. Richey*, 139 S. Ct. 1531 (2019) (Mem.); *Perez v. Florida*, 137 S. Ct. 853 (2017) (Mem.); *Del. Strong Families v. Denn*, 136 S. Ct. 2376 (2016) (Mem.).

pending, it is virtually impossible for applicants to show that the Fifth Circuit demonstrably erred in applying this Court's guidance in granting a stay.

But even overlooking applicants' haste, each of the traditional stay factors—(1) whether the Attorney General made a strong showing that he was likely to succeed on the merits (or in this instance, because the stay was issued after oral argument and a preliminary vote, the Attorney General likely *has* succeeded on the merits), (2) whether the Attorney General would have been irreparably injured absent a stay, (3) whether issuance of a stay would substantially injure other parties, and (4) whether the public interest supports a stay—favored the Attorney General below. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

A. The Attorney General is likely to prevail against the platforms' facial challenge to the Hosting Rule.

The Attorney General is likely to succeed on the merits of HB 20's Hosting Rule because that Rule regulates only the platforms' conduct, not their speech. In the alternative, even if Hosting Rule implicated the platforms' First Amendment rights, the Attorney General is likely to show that the Hosting Rule permissibly regulates the platforms as common carriers.

The platforms' only response—that the Hosting Rule impinges on their "editorial discretion"—is likely to fail for multiple reasons. *First,* a State may override a common carrier's "editorial discretion" to the extent necessary to prevent that carrier from discriminating among members of the public. *Second*, the platforms cannot insist on being treated as "publishers" for the

purposes of the First Amendment when they expressly disclaim any responsibility for the information their users publish, including for section 230's purposes. *Third*, a right to "editorial discretion" has never been understood as giving a business a right either to refuse to serve a potential customer as a form of First Amendment speech or to regulate conversations among its customers. And, *fourth*, the platforms' supposedly contrary authorities are inapposite.

1. The Hosting Rule does not implicate the First Amendment because it regulates conduct, not speech.

The Attorney General is likely to prevail on the merits of his appeal because the Hosting Rule regulates conduct, not speech—specifically, the platforms' discriminatory refusal to provide, or discriminatory reduction of, service to classes of customers based on viewpoint. The First Amendment generally does not prevent restrictions on "conduct," even if those restrictions "impos[e] incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Because the Hosting Rule merely requires the platforms to serve customers on a non-discriminatory basis, it is "a perfectly legitimate thing for the Government to do"—even if the service the platforms provide is "to host another person's speech." *Agency for Int'l Dev. v. All. for Open Soc'y, Int'l, Inc.*, 140 S. Ct. 2082, 2098 (2020) ("*USAID*") (Breyer, J., dissenting) (summarizing this Court's precedents).

a. The Court first indicated that a decision to host speech should be viewed as conduct rather than speech in *PruneYard*. There, a shopping mall

had a policy prohibiting visitors from engaging in expressive activity not "directly related to [the mall's] commercial purposes," 447 U.S. at 77, which violated a California law that prohibited shopping malls from infringing on the visiting public's "speech and petition[]" rights, *id.* at 78. This Court rejected the mall's argument that it enjoyed a "First Amendment right not to be forced by the State to use [its] property as a forum for the speech of others." *Id.* at 85.

This Court concluded that California's hosting requirement did not infringe on the mall's speech rights for three reasons. *First*, because the mall was "open to the public to come and go as they please," no reasonable onlooker would have associated any given speaker's views with those of the mall itself. *Id.* at 87. *Second*, California did not require the mall to host a "specific message"; instead, the State's law applied equally to all potential speakers and messages. *Id. Third*, the mall remained free to "expressly disavow any connection with" a disfavored speaker or message. *Id.*; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 579-80 (1995) (explaining the *PruneYard* outcome on these grounds). Every Justice agreed, with several concurring on additional grounds. Justice Powell in particular raised concerns that small retail establishments subject to California's law might have a Takings Clause claim. *PruneYard*, 447 U.S. at 96-97 (Powell, J., concurring).

The platforms' speech rights are no more infringed by the Hosting Rule than the speech rights of the mall in *PruneYard* were by California's law.

First, the platforms hold themselves open to all comers. *See supra* at 4-5. *Second*, HB 20 does not dictate any specific message that the platforms must host—only that must they treat their customers equally regardless of those customers' stated viewpoint. *See supra* at 11-12. And *third*, the platforms remain free under HB 20 to disavow any connection with disfavored messages—indeed, they already do so regularly. *See, e.g.*, Facebook, *Terms of Service* § 4.3, https://perma.cc/HK4X-QPL8 (as of Dec. 13, 2021) ("We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct . . . or any content they share."); Twitter, *Terms of Service* § 3, https://perma.cc/2QCU-VLW4 (as of Dec. 13, 2021) (similar); *see also, e.g.*, Twitter, *Updating Our Approach to Misleading Information* (May 11, 2020), https://perma.cc/K8CT-NQHZ (explaining that platform appends its own messages to content it deems "misleading" or "harmful").

b. This Court unanimously applied and expanded *PruneYard*'s reasoning in *FAIR*, 547 U.S. at 65, expressly holding that a speech-hosting requirement regulates the host's "conduct, not speech," *Id.* at 60. In *FAIR*, the Court examined Congress's requirement that universities host military recruiters on the same terms they hosted other potential employers. *Id.* at 55-58. Some law schools "object[ed]" to the military's then-policy refusing to allow gays and lesbians to serve in uniform. *Id.* at 52 & n.1. The law schools wanted to exclude military recruiters from the schools' on-campus recruiting activities to express their disagreement with the military's policy. *Id.* at 52-53. But this Court concluded that Congress's prohibition on discrimination against the

military regulated only the law schools' conduct—and that such regulation "d[id] not sufficiently interfere with any message of [a] school" to trigger First Amendment scrutiny. *Id.* at 64. That was because the law schools' hosting obligation only "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60. So too here: HB 20's Hosting Rule affects only what the platforms "must do"—refrain from engaging in viewpoint discrimination—"not what they may or may not say." *Id.*

2. Even if the Hosting Rule implicated the platforms' First Amendment rights, the Rule is a permissible regulation of the platforms as common carriers.

Even if the Hosting Rule implicated the platforms' First Amendment rights in some way, the Attorney General is still likely to prevail because Texas law declares the platforms are common carriers. The State may therefore properly limit the platforms' ability to discriminate among their customers. This Court has historically upheld similar regulations as applied to similar enterprises—for example, telegraphs, telephones, and cable operators. Texas has as compelling an interest in preserving its residents' ability to communicate and receive information on the platforms as States had regarding these previous generations of communications technology.

a. Common carriers—and the concept of a common carrier—have existed since the 1300s. *See* Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 147 n.31 (1914); *see also, e.g.*, 47 U.S.C. §§ 201-202

(codifying federal common-carriage requirements for certain communications providers). It is well established that a common carrier "can make no discrimination between persons," and is "bound to accept all goods offered within the course of his employment." *York Co. v. Cent. R.R.*, 70 U.S. (3 Wall.) 107, 112 (1865) (stating the common-law rule); *VIA Metro. Transit v. Meck*, 620 S.W.3d 356, 360 (Tex. 2020) (noting that Texas adopts the common-law treatment of common carriers).

Nothing about these well-settled principles changes merely because the common carrier is a communications platform, as this Court has affirmed for over a century. *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896) (affirming enforcement of state law that required "telegraph" companies to "transmit and deliver [messages] with impartiality and good faith"). For a communications-provider common carrier, the carrier must, "to the extent of their capacity," "transmit" all messages "upon reasonable terms." *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894). This requirement has not "rais[ed] any First Amendment question." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016); *see also Knight*, 141 S. Ct. at 1222-23. And these principles continue to apply even where the platforms wish to censor third-party speech—just as past communications-provider common carriers have sometimes desired. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2321-22 (2021).

There is also little doubt that the platforms resemble historical communications-provider common carriers sufficiently to justify the

continued application of these principles, as Justice Thomas has explained. *Knight*, 141 S. Ct. at 1222-23. After all, the platforms hold themselves open as willing to do business with all comers on equal terms; they are communications enterprises; they are demonstrably affected with a "public interest"; and they enjoy statutory limitations on liability (such as under section 230). *Id.*; *see also* Supp. App.9a-11a. (expert report explaining why the platforms are akin to historical common carriers).

To the extent that any question remains whether the platforms are common carriers, that counsels against the Court's intervention at this time. Though monopoly power is neither necessary nor sufficient for an entity to become a common carrier, courts sometimes consider a party's market power in determining whether an enterprise should be subject to the legal obligations associated with being a common carrier. *Knight*, 141 S. Ct. at 1224-25 & n.4 (collecting authorities). Because the district court sharply limited discovery before issuing its preliminary injunction, the parties have not yet had the opportunity to develop many factual questions, including whether the platforms possess market power, and how any potential network effects interact with whatever market power they possess. Several jurists have suggested that they believe the platforms wield such power. *See, e.g.*, *Knight*, 141 S. Ct. at 1224-25 (Thomas, J., concurring); *Tah*, 991 F.3d at 255 n.11. (Silberman, J., dissenting). The Attorney General will, if necessary, develop these factual questions below once discovery resumes. *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 187 (1997) (*Turner II*) (reviewing "must-carry" rules for

cable providers after remand for development of legislative record, "as well as additional expert submissions" and additional documents). Any factual question that persists on these points counsels against this Court's immediate review—and thus also against vacating the Fifth Circuit's stay. *Supra* at 16-17.

b. This Court's opinions in the *Turner* cases confirm that even if the Hosting Rule implicates the platforms' speech rights, the Rule comports with the First Amendment as a regulation of a common carrier. The *Turner* cases involved the Cable Television Consumer Protection and Competition Act's "must-carry" requirement, which required cable operators to reserve over one-third of their channels for local broadcasters to use. This reservation came at the expense of cable operators' ability to host cable programmers' speech on these channels; nonetheless, this Court squarely upheld the Act's requirement. *See Turner I*, 512 U.S. at 630-32.

In the *Turner* cases, the Court determined that the Cable Act's must-carry requirement implicated both cable operators' and cable programmers' First Amendment rights, but that the requirement survived intermediate scrutiny. The must-carry requirement implicated the cable operators' speech rights because the requirement "reduce[d] the number of channels over which cable operators exercise[d] unfettered control." *Id.* at 637. And it implicated the cable programmers' rights because it "render[ed] it more difficult for cable programmers to compete for carriage on the limited channels" not reserved. *Id.* Nevertheless, the requirement survived intermediate scrutiny as to both

operators' and programmers' First Amendment rights because the requirement advanced the government's significant interest in the "widest possible dissemination of information from diverse and antagonistic sources." *Turner II*, 520 U.S. at 189, 192 (concluding this dissemination is "essential to the welfare of the public").

So it is with the Hosting Rule. Even if the Rule significantly limited the platforms' ability to carry the speech of speakers they prefer—and it does not—Texas possesses compelling interests in ensuring both the wide dissemination of ideas from many and varied sources and the free exchange of ideas within the State. And the Rule advances those interests by narrowly forbidding only the very largest platforms—those with the greatest control over the modern public square—from censoring speakers based on their viewpoint. Even then, the Rule is further narrowed to Texas's specific interests: it applies only within the State's geographic bounds.

The Hosting Rule would satisfy even the *Turner dissent's* approach, which applied strict scrutiny. *Turner I*, 512 U.S. at 677 (O'Connor, J., concurring in part and dissenting in part). As the *Turner* dissent observed, the must-carry regulation did not require carriers to serve all comers equally; it selected favored speakers for preferential treatment. *Id.* at 683. But as the *Turner* dissent recognized, traditional common-carriage treatment did not present nearly as sharp of constitutional concerns as the must-carry requirement, because "it st[ood] to reason that if Congress may demand that telephone

companies operate as common carriers, it can ask the same of cable companies." *Id.* at 684.

c. The platforms raise several responses, none of which has merit. The platforms first insist (at 22 & n.7) that this Court held in *Reno v. ACLU*, 521 U.S. 844 (1997), that *Turner*'s analysis had no application to the Internet. This Court did no such thing. In *Reno*, the Court identified that some of its precedents subjected restrictions of broadcast media to relaxed First Amendment scrutiny in part due to "the scarcity of available frequencies" for those media. 521 U.S. at 868. Because the Internet suffers from no similar scarcity problem, applicants argue, the Court's broadcast-media precedents do not apply here—and thus this Court need not consider *Turner* in the Internet context.

But a key premise of the platforms' syllogism is false: *Turner I* expressly disavowed any reliance on a broadcast-media spectrum-scarcity rationale. As in *Reno*, this Court acknowledged in *Turner I* that some of its "cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media." 512 U.S. at 637. *Turner I* explained this more permissive approach as a function of "the unique physical limitations of the broadcast medium." *Id.* Yet *Turner I* rejected an argument for applying the broadcast-medium approach to cable operators, declaring those cases "inapposite … because cable television does not suffer from the inherent limitations that characterize the broadcast medium." *Id.* at 638-39. Far from repudiating *Turner I*'s approach, *Reno* supports it.

The platforms next argue (at 30-31) that the Hosting Rule warrants heightened scrutiny because its application to specific platforms and exceptions to its common-carriage requirement discriminate among speakers, types of content, and viewpoints. They are incorrect for a threshold reason: because the Hosting Rule regulates the platforms' *conduct*, distinctions that would raise constitutional concerns if applied to speech do not create the same constitutional problems as applied to conduct. But even if the Rule regulated the platforms' speech, the distinctions the Rule draws regarding both what platforms it regulates and what exceptions it makes to its nondiscrimination obligation fit well within the First Amendment's bounds.

HB 20 does not define which platforms must comply with the Hosting Rule by reference to content. Applicants argue (at 29-30) that the Hosting Rule's exemption of "website[s] … consist[ing] primarily of news, sports, entertainment, or other information that is not user generated but is preselected by the provider," Tex. Bus. & Com. Code § 120.001(1)(C)(i), discriminates on the basis of content, but that misses the mark. Any news, sports, or entertainment content transmitted on social-media platforms is subject to the Hosting Rule's nondiscrimination requirement. Indeed, content that is not initially subject to the Rule because it appears on an exempt news website becomes subject to the Rule when transmitted on a covered platform. That is not a content-based distinction.

Nor does the Hosting Rule discriminate among viewpoints in its scope. Applicants claim (at 30) that the Rule's application only to the largest

platforms "can be explained only as viewpoint discrimination against" them. This hyperbolic assertion overlooks the obvious: Texas sought to vindicate its residents' interests in a free and open public square in a careful, measured manner by regulating only the platforms with the greatest control over that square. The platforms hang their viewpoint-discrimination arguments (at 10) solely on statements by the Governor of Texas that the *platforms* have, in the past, discriminated against particular viewpoints. But isolated statements by individuals involved in the legislative process seldom doom laws. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (rejecting a "cat's paw" theory of legislative intent because "the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents"); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (courts do not "void a statute that is . . . constitutional on its face, on the basis of what [some] Congressmen said about it"). At most, the Governor's statements in connection with HB 20 did no more than reiterate the concerns raised by government officials at all levels of government for at least the last five years. *Supra* at 6-7. That hardly establishes that the platforms have been subjected to unconstitutional viewpoint discrimination—let alone that such discrimination is the "only explanation" for the Hosting Rule's scope.

The platforms also fault the Hosting Rule in passing (at 30-31) for permitting them to exercise unfettered control over certain categories of content, such as that which incites violence or is illegal or tortious. It is difficult to see how these exceptions could inflict a First Amendment injury on the

platforms.[10] Even if these exemptions could raise First Amendment concerns under some circumstances, applicants' *facial* challenge requires them to show that these exemptions would be "unconstitutional in a substantial number of [their] applications," *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). Applicants do not even attempt to address the wide swath of cases in which the State would plainly be constitutionally justified in withholding antidiscrimination protections from content that enjoys no First Amendment protections in the first place—for example, incitements to violence or illegal content.

d. Even if some higher level of scrutiny applied, the Hosting Rule would satisfy it. The Rule advances several compelling governmental interests, including the preservation of the "widest possible dissemination of information from diverse and antagonistic sources," *Turner II*, 520 U.S. at 192, and the protection of the free exchange of ideas and information, App.39a (reproducing HB 20's findings), in the "modern public square." *Packingham*, 137 S. Ct. at 1737. There is nothing more narrow that Texas could have done while still adequately advancing these interests. The district court's opinion and the platforms' advocacy below confirms as much—the only less-restrictive

[10] In any event, if the district court found these carveouts problematic, the proper remedy would have been to enjoin the exceptions—not the Hosting Rule, as the Rule's exceptions are severable by HB 20's terms. App. 52a-54a (reproducing HB 20's intricate severability provision); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2352-55 (2020).

alternative they proposed below was for Texas to "create[] its own" "social-media platform." Platforms' Fifth Cir. Br. at 49; App.33a. That immodest proposal amounts to an admission that Texas carefully crafted the Hosting Rule's scope.

3. The platforms' reliance on "editorial discretion" is misplaced.

The platforms claim a First Amendment right to "editorial discretion" over their users' speech that enjoys the same First Amendment protections as would the platforms' own speech. This argument fails for several independent reasons.

a. A common carrier does not enjoy the "editorial discretion" to refuse service to disfavored members of the public.

To begin, applicants claim (at 5-9) a right to "editorial discretion" that common carriers have not historically enjoyed. "[O]ur legal system and its British predecessor" have long recognized the unique role of common carriers and "have long subjected … common carriers[] to special regulations, including a general requirement to serve all comers." *Knight*, 141 S. Ct. at 1222. For example, common-carriage rules were imposed on those "who had … carried the mails." *United States v. Thomas*, 82 U.S. 337, 344 (1872) (citing *Lane v. Cotton*, 1 Lord Raymond 646 (K.B. 1701)).

Moreover, *Turner I* rejected an analogous appeal to "editorial discretion" by cable operators. While the Court recognized that cable operators have "editorial discretion over which stations or programs to include in [their] repertoire," the Court nevertheless upheld Congress's rules requiring those

companies to host specific broadcasters' speech on their channels at the expense of cable programmers that the companies would have preferred to host. 512 U.S. at 636. Even the *Turner I* dissent recognized that "common carriage" requirements could require a common carrier to host others' speech, notwithstanding the exercise of "editorial discretion." 512 U.S. at 682, 684. Because these common-carriage rules were "permissible at the time of the founding," *Knight*, 141 S. Ct. at 1223-24 (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)), the First Amendment is no obstacle to the Rule's common-carriage obligation.

b. The platforms cannot rely on "editorial discretion" that they have repeatedly disclaimed.

Even if the platforms could assert their "editorial discretion" as a defense to a common-carrier regulation as a general matter, they could not do so in these specific circumstances. The platforms have spent years disclaiming responsibility for or editorial control over the content generated by their users. And any editorial-discretion rights this Court has recognized depend on a putative editor being understood as approving of the underlying speech over which the editor exercises control. This Court should not countenance applicants' attempt to recharacterize their business conduct as the exercise of editorial discretion, especially given the platforms' repeated litigation representations to the contrary when seeking a liability shield under section 230.

First, this Court has only recognized "editorial discretion" rights for enterprises that choose content with which they will be associated and for which they will be responsible. *See, e.g.*, *Associated Press v. NLRB*, 301 U.S. 103, 127 (1937) (stating that "editors" are "responsible" for content they deem "appropriate" to reproduce); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386 (1973) (legal responsibility). Neither applicants nor the platforms choose to be associated with the vast majority of the content that appears in their spaces in any respect. Indeed, the platforms acknowledge that much of the content that appears on their services conflicts with their own policies. *See* App.126a n.56; 296a-97a; 303a. That admission is categorically inconsistent with a claim that the platforms exercise editorial discretion over users' speech that they host.

By contrast, the Hosting Rule does not regulate the small amount of content over which the platforms arguably exercise actual editorial discretion. For example, the platforms might substantively modify a user's speech or otherwise "recommend" it. But when the platforms do so, they engage in their *own* speech, to which the Hosting Rule does not apply. *See* Tex. Civ. Prac. & Rem. Code § 143A.002.

To the extent that the Hosting Rule may apply to ambiguous situations falling in-between the platforms' conduct of hosting user content and the platforms' own speech, this facial challenge is a poor vehicle to address them. After all, as this Court has instructed, "federal courts" should not "determine the constitutionality of state laws in hypothetical situations where it is not even

clear the State itself would consider its law applicable." *Morales v. TWA*, 504 U.S. 374, 382 (1992). And again, because the platforms advance only a facial challenge here, App.14a, these cases' ambiguity militates against this Court's immediate review, while their number cuts against applicants' claims on the merits, *Bonta*, 141 S. Ct. at 2387.

Second, this case would present an especially poor vehicle to expand the scope of any editorial-discretion right given that the platforms have repeatedly disclaimed that they possess any editorial discretion over user content in order to take advantage of section 230's liability limitations. When the platforms resort to section 230's protections—which they do routinely—they are relying on Congress's determinations that they are not the "publisher" of their users' content, 47 U.S.C. § 230(c)(1), and that they are not "responsible" for that content in any respect, *id.* § 230(f)(3). It would be strange if the platforms enjoyed a First Amendment editorial right over third-party content that Congress has long determined, and the platforms have long agreed, that they neither publish nor are responsible for.

Congress may plainly create statutory benefits which, if used, will forestall the beneficiary from fully asserting his First Amendment rights. For example, 501(c)(3) companies enjoy tax-code benefits, 26 U.S.C. § 501(c)(3), but they may not exercise their core First Amendment right to participate in political campaigns for candidates for public office while enjoying that benefit. *Regan v. Tax'n With Representation of Wa.*, 461 U.S. 540, 548-49 (1983) (lobbying restrictions).

Section 230 puts internet platforms to an analogous choice. Section 230's shield confers a significant benefit, protecting the platforms from liability that publishers would incur for others' speech, such as for defamation. *See, e.g.*, *Pittsburgh Press*, 413 U.S. at 386 (stating that a publisher can "not defend a [tort] suit on the ground that the [tortious] statements are not its own"). When an entity invokes that protection, it relies on Congress's determination that it is not a "publisher" of its users' speech and that it has no "responsibility" for that speech. These positions may well forestall an entity from claiming it possesses a publisher's right of "editorial discretion" over its users' content. *Cf. Regan*, 461 U.S. at 549 And that may put the platforms to an eminently permissible choice: rely on section 230's liability limitation, or assert a publisher's prerogatives under the First Amendment, but not both. Putting platforms to such a choice no more "overrides" their First Amendment rights, *contra* Appl. 29, than a nonprofit corporation's limitations on political campaigning would.

This Court should view applicants' assertions of "editorial discretion" with special skepticism given their members' repeated assertions that the platforms do not exercise "editorial discretion" when hosting others' speech. The platforms have described themselves as mere "conduits for others' speech."[11] They claim to provide only a "neutral means for users to share

[11] Br. for Facebook, *Klayman*, *supra*, at 1; *see also* Defendants Motion to Dismiss at n.5, *Fields v. Twitter, Inc.*, No. 3:16-cv-00213, 2016 WL 2586923 (N.D. Cal. Apr. 6, 2016).

information, ideas, and other content."[12] They represent that they "passively offer[] to the public routine, generally available services."[13] They compare themselves to "prototypical online messaging board[s]," which amount to no more than a "platform for third-party generated content."[14] They describe their algorithms as "neutral" tools that "connect users on the platform,"[15] and which operate "solely in conjunction with content that third parties choose to publish."[16] They expressly compare themselves to "scores of other types of service providers, including wireless carriers and utilities."[17] And they say they are akin to "passive distributor[s]" of users' speech.[18] None of these assertions is consistent with applicants' newfound discovery of the platforms' supposed "editorial discretion." That is because they have none.

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[12] Motion to Dismiss at 34, *Crosby v. Twitter*, No. 2:16-cv-14406 (E.D. Mich.) (Doc.29); *see also* Motion to Dismiss at 19, *Gonzalez v. Twitter*, No. 4:16-cv-03282 (N.D. Cal.) (Doc.61).

[13] Motion to Dismiss Reply at 3, *Sinclair v. Twitter*, No. 4:17-cv-5710 (N.D. Cal. 2018) (Doc.58).

[14] Memorandum in Support of Motion to Dismiss at 12, *Green v. Youtube*, No. 1:18-cv-00203 (D.N.H. 2018) (Doc.48-1); Motion to Dismiss at 8, *Jefferson v. Zuckerberg*, No. 1:17-cv-03299 (D. Md. 2018) (Doc.4).

[15] Memorandum in Opposition to Motion to Vacate at 11, *Force v. Facebook*, No. 1:16-cv-05158 (E.D.N.Y. 2018) (Doc.75).

[16] Appellee Br. at 22-23, *Force v. Facebook*, No. 18-397 (2d Cir. 2018) (Doc. 129); *see also Colon v. Twitter, Google, and Facebook*, No. 6:18-CV-00515, 2019 WL 7835413 (M.D. Fla. Dec. 20, 2019).

[17] Motion to Dismiss at 34, *Crosby*, *supra.*

[18] Memorandum in Support of Motion to Dismiss at 15, *Hepp v. Facebook*, No 2:19-cv-04304 (E.D. Pa. 2020) (Doc. 56-1).

c. An entity does not exercise "editorial discretion" by controlling communications between third parties.

Even if the platforms exercised some degree of editorial discretion by hosting others' speech, they still would have no "editorial discretion" right to be free from a regulation limiting how they control users' communication with each other.

A party exercises editorial discretion when it decides how to select and present others' speech with the understanding that onlookers will associate the editor with that content. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). This discretion involves both selecting a third party's speech for publication and affiliating the editor with the selected speech and speaker, such as "a university selecting a commencement speaker" or "a public institution selecting speakers for a lecture series" would. *Id.* Thus, newspapers exercise "editorial discretion" when deciding which editorials they will print, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and television broadcasters do the same when determining which broadcasts they will air, *Ark. Educ.*, 523 U.S. at 674.

But no one exercises "editorial discretion" by policing conversations between third parties. The law schools in *FAIR* claimed their restrictions of disfavored third-party speech amounted to the exercise of such discretion, Respondents' Br. 27-28, *FAIR*, 2005 WL 2347175 (U.S. 2005), but this Court unanimously rejected that argument. The reason is straightforward: an enterprise exercises First Amendment rights when it edits third-party speech

that it will be associated with and held responsible for; it does not "edit" conversations that one group of people (*e.g.*, military recruiters) have with another (*e.g.*, law students) just because those conversations happen on the enterprise's property. Absent more, a requirement that an enterprise host third parties' communication with one another on the enterprise's property "does not sufficiently interfere with any message of the" enterprise itself to implicate that enterprise's First Amendment rights. *FAIR*, 547 U.S. at 64. That remains true no matter how much the enterprise "object[s]" to the content of that exclusively third-party speech. *Id.* at 52.

d. The platforms' cases do not require a different result.

The platforms' argument to the contrary principally relies on three cases: *Hurley*, 515 U.S. 557; *Miami Herald*, 418 U.S. 241; and *Pac. Gas & Elec. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) ("*PG&E*"). Their reliance on each is misplaced.

1. None of these cases benefit applicants because none deals with an entity that held itself as open generally to the public. Instead, in each case, the government required an entity emphatically *not* open to the public to begin hosting unwanted third-party speech. That distinction is critical: "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021); *PG&E*, 475 U.S. at 26 (Marshall, J., concurring). The *Miami Herald* newspaper and the *PG&E* newsletter were not open to the

public in any sense—these media carried exclusively either the entity's own speech or speech selected by that entity's owner (the Miami Herald or the Pacific Gas & Electric (PG&E) Company). And the parade organizer in *Hurley*, although relatively "lenient" about admitting parade units, nevertheless "select[ed] the expressive units of the parade from potential participants." 515 U.S. at 569, 574. So the parade likewise was not open to the public.

The platforms, by contrast, were built for the specific purpose of hosting third-party speech, and are "open to the public to come and go as they please." *PruneYard*, 447 U.S. at 87. The Hosting Rule also expressly applies only to platforms "open to the public." Tex. Bus. & Com. Code § 120.001(1). The First Amendment's limitations are categorically different—and more permissive—regarding platforms open to the general public. *PruneYard*, 447 U.S. at 87.

2. At most, all three cases stand for the unobjectionable proposition that requiring an enterprise to host third-party speech can implicate the enterprise's speech rights when the hosting would cause the enterprise's "own message [to be] affected by the speech it [i]s forced to accommodate." *See FAIR*, 547 U.S. at 63 (describing all three cases). But the Hosting Rule does not affect the platforms' own messages.

First, in *Hurley*, the host parade organizer's own message would have been affected by the unwelcome parade unit because, as the Court in *Hurley* concluded, the public would likely "misattribut[e]" the unwelcome unit's speech to the parade's organizer. 515 U.S. at 577; *see also USAID*, 140 S. Ct.

at 2088 (describing *Hurley* as a "speech misattribution" case); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.9 (2008) (same). The Court in *Hurley* arrived at that conclusion based on well-established understandings regarding how parades operate and are interpreted by viewers. *Hurley*, 515 U.S. at 568-69, 576-77. But the possibility of misattribution must be evaluated from the perspective of a reasonable observer. *See FAIR*, 547 U.S. at 65. And the platforms have spent considerable effort ensuring that in the vast majority of cases, no reasonable observer would misattribute a user's speech on the platforms to the platforms themselves. *Supra* at 5.

The platforms say (at 7) that advertisers and others "have sought to hold platforms accountable" if they do not censor "harmful" speech. But those economic and business pressures have nothing to do with potential misattribution for First Amendment purposes. *See* Motion to Dismiss at 23, *Gonzalez*, *supra* (asserting that even though the platforms host terrorist content, "objective observer[s] would [not] conclude" that they "promote terrorism"). For good reason: it is well-established that, without more, it is not "plausible" that a rule requiring an entity to host third-party speakers neutrally will cause a reasonable observer to misattribute a third party's speech to that entity. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995).

Second, in *Miami Herald*, the host newspaper's own message would have been affected by the hosted speech in two ways. As an initial matter, the

newspaper would have to devote finite space to speech that it could have "devoted to other material" that it "preferred to print." *Miami Herald*, 418 U.S. at 256; *FAIR*, 547 U.S. at 64. Moreover, the requirement challenged in *Miami Herald*—a compulsory right of reply for any candidate for office criticized by the newspaper there—attached only when the newspaper itself spoke or published others' speech on a specific topic, thereby penalizing the newspaper for its "choice of material." *Miami Herald*, 418 U.S. at 258; *Turner I*, 512 U.S. at 654. Neither problem is present here because the platforms possess essentially infinite space for hosting speech, *see Knight*, 141 S. Ct. at 1224-25, and the Hosting Rule operates independently of any message the platforms themselves speak.

Third, *PG&E* essentially reprised the first of *Miami Herald*'s two problems. *FAIR*, 547 U.S. at 64. There, a state regulator allowed a public-interest group antagonistic to PG&E's interests to appropriate PG&E's customer newsletters, requiring PG&E to disseminate the group's hostile message while preventing PG&E from fully publishing its own speech. *PG&E*, 475 U.S. at 9; *id.* at 24 (Marshall, J., concurring). If permitted, that appropriation could have resulted in PG&E's customers misattributing the group's antagonistic speech to PG&E. *Id.* at 15-16. That result was possible in *PG&E* (but is not here) because PG&E's newsletter had traditionally carried only that company's own speech; a reasonable observer could have assumed that if another entity published a message in that newsletter, PG&E permitted it to do so because it agreed with and wished to adopt that entity's message.

3. *Miami Herald* and *PG&E* are also inapposite because they involved content-based rules privileging specific speech proffered by specific speakers. *Id.* at 13 (noting that the *Miami Herald* statute was "content based in two senses"); *id.* at 12 (access right in *PG&E* was "content based"). "This kind of favoritism [went] well beyond" what the Constitution allows. *Id.* at 14-15. "[U]nlike the access rules struck down in those cases, the [Hosting Rule is] content neutral in application," so it differs materially from the rules in those cases on that basis as well. *Turner I*, 512 U.S. at 654. The Hosting Rule imposes a nondiscrimination requirement that protects all users equally, regardless of the content of their speech.

4. The platforms' other authorities (at 20) are even further afield. They identify cases addressing whether the First Amendment *itself* compels certain enterprises to host speech. *See Halleck,* 139 S. Ct. 1921; *Ark. Educ.*, 523 U.S. 666; *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). But as the most recent of those cases expressly disclaimed, "the degree to which the First Amendment *protects* private entities . . . from government legislation or regulation requiring those private entities to open their property for speech by others" is a "distinct question not raised" in those cases. *Halleck*, 139 S. Ct. at 1931 n.2; *see also Ark. Educ.*, 523 U.S. at 675; *Denver,* 518 U.S. at 825. That the platforms resort to such inapposite authority only underscores that the Fifth Circuit did not demonstrably err in determining that the Attorney General likely will prevail on his appeal of the

district court's determination that the Hosting Rule violates the First Amendment.

B. The Attorney General is likely to prevail regarding the platforms' facial challenge to HB 20's disclosure and operational requirements.

The Attorney General is also likely to prevail on appeal challenging the district court's conclusion that HB 20's disclosure and operational requirements violate the First Amendment. As this Court has repeatedly held, the government can require commercial enterprises to disclose "purely factual and uncontroversial information about" their services, so long as that disclosure would not be "unduly burdensome." *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-53 (2010). That is why these disclosures are common and commonly upheld by the courts of appeals. *See, e.g.*, *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 850-52 (9th Cir. 2019) (disclosure of radiation levels); *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (disclosure of products' countries of origin); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009) (disclosure of "calorie content"). HB 20 comfortably fits within this world of accepted disclosure laws.

1. There is no merit to the platforms' blizzard of arguments that *Zauderer* does not apply. They are wrong (at 34) that HB 20's disclosure requirements warrant strict scrutiny as impermissibly content-, speaker-, or

viewpoint-based. Almost all disclosure requirements apply to only certain businesses regarding certain information—but this Court has not faulted those requirements as content- or speaker-based discrimination. *See Milavetz*, 559 U.S. at 250 (applying *Zauderer* review to law that established specific content to be disclosed only by "debt relief agenc[y]"). Indeed, it is difficult to imagine a mandatory-disclosure regime applying without limit to all businesses and all contents—let alone one not "unduly burdensome." Nor does heightened scrutiny under the "campaign-finance disclosure[]" framework apply, *contra* Appl. 34 n.12, because HB 20's disclosure requirements plainly have nothing to do with that subject. The platforms are also wrong to say (at 35 & n.13) that their (non-existent) editorial discretion shields them from disclosure requirements. *See Herbert v. Lando*, 441 U.S. 153, 174 (1979) (rejecting similar argument by newspaper attempting to immunize its exercise of editorial discretion from discovery in defamation case). Nor, contrary to applicants' assertion (at 35), is *Zauderer* limited to only commercial speech: for example, mandatory "health and safety warnings" with no apparent commercial component have "long [been] considered permissible." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018).

2. The platforms' arguments under *Zauderer* (at 36-39) also fail. To show that a disclosure under *Zauderer* unduly burdens a speaker, a challenger must show that the disclosure requirement burdens a plaintiff's *speech*, such as by "drown[ing] out" the plaintiff's own message. *NIFLA*, 138 S. Ct. at 2378. For example, a government mandate that an advertiser append a disclosure that

occupies 20% of an advertisement's space may be "unduly burdensome" because it consumes too much of the advertiser's own message. *See Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 756-57 & n.5 (9th Cir. 2019) (en banc). But factual-disclosure requirements are not invalid simply because they may prove administratively difficult to comply with those requirements—which is all applicants essentially argue. *Cf. Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020) (rejecting argument about "excessive financial burdens"). In any event, the real-world costs or challenges that HB 20's disclosure requirements might impose on any given platform at any given time are appropriate subjects for *as-applied* challenges, not the *facial* challenge applicants press here. That facial challenge fails for at least three additional reasons.

First, HB 20's requirements that regulated platforms disclose their acceptable-use policies and how they manage data on their properties no more unduly burden speech than nutritional labels do. Each of these requirements may be satisfied by succinct, easily replicated statements that regulated platforms include on their websites.[19]

[19] The platforms perplexingly also claim (at 38) that they believe they are "already complying with" HB 20's requirement that they disclose their acceptable use policies. If so, that concession betrays that the platforms are not seriously and irreparably injured by that provision taking effect pending further proceedings.

The platforms next assert (at 37) that HB 20's data-management disclosure requirement would "enable wrongdoers" and "reveal trade secrets." The platforms provide no evidence other than their own conclusory declarations to prove this surprising outcome might occur. Nothing about HB 20 requires the platforms to disclose either trade secrets or information that would "enable wrongdoers." And if the Attorney General were to sue the platforms for failing to provide, for example, a legally protected trade secret, the platforms could raise that property right in an as-applied challenge to the requirement of such a disclosure.

Second, HB 20's biannual transparency report requirement can largely be satisfied with a top-line "number of instances" of certain categories of decisions, *see* Tex. Bus. & Com. Code § 120.053(a)(1); *id.* § 120.053(a)(2), and a general description of the tools that the platforms use to enforce their acceptable use policies, *id.* §120.053(a)(7). Demonstrably more demanding reporting requirements, such as the SEC's requirements regarding corporate proxy statements, are well-established and do not raise any constitutional problem. *See generally Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (identifying "numerous examples could be cited of communications that are regulated without offending the First Amendment," including "the exchange of information about securities, and "corporate proxy statements") (internal citations omitted).

The platforms—some of the most sophisticated technology and computer companies ever to exist—next reply (at 38) that they are incapable of

calculating the required top-line figures. That confession of computational incompetence is difficult to take seriously. It is also unsupported by any *bona fide* record explanation. *Cf.* App.366a (platforms' lawyer-declarant admitting he personally does not "even know or understand the math" that would be used to develop the biannual transparency report).

Third, the operational provisions are ordinary regulations of business conduct that fall well outside the First Amendment's scope. These provisions essentially require the platforms to maintain a customer-service department for processing complaints and reviewing user appeals. Tex. Bus. & Com. Code §§ 120.101-.104. Granted, customer-service representatives speak when interacting with customers. But HB 20 does not control what such representatives must say, and "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456. As this requirement does not meaningfully differ from similar longstanding consumer-protection laws, *e.g.*, 15 U.S.C. § 1681i (Fair Credit Reporting Act), the platforms have not shown that the Fifth Circuit demonstrably erred in concluding that the Attorney General was likely to prevail regarding the platforms' facial challenge to these operational requirements as well.

C. The Fifth Circuit correctly concluded that the remaining *Nken* factors favor the Attorney General.

Because of the posture of this case, it is impossible to know precisely how the Fifth Circuit analyzed the remaining *Nken* factors. But because each of

the remaining factors favor the Attorney General, the Fifth Circuit necessarily correctly concluded that the Attorney General was entitled to a stay of the district court's preliminary injunction pending further proceedings.

Texas suffers a unique and powerful sovereign injury each day that HB 20 is wrongfully enjoined, *see, e.g.*, *Cameron v. EMW Women's Surgical Ctr. P.S.C.*, 142 S. Ct. 1002, 1011 (2022), and its residents suffer a loss of equal access to the modern public square and the many benefits resulting from free and open dialogue in that square. Whatever harms the platforms suffer from interim compliance with HB 20, by contrast, are generally financial and comparatively less significant. *See infra* at 52-55. Further, because Texas sought a stay pending appeal, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken*, 556 U.S. at 435). And the public interest overwhelmingly favors HB 20's operation. The public enjoys an interest of the "highest order" in ensuring individuals have access to a "multiplicity of information sources." *Turner II*, 520 U.S. at 190. And "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984). None of those values are diminished by the fact that they protect offensive—even hateful—speech. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it" protection. *Hustler Mag., Inc. v. Falwell* 485 U.S. 46, 55-56, (1988).

* * *

In sum, the platforms have not established the second element of this Court's test in determining whether to lift a stay: that the Fifth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304. That alone is sufficient to refuse applicants' request.

III. The platforms Have Not Shown That They Will be Seriously and Irreparably Injured by the Stay.

Finally, the platforms have also failed to demonstrate that they will be "seriously and irreparably injured" by the Fifth Circuit's stay. *Id.* In an attempt to make this difficult showing, the platforms speculate (at 39-42) that: (1) "HB20 will require platforms to incur massive nonrecoverable financial injuries" due to the need to "transform their operations"; (2) they will "lose millions of dollars" due to advertiser boycotts that will arise if they comply with HB 20; and (3) their First Amendment expression will be impaired by complying with HB 20. These assertions do not withstand scrutiny.

First, these dire predictions ignore that the district court's injunction applies only to the Attorney General. App. 35a. But HB 20 expressly contemplates that a "user may bring an action" to enforce the Hosting Rule "regardless of whether another court has enjoined the attorney general." Tex. Civ. Prac. & Rem. Code § 143A.007(d). As a result, vacating the stay will have no effect on any alleged irreparable harm resulting from the possibility of the enforcement of the Hosting Rule.

Second, the platforms nevertheless predict (at 40) that HB 20 will convert them into "havens of the vilest expression imaginable," breathlessly claiming that HB 20 will force social-media platforms to host "slurs, pornography, spam, and material harmful to children" (at 9), "propaganda" from ISIS, Russia, and the KKK (at 1), and "pro-Nazi speech, hostile foreign government propaganda, pro-terrorist-organization speech" (at 40). These predictions are unfounded. HB 20 allows the platforms to remove content: they merely must do so on a viewpoint-neutral basis, such as a rule banning all spam or all pornography, or by relying on one of the Hosting Rule's express exceptions to its antidiscrimination requirement, such as the exceptions authorizing the platforms to remove, even on viewpoint-discriminatory terms, content that is illegal or that incites violence. *See* Tex. Civ. Prac. & Rem. Code § 143A.006(a). In addition, nothing in HB 20 prevents the platforms from curating an individual users' content feed consistent with that user's preferences. *Supra* at 11-12. HB 20 explicitly permits the platforms to discriminate in how it presents content to a given user so long as the platform does so to facilitate the user's own preferences. Tex. Civ. Prac. & Rem. Code § 143A.006(b).

Third, the platforms offer only speculative theories as to how the Fifth Circuit's stay may harm them. Take their assertion (at 39) that compliance with HB 20 will require them to "transform their operations" and "incur massive nonrecoverable financial injuries." The platforms appear to stake this jarring (and on its own terms, "massive") claim entirely on the off-hand conjecture of Facebook's Vicė-President for Trust & Safety, Neil Potts, who

opined at a deposition that it "will be impossible for [Facebook] to comply" with HB 20, that it would "force [Facebook] to change all of [its] systems," and that such changes could require a $13 billion investment. Appl. 3, 40 (citing App.350a, 364a, 365a).

This avowed guesswork does not demonstrate that the applicants will suffer an irreparable injury—let alone a serious one. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (irreparable injury to be relied on must be "likely," not "based on a possibility"). "[T]here must be more than an unfounded fear on the part of the applicant." 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & M. KANE, FED. PRAC. & PROC. §2948.1 (3d ed.). To the extent that Potts was even competent to offer an opinion on the nature, extent, and likely expense of any technological changes required to comply with HB 20, he based that opinion on his incorrect and expansive view of HB 20's scope. *Compare* App.348a-50a, *with supra* at 10-12.[20] And his implausible contention that it would cost Facebook $13 billion to comply with HB 20 relied on the *non sequitur* that Facebook had "spent $13 billion since 2016 on safety and security," App.338a, coupled with his unexplained guess that Facebook would have to "invest nearly as much to be able to comply" with HB 20, App.350a.

Potts' speculation about Facebook's technological capabilities and the costs that Facebook would incur in complying with HB 20 is particularly

[20] Potts is an in-house attorney, "not an engineer," App.329a, 362a, and he testified the alleged compliance required of Facebook would not be implemented by him or his team, App.363a-64a.

difficult to square with the fact that HB 20 has been in effect for nearly six months without any impediment to users filing suits to enforce the Hosting Rule—yet the application suggests that no technological overhaul has been undertaken. Moreover, the platforms professed for years to operate in accordance with the Hosting Rule's viewpoint-neutrality mandate. *Supra* at 4-5. And the platforms repeatedly and emphatically assured congressional lawmakers that they did not engage in viewpoint discrimination. *See* Br. of State of Texas et al. as Amici Curiae at *7-*8, *NetChoice, LLC et al. v. Att'y Gen., State of Fla.*, No. 21-12355 (11th Cir. Sept. 14, 2021), 2021 WL 4237301 (collecting examples).

The platforms' contention (at 40) that HB 20 will cause advertiser boycotts that will cost them millions in advertising revenue is equal parts speculative and irrelevant. The platforms claim (at 40) that their fears of such boycotts are "not hypothetical" because YouTube experienced such boycotts in 2017 after their ads were "distributed next to videos containing extremist content and hate speech" and Facebook faced a similar backlash in 2020. But it is far from clear that HB 20 will force the platforms to host the types of content that ignited those advertiser responses. For example, the objectionable content on YouTube included videos of an Egyptian cleric who had been "banned from the US over extremism" and a preacher whose messages "were said to have

inspired the murder of a politician."[21] The Hosting Rule, however, expressly allows platforms to remove content "authorized to [be] censor[ed] by federal law," and content that "directly incites criminal activity or consists of specific threats of violence." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(1)-(4).

Even if the platforms' compliance with HB 20 would certainly cause similar advertiser boycotts, the costs these boycotts would inflict would not be cognizable injuries. This Court does not give disapproving observers a heckler's veto over laws by excusing those laws' obligations on account of potential offense at the prospect those obligations will be obeyed. *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 231 & n.12 (1964); *cf. Salazar v. Buono*, 559 U.S. 700, 703 (2010) (rejecting claim of harm based on community offense at continued display of religious monument).

Regardless, the platforms have not shown why the YouTube boycott of 2017 and Facebook boycott of 2020 would predict advertisers' behavior in response to the platforms' compliance with HB 20. As noted, the YouTube boycott may have been instigated by content that HB 20 does not require the platforms to host. Further, content that violates YouTube's own policies appears to be available on YouTube to this day—presumptively without leading to an advertiser boycott. App.126a & n.56, 296a-97a, 303a. The Facebook boycott appears to have been due at least in part to the "polarized

[21] Olivia Solon, *Google's Bad Week: YouTube Loses Millions as Advertising Row Reaches US*, THE GUARDIAN (Mar. 25, 2017), https://tinyurl.com/jssaaw8k.

election period" of 2020 and a coordinated campaign by a "coalition of civil rights organizations" to pressure advertisers.[22] In any case, the Facebook boycott was perceived as "largely symbolic," unlikely to "make a dent" in the company's $70 billion annual advertising revenue, and were seen as temporary nuisances by Facebook's CEO, Mark Zuckerberg, who told his staff that "all these advertisers will be back on the platform soon enough."[23] The platforms' claim (at 40) that a repeat showing of such ineffectual boycotts would seriously and irreparably injure them is hard to reconcile with these contemporaneously expressed sentiments.

Finally, the platforms argue (at 41-42) that lifting the Fifth Circuit's stay will vindicate their First Amendment rights. This argument adds nothing, as it merely conflates their merits arguments with their proposed irreparable and serious injuries. In any event, as explained above (at 21-24), HB 20 does not infringe on the platforms' First Amendment rights—so they suffer no corresponding First Amendment injuries.

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[22] Kim Lyons, *Coca- Cola, Microsoft, Starbucks, Target, Unilever, Verizon: All the Companies Pulling Ads from Facebook*, THE VERGE (Jul. 2, 2020), https://tinyurl.com/yeyvhw4d.

[23] *Id.*

CONCLUSION

The Court should deny the emergency application to vacate the Fifth Circuit's stay pending appeal.

Respectfully submitted.

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May 2022

Supplemental Appendix

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

NETCHOICE, LLC, et al., *Plaintiffs*,	
v.	**Civil Action No. 1:21-cv-00840-RP**
KEN PAXTON, in his official capacity as Attorney General of Texas, *Defendant*.	

FEDERAL RULE OF CIVIL PROCEDURE 26(a)(2)(b) EXPERT WITNESS REPORT OF ADAM CANDEUB

I. Introduction

A. Purpose

I am an expert in the historical development and application of the common carrier doctrine and the regulatory powers of government over communications networks, public utilities, and the internet. The Texas Office of the Attorney General has retained me as an expert in connection with *NetChoice, LLC v. Paxton*, Civil Action No. 1:21-cv-00840-RP (filed in the Western District of Texas, Austin Division), to offer opinions regarding the historical basis for Texas' regulation of social media platforms and email service providers as common carriers, as expressed in Texas' recently enacted H.B. 20.

I am being paid for my work in connection with this litigation at the rate of $350 per hour, plus reimbursement for any reasonable expenses. My compensation is not dependent upon my opinions or the outcome of this case.

The opinions I express are based on my own personal knowledge, qualifications, experience, research, and professional judgment. If called as a witness in this case, I am prepared to testify as a fully competent witness about my opinions.

I understand that discovery in this case is ongoing, and I reserve the right to amend or add to my opinions if new evidence is provided or if new opinions or arguments are presented by other parties, amici, or experts.

B. Qualifications

My qualifications are summarized in my Curriculum Vitae (or "CV"), which is included as Appendix A to this Report. My CV contains all my scholarly publications authored in the previous ten years. Appendix B contains an additional list of my articles written for popular audiences.

I have served as a law professor at Michigan State University for over 17 years, was tenured in 2010, and have written over 25 scholarly publications. Most of those publications involve common carriage and/or communications/internet law. My historical analyses of common carrier networks have been cited by federal courts. In addition, I have extensive experience in communications and internet law, serving as an attorney advisor for the Federal Communications Commission's Common Carriage Bureau and later Acting Assistant Secretary of Commerce for the National Telecommunications and Information Authority.

I have not testified as an expert at trial or by deposition in any case during the past four years.

C. Materials Considered

In addition to my knowledge based on many years of studying and working in relevant fields, as well as the extensive materials cited in this report, I have reviewed various documents specifically related to this case. The case-specific documents that I reviewed are listed in Appendix C to this Report.

II. Opinions

The State of Texas has the power to regulate large social media platforms as common carriers or firms "affected with the public interest." State and federal governments rely on these legal categories for the authority to regulate large communications networks. Just as courts recognized states' power in the 19th century to categorize the then cutting-edge telegraphs and telephones as common carriers, so may Texas now regulate social media platforms and email service providers, which are but communication technology's more recent iterations. Limiting this authority would constitute a judicial diminishment of government's regulatory power not seen since the days of *Lochner v. New York*.[1]

Throughout the centuries, courts have defined common carriers in numerous ways. A recent statement by one of the current Supreme Court Justices well summarizes this law into five tests: (1) whether a firm exercises market power, (2) whether an industry is affected with "the public interest," (3) whether the entity regulated is part of the transportation or communications industry, (4) whether the industry receives countervailing benefits from the government, or (5) whether the firm holds itself out as providing service to all.[2]

These tests are necessarily broad because they give government the ability to ensure all citizens have access to essential services, ranging from gas, electricity, and water to airline and railway travel as well as telephone and internet access. In today's world, this regulation is particularly necessary to ensure equal and non-discriminatory access to the internet, which the United States Supreme Court has termed our "modern public square."[3]

But even under the Plaintiffs' and their Amici's, at times, incomprehensible description of social media, the major social media platforms satisfy each of the five tests courts have set forth for common carrier status and industries "affected with the public interest." Purporting to avoid this conclusion, Plaintiffs and their Amici put forth novel legal tests for common carrier status that lack any basis in precedent as a matter of historical fact.

A. Common Carriers: The Historical Development of the Legal Concept

The five tests for common carriers listed above accurately reflect centuries of legal decisions distinguishing between common carriers and other firms. Until the Supreme Court's decision in *Nebbia*,[4] which reversed much of the *Lochner* era constitutional restrictions on government regulation of business, the Court had ruled that government could impose extensive regulation only upon common carriers and other industries "affected with the public interest."[5] These tests, therefore, received much attention during the 19th and early 20th century because they demarcated

[1] *Lochner v. New York*, 198 U.S. 45 (1905).
[2] *Biden v. Knight First Amendment Inst.*, ___U.S.___, 141 S. Ct. 1220, 1222–23 (Thomas, J., concurring statement concerning denial of certiorari).
[3] *Packingham v. North Carolina*, ___U.S.___, 137 S.Ct. 1730, 1737 (2017).
[4] *Nebbia v. New York*, 291 U.S. 502 (1934).
[5] *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

the limits of government regulatory power. Important for the case at hand, under any of these tests, a social media platform is properly classified as a common carrier.

A "common calling," of which common carrier is but one type, is a legal concept with roots in the earliest chapters in English law. Mentioned in the Year Books, the earliest law reports, a common calling refers to any trade or industry that had an obligation to serve all without discrimination on generally accepted terms and conditions.[6] Common callings typically worked under special, higher standards of care and liability.[7] Given that the early legal system of England was largely status-based, as opposed to contract-based, there were many such callings. For example, millers, who were obligated to process all surrounding farmers' grain, were considered a common calling, as were bakers, who were obligated to provide daily bread for all in a village. According to Arterburn, the first litigated legal case on record concerning a common calling dates from 1348 and involved a ferryman.[8] Adler asserts that the first mention of common carriers, referred to as *aliis communibus cariatoribus*, can be found in the Beverley Town Documents (Selden Society) dating from between 1300 and 1600.[9]

In the centuries since the concept's introduction into English law, courts have entertained numerous tests to distinguish common carriers from ordinary businesses. Writing in the early 1900s, Bruce Wyman suggested that in the infancy of England's trade economy in the 14th and 15th centuries, the special common calling duties applied to all trades and businesses, because in any area, few persons were engaged in each trade and the problem of monopoly or market power abuse was thus endemic.[10] He viewed common callings as a type of early common law antitrust or trade regulation. This view has been criticized because many early public callings clearly had no obvious monopoly power.[11] Gustavus Robinson expands Wyman's notion arguing that public utilities serve a central economic *and social* role in society without necessarily being a monopoly.[12] This interpretation of common carriage law is reflected in the first of Justice Thomas's tests, "whether a firm has market power," and many courts and agencies have adopted this test.[13]

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[6] *See, e.g.*, Y.B. 2 Hen IV.7, pl. 31 (mentioning innkeepers). According to Arterburn, the first "duty to serve" case dates from the 15th century. Norman F. Arterburn, *Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. 411, 424 (1926-1927), citing Keilw. 50, pl. 4 (1450).

[7] Joseph H. Beale, Jr., *The Carrier's Liability: Its History*, 11 Harv. L. Rev. 158, 163 (1897) ("From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a "common" or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers.").

[8] Arterburn, *Origin and First Test of Public Callings*, 75 U. Pa. L. Rev at 421 (citing Y.B. 22 Ass. 95, pl. 41 (1348)).

[9] Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 147 n.31 (1914-1915).

[10] Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1904).

[11] Adler, 28 Harv. L. Rev. at 149 ("When we consider the principle of monopoly as producing in the early days the supposed distinction between classes of callings, its failure is clearly apparent, for no evidence of any kind is offered that carriers were less numerous than butchers, or that innkeepers were fewer than carpenters, or barbers than weavers. Tailors were no less numerous than fullers.").

[12] *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277 (1928); *see also* Arterburn, 75 U. Pa. L. Rev. at 427-28 (asserting that social and economic conditions led to particular industries being labelled common and arguing the Black Death's labor shortage led to the development of the duty to serve all).

[13] *Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 57 (D.C. Cir. 2019) (the "premise of Title II and other public utility regulation is that [broadband providers] can exercise market power sufficient to substantially distort economic efficiency and harm end users"); *In the Matter of Pol'y & Rules Concerning Rates for Competitive Common Carrier*

In contrast, other scholars have argued that the difference between common callings and other trades was in the legal nature of their offering. Singer as well as Haar & Fessler contend that common callings offered their goods and services on general terms and conditions to all.[14] In the 17th and 18th century, courts continued to treat certain industries, such as common carriers and innkeepers, as common callings on public policy and fairness grounds. Burdick has argued that a firm was categorized as a common calling "because a person held himself out to serve the public generally, making that his business, and in doing so assumed to serve all members of the public who should apply, and to serve them."[15] This interpretation of common carriage is found in Justice Thomas's fifth test: whether the actor holds itself out as providing service to all. Many courts have adopted this test.[16]

In addition, Burdick also argued that "the peculiar duties resting upon them [common carriers and public utilities] grow out of the exercise of public franchises or the receipt of financial aid from the state."[17] Here, he presaged Justice Thomas's fourth test: whether an industry receives countervailing benefits from the government, such as tax benefits or powers of eminent domain, which some courts have followed.[18]

Servs. & Facilities Authorizations Therefor, 84 F.C.C.2d 445, 448 (1981) ("we have tentatively determined that those communications suppliers without market power need not be treated as common carriers").

[14] Charles M. Haar & Daniel W. Fessler, *The Wrong Side Of The Tracks: A Revolutionary Rediscovery Of The Common Law Tradition Of Fairness In The Struggle Against Inequality* 15 (1986) ("Over the centuries, the common law doctrine of equal services and the duty to serve surfaced and resurfaced as a potent and dynamic means to address changing—and often the grimmest imaginable—social and economic traditions."); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1298 (1996) ("the most plausible statement of the law is that all businesses open to the public had a duty to serve the public").

Justice Story adopts this view too. He states, "To 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, pro hac vice." Story, Commentaries of the Law of Bailments § 495 (9th ed. 1878) at 323 (citations omitted).

[15] Charles K. Burdick, The Origin of the Peculiar Duties of Public Service Companies. Part II, 11 Colum. L. Rev. 616, 635 (1911).

[16] *See, e.g.*, *Refrigerated Transp. Co. v. I.C.C.*, 616 F.2d 748, 754 (5th Cir. 1980) (a "common carrier has a duty to serve"); *N. Am. Acc. Ins. Co. v. Pitts*, 213 Ala. 102, 105 (1925) ("A common carrier of passengers is one who is engaged in a public calling, which imposes upon him the duty to serve all without discrimination."); *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 294 (1932) ("the doctrine that common carriers and others under like duty to serve the public"); *W. Union Tel. Co. v. Byrd*, 155 Tenn. 455, 458 (1927) ("Telegraph and telephone companies have frequently been termed 'common carriers,' or common carriers of news or information, and in some jurisdictions have been declared to be common carriers by constitutional or statutory provisions; but while they are in the nature of common carriers in regard to their quasi-public character, and their duty to serve the public generally and without discrimination.").

[17] Burdick, 11 Columb. L. Rev. at 621.

[18] *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 205 (Tex. 2012) ("To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder's exclusive use."); *Tenn. Gas Pipeline Co. v. Rylander*, 80 S.W.3d 200, 205 (Tex. App.—Austin 2002, pet. denied) ("The Comptroller's interpretation of Rule 3.297 does not deny effect to Tennessee Gas's status as a licensed and certificated carrier because it can still qualify for exemptions in the tax code intended to be available to common carrier pipelines or to licensed and certificated carriers generally. As the Comptroller points out, by virtue of its status as a common carrier pipeline, Tennessee Gas may qualify for an exemption under section 151.330(h) of the tax code . . . .").

By the 17th century, the law was clear that an "implied contract" required common callings to serve all on the same nondiscriminatory terms. At the same time, as this law developed in the 17th and 18th century, contract law began to govern most commercial activities, such as "taylor" or "workman," limiting the number of common callings.[19]

The following excerpt from Blackstone, writing in the 17th century, demonstrates this shift. Blackstone recognized as common callings trades so recognized in the subsequent centuries by American courts, namely innkeeper, common carrier or bargemaster, and common "farrier," a blacksmith that specialized in shoeing horses.[20] At the same time, reflecting older law, Blackstone recognized trades which would not be considered common just a century later, such as "taylor," or workman.

> There is also in law always an implied contract with a common inn-keaper, to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking . . . . Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is 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.[21]

The trades and occupations that courts continued to classify as common carriers were typically related to transportation and communications. Innkeepers and farriers were, of course, vital to travel by horse and coach and transporting goods through the 17th to the 19th centuries. By the same token, these industries were central to communication. Until the emergence of the telegraph in the 19th century, communications were exclusively by letter. And a significant portion of letters were borne by private carrier as the United States Post Office for most of the 19th century failed to provide home delivery in most places.

Armed with these legal concepts, courts in the 19th century expanded the notion of common carrier to new technologies, such as steamboats and railroads. Eventually, courts realized that most types

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[19] William C. Scott, Judicial Logic as Applied in Delimiting the Concept of Business Affected with a Public Interest, 16 Ky. L.J. 19, 21-23 (1930).

[20] According to Scott, "With the dawn of what we might call our modern judicial era, or at least semi-modern, we find that only two members of the erstwhile 'common' group retain their status, namely, carriers and innkeepers." 16 Ky. L.J at 23. In addition, farriers as well were considered common carriers. *See Lord v. Jones*, 24 Me. 439, 443 (1844) ("[T]he law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the people. Upon this ground common carriers, innkeepers, and farriers had a particular lien." (quotation omitted)); *N. Chicago Street Railroad Co. v. Williams*, 140 Ill. 275, (1870) ("[A]mong the instances of implied contracts are mentioned those of the common innkeeper to secure his guest's goods in his inn, of the common carrier to be answerable for the goods he carries, and of the common farrier that he shoes a horse well without laming him. 'The law presumes or implies from the fact of receiving, as common carriers, the passenger to carry for hire, a contract.'"); *Conwell v. Voorhees*, 13 Ohio 523, 540 (1844) ("These authorities establish the rule that if a party undertakes to perform work without consideration, and does not proceed on the work, no action will lie; but these authorities expressly except from the rule common carriers, innkeepers, porters, ferrymen, farriers.").

[21] III William Blackstone, *Commentaries On The Law Of England*, 163.

of "[t]ransportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result" and classified most types of transportation services as common carriers.[22]

In addition, courts and legislatures expanded the common carrier category to keep up with technology innovation in communications as telegram and telegraph replaced the physical letter. For instance, the Supreme Court held that telegraphs, because they "resemble[d] railroad companies and other common carriers," were "bound to serve all customers alike, without discrimination."[23] The Court later stated, "As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for [all] alike."[24] Similarly, numerous states classified telegraphs as common carriers by statute, with courts seeing "no good reason why the Legislature may not, in the exercise of its discretion, when it deems such action appropriate, fix upon a telegraph company the status of a common carrier."[25]

Perhaps most important, federal law recognized telegraphs and telephones—indeed all "wire communications" as common carriage. The Mann-Elkins Act of 1910 resolved whether telegraphs and telephones were classified as common carriers and gave regulatory control of telegraph and telephone services to the Interstate Commerce Commission (ICC).[26] Similarly, Section 201 of the Communications Act of 1934 regulates all common carriage service that is "communication by wire" to this day.[27] Thus, we get Justice Thomas's third test: whether the entity regulated is part of the transportation or communications industry. No one can doubt that social media platforms and email services providers are modern communications industries.

Finally, common carriers fall under the rubric of industries affected with the public interest. In *Munn v. Illinois*, the Court ruled that grain elevators could be constitutionally subject to state non-discrimination and rate regulation because they were "affected with the public interest."[28] States could regulate these industries despite the *Lochner*-era restrictions on government action.

Chief Justice Waite stated that an industry is "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[29] While the New Deal

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[22] *Curtiss-Wright Flying Service v. Glose*, 66 F.2d 710, 712 (3d Cir. 1933).
[23] *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894).
[24] *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 605 (1926); *see also Pac. Tel. Co. v. Underwood*, 55 N.W. 1057, 1057 (Neb. 1893) ("A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it."); *Parks v. Telegraph Co.*, 13 Cal. 423, 424 (1859) ("The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or packages along a route. The physical agency may be different, but the essential nature of the contract is the same.").
[25] *Blackwell Mill. & Elevator Co. v. W. Union Tel. Co.*, 89 P. 235 (Okla. 1906); *Reaves v. W. Union Tel. Co.*, 110 S.C. 233 (1918) ("Is defendant a common carrier in the transmission of money by telegraph? With regard to the transmission of intelligence for hire, defendant was made a common carrier by section 3 of article 9 of the Constitution, which provides that all telegraph corporations engaged in the business of transmitting intelligence for hire are common carriers. That provision, however, is merely declaratory of the common law.").
[26] Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544 (1910).
[27] 47 U.S.C. § 201.
[28] *Munn v. Illinois*, 94 U.S. 113, 126 (1876).
[29] *Id.*; *see also* Walton H. Hamilton, *Affectation with Public Interest*, 39 Yale L.J. 1089, 1097 (1930).

Supreme Court's disavowal of *Lochner* lessened the term's importance to regulatory authority, *see Nebbia v. New York*, 291 U.S. 502 (1934), the term retains its validity. The Supreme Court cases such as *Nebbia* simply expanded the power of government to regulate and never overturned or disavowed the common carriage. Here we get Justice Thomas's second test: whether the entity is affected with "the public interest."

B. Based on Established Legal History, Social Media Platforms and Email Service Providers May Be Regulated As Common Carriers.

As an initial matter, Plaintiffs have produced nothing to show that their members are not in fact common carriers under the various historical tests. This is particularly true in light of the minimal factual development at this stage of litigation. "Courts routinely hold that "[w]hether a particular individual is a common carrier is a question of fact to be determined from the evidence."[30] Plaintiffs' members, despite their claim otherwise, do not constitute "common carriers as a matter of law" (Dkt. No. 12 at 32) under any historical test. As the above analysis shows, common carriage tests often present complicated, fact-intensive questions.

Yet, even given the currently inadequate factual record, large social media platforms and email service providers are prima facie common carriers within the various historical understandings of that term. First, it is unquestionable that the large social media platforms and email service providers have market power. They currently face numerous antitrust suits in Europe and the United States.[31] While these cases have yet to find the platforms violate the U.S. antitrust laws, market power is but one part of a successful antitrust suit. The economic consensus holds that the large platforms exercise market power against advertisers and have deterred entrance in an anticompetitive manner.[32]

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[30] *Williams v. Limpert*, 50 V.I. 467, 470 (D.V.I. Aug. 4, 2008) (citing *Commonwealth v. Babb*, 70 A.2d 660, 662 (Pa. Super. Ct. 1950); *Esprit De Corp. v. Victory Express*, No. 95–16887, 1997 U.S. App. LEXIS 7724, at *4, 1997 WL 191466 (9th Cir. Apr. 17, 1997) ("Whether a carrier meets the statutory and regulatory requirements to act as a contract carrier or a common carrier is a question of fact.") (citation omitted); *Powerhouse Diesel Servs. v. Tinian Stevedore*, Civ. No. 93–0003, 1994 U.S. Dist. LEXIS 10661, at *34–35, 1994 WL 383231 (D.N. Mar. I. July 15, 1994) ("What constitutes a common carrier, and what constitutes a contract carrier, are questions of law, but whether the carrier is acting as a common carrier or as a contract carrier is a question of fact.") (quotation omitted); *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996) ("It is a question of law for the court to determine what constitutes a common carrier, but it is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity."); *Beavers v. Federal Ins. Co.*, 437 S.E.2d 881, 882–83 (N.C. Ct. App. 1994) ("[W]hat constitutes a common carrier is a question of law, but whether one is acting as a common carrier is ordinarily a question of fact.") (citation omitted); *Adkins v. Slater*, 298 S.E.2d 236, 240 (W. Va. 1982) ("What constitutes a common carrier is a question of law, but whether a party in a particular instance comes within the class is a question of fact, to be determined as the case may arise.") (quotation omitted)).

[31] *See, e.g.*, Adam Satariano, *Facebook Faces Two Antitrust Inquiries in Europe*, N.Y. Times, June 4, 2021, *available at* https://tinyurl.com/2stnassb; Katyanna Quach, *US States' Antitrust Lawsuit Against Google's Advertising Business Keeps Growing*, The Register, Nov. 16, 2021, *available at* https://tinyurl.com/hv8n5b9j; Cecelia Kant, *States Say They Will Appeal the Dismissal of Their Facebook Antitrust Suit*, N.Y. Times, July 28, 2021, *available at* https://tinyurl.com/2y5dffpa; Aoife White. *EU, U.K. Open First Antitrust Probe into Facebook*, Bloomberg, June 4, 2021, *available at* https://tinyurl.com/v7fnv3bw.

[32] J. Alleman, E. Baranes & P.N. Rappoport, "Multisided Markets and Platform Dominance," in J. Alleman, P.N. Rappoport & M. Hamoudia (eds.), *Applied Economics in the Digital Era* (Palgrave Macmillan 2020); Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 Berkeley Tech. L.J. 1051 (2017).

Second, both social media and email service providers are industries "affected with the public interest." The category is broad and no doubt includes entities traditionally recognized as common carriers as well as public utilities. In his highly influential listing of industries affected with the public interest, Chief Justice Taft includes both common carriers and public utilities.[33]

Transportation and communications industries form the core of those affected with the public interest as industries providing basic services. In a series of cases, the Supreme Court expanded the concept to include industries closely related to transportation and communication. For instance, the Court ruled meat slaughtering yards were affected with the public interest because they were so interconnected to trains and thus part of the transportation network and essential to food production.[34]

Surely, if industries such as meat packing or express messaging, which are peripheral to a transportation or communication network, are affected with the public interest, then social media would qualify *a fortiori*. There is nothing peripheral about social media. Rather, it is, as the Supreme Court says, the "modern public square."[35]

Third, there is no doubt that social media is part of the communications industry.

Fourth, social media platforms receive countervailing benefits from the government of the sort typically enjoyed only by common carriers. Most importantly, they have conduit immunity under section 230 of the Communications Decency Act, meaning they do not have liability for the third-party content they carry (e.g., unlawful content).[36] This protection is shared with common carriers, which do not have legal liability for the content of the messages they bear.[37]

Like other historic common carriers, social media platforms enjoy a federal exemption from local taxation on the services they provide. The Internet Tax Freedom Act (ITFA) prohibits state and local entities from taxing internet access services that the platforms provide.[38] Again, extraordinary tax privileges and exemptions are historically typical for common carriers, which have often enjoyed exemptions from state and local taxes.[39]

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[33] *Charles Wolff Packing Co. v. Ct. of Indus. Rels. of Kan.*, 262 U.S. 522, 535–36 (1923).
[34] *Id.*; *see also German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 414-15 (1914) (fire insurance relied upon as an essential service for all industries); *Brass v. North Dakota ex rel. Stoeser*, 153 U.S. 391, 405 (1894) (grain elevators that were an integral part of grain transportation and the commodity trade); *Fort St. Union Depot Co. v. Hillen*, 119 F.2d 307, 312 (6th Cir. 1941) (railroad terminals that simply receive traffic are common carriers because they are essential to transportation); *Railway Express Agency v. Kessler*, 189 Va. 301, 305 (1949) (express messenger services that rely upon regular train operation).
[35] *Packingham v. North Carolina*, ___U.S.___, 137 S. Ct. 1730 (2017).
[36] 47 U.S.C. § 230(c)(1); *see Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).
[37] Telegraph companies generally had no liability for the statements they transmitted, but they could be liable if they acted with malice or with knowledge that the sender was not privileged to make the statement. *See* Restatement (Second) Of Torts § 612(2); *Mason v. W. Union Tel. Co.*, 125 Cal. Rptr. 53, 56 (1975); *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950); *Von Meysenbug v. W. Union Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1946).
[38] Title IX, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998).
[39] *See supra* note 18.

Fifth, social media holds itself out as providing service to all. Anyone can join a social media platform on equal terms as set forth in the platform's terms and conditions.

C. Plaintiffs' and Amici's Proposed Common Carriage Tests Have No Historical Legal Bases.

Rather than apply the accepted historical tests for common carriage to large social media firms, Plaintiffs and their Amici invent tests out of whole cloth and then claim that social media platforms fail to meet their ersatz tests. Contrary to historical precedent, they erroneously claim that (1) common carriers must serve users "indifferently" and may not have terms and conditions concerning the goods, passengers, or messages they carry; and (2) common carriers produce or provide standardized or uniform goods or services, which at least one Amicus terms a "widget of information," whereas social media is rapidly advancing public-facing communications. Neither argument has a basis in legal history.

Plaintiffs assert that large social platforms "are not common carriers as a matter of law or fact . . . [because] common carriers were those who undertook to transport or carry goods 'indifferently.'" (Dkt. No. 12 at 32) Plaintiffs define "indifferent" as not distinguishing among customers, materials, or content carried. They contend that because social media platforms are *not* indifferent and, for instance, do not permit adult content or pornography or only accept users who agree to the platforms' terms and policies and comply with each platform's respective community standards, the platforms cannot be common carriers.

First, there is no historic common carrier legal test that requires "indifference." Common carriers were never obligated—and to this day have no obligation—to accept all traffic. They are *not indifferent* to the passengers, goods, and messages they transport. Airlines can deny service to unruly passengers or those who otherwise violate their rules, as can railroads.[40] Telephones are not obligated to carry harassing phone calls.[41]

Rather, cases that use "indifferent" refer to Blackstone's implied contract, which must be offered to all but can distinguish among customers, materials, or content. Historically, common carriers must serve all under the same and "non-different" general terms and conditions, i.e., Justice Thomas's fifth test for common carriers. But, in this context, "indifferently" means that the terms and conditions in the implied contract must be offered to all. "Indifferent" here means "not different." Common carriers must have "nondiscriminatory . . . terms."[42] A common carrier need not "make individualized decisions, in particular cases, whether and on what terms to deal."[43] For

[40] *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (recognizing the "common law rule that 'where a carrier has reasonable cause to believe, and does believe, that the safety or convenience of its passengers will be endangered by a person who presents himself for transportation, it may refuse to accept such person for transportation and is not bound to wait until events have justified its belief"); *Dir. Gen. of Railroads v. Viscose Co.*, 254 U.S. 498 (1921) (a common carrier railroad may refuse to transport artificial silk providing such limitation was duly promulgated in tariffs).

[41] *See* 47 U.S.C. 223 – Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications.

[42] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005).

[43] *Am. Orient Exp. Ry. Co., LLC v. Surface Transp. Bd.*, 484 F.3d 554, 557 (D.C. Cir. 2007) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

example, a common carrier railroad may refuse to carry artificial silk, provided that such prohibition is duly published in its tariffs and thereby included in its terms or service.[44] A common carrier is not obligated to carry all substances.

Even though common carriers have traditionally been required to offer the same contract to all, that historical requirement has not meant that common carriers cannot refuse certain passengers, freight, or messages or have demanding terms of service, provided these terms and conditions are non-discriminatorily applied. Further, the "rule of the common law [is] that common carriers have the right to decline shipment of packages proffered in circumstances indicating contents of a suspicious, indeed of a possibly dangerous, nature."[45]

The cases Plaintiffs cite do not negate this historical understanding. In *Allen v. Sackrider*,[46] the court answered the question of whether a sloop hired in what appeared to be a one-off contract to carry grain was a common carrier. Finding that the sloop did not make a general offering of services to all, the court held that it was not a common carrier. It stated, quoting Story on Contracts, § 752: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire."[47]

The full quotation makes it apparent that the case is an example of Justice Thomas's fifth test for common carrier: whether a firm "holds himself out in common" to all offering the same, non-differentiated contracts. The case does not mean that a common carrier must carry all and has no power to refuse—rather it must make a common offering of terms and conditions, which can be restrictive or selective, to all.

Bank of Orange v. Brown,[48] is also an example of this same test for common carrier, which the court applied to a steamboat that apparently mislaid bank bills. Plaintiffs quote the court: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier." Plaintiffs omit the very next sentence: "There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation."[49] The court was speaking about an "implied undertaking" that is the same, i.e., the carrier had to offer in its implied contract the same standard of liability to all. However, that does not mean that he must carry more grain than his ship can safely carry or bear unlawful substances in his steamboat.

Finally, *Gisbourn v. Hurst*,[50] is inapposite. The case involved whether a landlord could seize cheese transported by a common carrier who owed the landlord rent. The opinion explains that

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[44] *Dir. Gen. of Railroads*, 254 U.S. 498.
[45] *United States v. Pryba*, 502 F.2d 391, 399 (D.C. Cir. 1974); *see also Nitro-Glycerine Case* (*Parrott v. Wells*), 82 U.S. (15 Wall.) 524, 535-36 (1872); *Bruskas v. Railway Express Agency*, 172 F.2d 915, 918 (10th Cir. 1949).
[46] *Allen v. Sackrider*, 37 N.Y. 341, 342 (1867).
[47] *Id.*
[48] *Bank of Orange v. Brown*, 1829 WL 2396 (N.Y. Sup. Ct. 1829).
[49] *Id.* at *2.
[50] *Gisbourn v. Hurst*, I Salk. 249, 250, 91 Eng. Rep. 220, 220 (1710).

"indifferently" means that a common carrier must offer the same terms and conditions to all. In other words, Hurst was obligated to carry cheese or similar goods for all. It did not mean that he had to be indifferent to what he carried, i.e., he could refuse to carry unlawful substances or things unsafe or too large for his wagon.

Amicus TechFreedom forwards different claims, which also lack historical legal basis. TechFreedom states that the "business of common carriers is, at its core, the transportation of property." (Dkt. No. 32 at 3 (internal quotation marks omitted).) As shown above, this claim has no historical basis. As an initial matter, one of the most important types of "property" that common carriers carried for most of history was letters. Given that history, courts classified new technologies that carry messages, such as telephones and telegraphs, as common carriers. As even TechFreedom concedes, telegraphs and telephones are regulated as common carriers under the Mann-Elkins Act of 1912. (Dkt. No. 32 at 3-4.) The Communications Act of 1934 discussed above defines common carriers even more broadly to include wire communications.

Retreating from its own claim that common carriers do not involve communications industries, TechFreedom argues that social media is somehow metaphysically different from telegraphs and telephones. "Although it doubtless contains a message, a telegram is best thought of as a widget of information conveyed along 'public ways' by a commodity carrier . . . ." (Dkt. No. 32 at 3 (citation omitted).) In contrast, social media platforms "are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not *transportation* at all. What the platforms offer is a wide array of differentiated—and rapidly evolving—forms of public-facing communication." (Dkt. No. 32 at 4.)

TechFreedom's discussion leaves it unclear what it means by "differentiated—and rapidly evolving—forms of public-facing communication," let alone a "widget of information." (Dkt. No. 32 at 3-4.) Indeed, all of its examples involve transmitting messages just like telegraphs and telephones. TechFreedom says, "Twitter's main product is a microblog." (Dkt. No. 32 at 4.) Well, no. Twitter transmits its users' messages ("tweets") to their followers. TechFreedom says Instagram "is primarily a photo-sharing service." (Dkt. No. 32 at 4.) Instagram sends pictures just as the post office or a fax machine does. Facebook, we learn, "has embraced several of these other forms, [although] has recently recommitted to fostering group pages." (Dkt. No. 32 at 4.) Again, a group page is simply a forum where multiple individuals send each other messages. As a matter of fact, each of these modern examples falls squarely within the historical definition of a common carrier.

TechFreedom also quotes the famous gnomic statement of media scholar Marshall McLuhan that "the medium is the message." (Dkt. No. 32 at 4.) But, even with famous quotations, TechFreedom cannot mispresent the essential nature of social media: carrying messages between users and recipients the user chooses—just as phones, telegraphs, and messenger services have historically done.

Finally, TechFreedom claims that "[t]he FCC has long held that data *transport* is the essence of telecommunications common carrier service, whereas any offering over the telecommunications network which is more than a basic transmission service is not." (Dkt. No. 32 at 4 (internal quotation marks omitted).) It claims that services other than telephones, "even simple text

messaging, which requires the carrier to undertake some information processing during transmission, is not" basic transmission. (Dkt. No. 32 at 4.)

This argument simply mispresents federal law and FCC regulation. All communications services, basic or enhanced, offered to the public is potentially regulable under section 201 common carrier authority.[51] The Communications Act of 1934 states that it "shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."[52] For decades, the FCC *chose* to exempt computer-based communications, such as internet access or text messaging, from common carriage, but continued to regulate them as "enhanced" or "information services."[53] But, the FCC never disclaimed the power to regulate these information services as common carriers—and indeed recently has so regulated them.[54]

D. It is Historically Well-Established That States May Impose Nondiscrimination Requirements on Common Carriers Transmitting or Receiving Interstate and Intrastate Messages.

The United States Supreme Court has long held that states have the power, pursuant to their common carrier authority, to impose non-discrimination requirements not only on intrastate common carriers but also on interstate carriers transmitting or delivering messages within their borders.

In *Western Union v. James*,[55] the Court reviewed a claim that a Georgia law regarding telegraph delivery within the state violated the Constitution by interfering with the federal government's power under the commerce clause. The Georgia law read in relevant part: "Be it enacted . . . [that] every electric telegraph company . . . wholly or partly in this state . . . shall transmit and deliver the same with *impartiality and good faith*."[56]

This case presented the exact issue the Court now faces—whether Texas may impose nondiscrimination requirements on communications firms for in-state transmission and delivery. The Supreme Court in *Western Union v. James* ruled that states do have that power. Rejecting a constitutional challenge that the state exceeded Commerce Clause limits, the Court reasoned that there "are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce."[57]

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[51] *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 629-30 (D.C. Cir. 2014) (The FCC "drew a line between 'basic' services, which were subject to regulation under Title II of the Communications Act of 1934 as common carrier services, *see* 47 U.S.C. §§ 201 *et seq.*, and 'enhanced' services, which were not. . . . What distinguished 'enhanced' services from 'basic' services was the extent to which they involved the processing of information rather than simply its transmission.").
[52] 47 U.S.C. § 201.
[53] *Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 34 (D.C. Cir. 2019) ("Petitioners are in a weak posture to deny that inclusion of 'search engines and web browsers' could support an 'information service' designation . . . .").
[54] *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5614-16 (2015).
[55] *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896).
[56] *Id.* (emphasis added).
[57] *Id.* at 662.

Western Union v. James was hardly an isolated decision. In subsequent decades, the Supreme Court and state supreme courts made clear that states could require communications firms within their borders to transmit and deliver messages in an impartial and good faith manner.[58]

III. Conclusion

Over the centuries, courts have developed five widely accepted tests for what constitutes a common carrier. It is my expert opinion that large social media firms qualify under each of these tests. Therefore, Texas is within its historical legal authority to regulate social media firms as common carriers. In fact, state laws have regulated telegraphs, which is a common carrier as well, in the precise way as H.B. 20 seeks to regulate social media platforms. The U.S. Supreme Court on numerous occasions has upheld those laws.

Plaintiffs evade the conclusion that social media firms can be regulated as common carriers by positing tests for common carrier status that are, to be blunt, invented for the purposes of this lawsuit. Their tests have no support in legal history or precedent.

Dated: November 22, 2021

Signed: Adam Candeub Digitally signed by Adam Candeub Date: 2021.11.22 17:01:42 -05'00'

Adam Candeub

[58] *See W. Union Tel. Co. v. Crovo*, 220 U.S. 364, 367 (1911) (New York law "makes it the duty of every telegraph company doing business in the state to receive and transmit prepaid messages 'faithfully, impartially, with substantial accuracy, as promptly as practicable.' But the standard of duty under the statute is precisely that imposed at common law upon such a common carrier."); *W. Union Tel. Co. v. Com. Milling Co.*, 218 U.S. 406 (1910) (upholding Michigan law requiring "all telegraph companies . . . to receive dispatches from and for other telegraph companies' line . . . and transmit the same with impartiality and in good faith"); *W. Union Tel. Co. v. Sims*, 190 Ind. 651 (Ind. 1921) (upholding Indiana law requiring telegraph firms to deliver a telegram "with impartiality and in good faith").

APPENDIX A

Adam Candeub

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EXPERIENCE

July 2004–Apr. 2020; February 2021-present
Michigan State University College of Law East Lansing, MI

- Assistant Professor (September 2004-August 2010)
- Associate Professor (September 2010-August 2012)
- Professor, College of Law (September 2012-present)
- Director, Intellectual Property, Information, and Communications Law Program (2007 – present)
    - Led program to a top ranking in US News and World Reports
    - Oversaw hiring of major, internationally recognized scholars
    - Created forward-looking, data analytics-centered curriculum
    - Developed novel gamified coursework

Dec. 2020-Jan.2021 Department of Justice Washington, D.C.

- Deputy Associate Attorney General

Apr. 2020–Dec. 2020 National Telecommunications & Information Authority (NTIA)
Department of Commerce Washington, DC

- Deputy Assistant Secretary (Apr. 2020-September 2020)
- Acting Assistant Secretary (Sept. 2020-Dec. 2020)
    - Led agency efforts on section 230 reform, supply chain security, and 5G spectrum

Mar. 2000 – May 2004 Federal Communications Commission Washington, DC
Attorney-Advisor

- Media Bureau (August 2001 – June 2004)
- Common Carrier Bureau, Competitive Pricing Division (March 2000 – August 2001)

Mar. 1998 – Mar. 2000 Jones, Day, Reavis & Pogue Washington, DC
Litigation Associate

Oct. 1996 – Jan. 1998 Cleary, Gottlieb, Steen & Hamilton Washington, DC

Corporate Associate

Aug. 1995 – Aug. 1996 Chief Judge J. Clifford Wallace San Diego, CA
Law Clerk, U.S. Court of Appeals for the Ninth Circuit

SELECTED PUBLICATIONS

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Introduction, Transnational Culture in the Internet Age: New Paradigms for Law and Communications (with Sean Pager) (2012)

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Network Growth: Theory and Evidence from the Mobil Telephone Industry (with Brendan Cunningham & Peter J. Alexander), 22 Information Econ. & Policy 91 (2010)

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Consciousness and Culpability, 54 Alabama L. Rev. 113 (2002)

Motive Crimes and Other Minds, Comment, 142 U. Penn. L. Rev. 2071 (1994)

EDUCATION

University of Pennsylvania Law School, J.D. *magna cum laude* 1992-95
Philadelphia, PA
University of Pennsylvania Law Review, Articles Editor 1994-1995
Order of the Coif

Yale University, B.A. *magna cum laude* 1986-90
New Haven, CT

COURSES TAUGHT

Administrative Law/ Regulatory State
Communications Law
Criminal Law
Quantitative Methods for Lawyers
Cyber Law
Antitrust
Legal Analytics
Privacy and Information Security Law
Ratemaking and Utility Law

AWARDS

Tilburg Law and Economics Center Award for Research in Search Engines (with S. Wildman)

Fulbright Lecture and Research Fellowship, University of Rijeka Faculty of Law, Croatia, Spring 2011

Appendix B
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Additional Publications

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- Dec. 18, 2019: A GitHub Subsidiary in China Threatens National Security and Internet Freedom
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- Mar. 13, 2020: Airbnb's Woe Now Includes IBM's Patent Infringement Suit
- Apr. 24, 2020: To Fight Global IP Theft, Keep Legal Enforcement Focused
- Apr. 26, 2020: "Infotainment Systems" in Cars Portend Safety, Privacy, and Competition Issues

Appendix C

Case Materials Reviewed:

- Plaintiffs' Motion for Preliminary Injunction (with exhibits)
- Defendant's Motion for Expedited Discovery (with exhibits)
- Plaintiffs' Combined Response in Opposition to Defendant's Motion for Expedited Discovery and Motion for Extension
- Defendant's Reply in Support of Motion for Expedited Discovery
- Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1)
- *Amicus Curiae* Brief of TechFreedom in Support of Plaintiffs NetChoice and CCIA's Motion for Preliminary Injunction