Nos. 22-277, 22-555

IN THE

Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, *et al.*,

Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,

Respondents.

NETCHOICE, LLC, DBA NETCHOICE, *et al.*,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND FIFTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE DIGITAL PROGRESS INSTITUTE IN SUPPORT OF RESPONDENTS

JOEL THAYER
Counsel of Record
DIGITAL PROGRESS INSTITUTE
1255 Union Street NE, 7th Floor
Washington, DC 20002
(760) 668-0934
joel@digitalprogress.tech

Counsel for Amicus Curiae

326611

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*[1]

The Digital Progress Institute (the "Institute") is a 501(c)(4) think tank based in Washington, D.C. The Institute advocates for federal and state policies in the technology and telecommunications space that are bipartisan and incremental in nature. Two of the Institute's five core principles are to advance laws that take a holistic approach to Internet regulation and promotes robust competition in tech markets. A finding that Texas's HB 20—a non-discrimination law targeted at the nation's largest social media platforms—violates the First Amendment would threaten that work, which is why the Institute has a concrete interest in ensuring the law's constitutionality.

INTRODUCTION

The First Amendment states in the relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I. James Madison, when authoring the free speech clause, intended it as a bulwark against government influence over what we can say or do. The First Amendment derives, in part, from Madison's—and the nation's—distrust over the concentrated power that a government can wield.

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1. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amicus curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

But Madison and the founding generation intended the First Amendment to be a shield against intrusive government regulation, not a sword to strike down every law that might burden a company. Indeed, Madison recognized that concentrated power was not exclusive to the government; it can just as easily derive from private monopolies, calling them the "greatest nuisances in Government." Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, *available at* http://founders.archives.gov/documents/Madison/01-11-02-0218. He believed that "[t]hey are powerful machines that have always been found competent to affect objects on principle in a greater independent of the people." James Madison, Speech in Congress Opposing the National Bank (Feb. 8, 1791) in Writings, pp. 480-90 (Library of America ed. 1999). Madison felt, that private operators, if left unchecked, could amass more power than the government itself. Scott Horton, *James Madison, Corporations, and the National Security State*, Written Remarks at Liberty and Power Lectures, Univ. of Ala. Law Sch. (2011), *available at* https://harpers.org/wp-content/uploads/madisoncorporationsnss2.pdf. Today's tech behemoths have proven Madison's skepticism warranted.

With this in mind, it is hard to imagine that he drafted the First Amendment as an instrument of corporate exceptionalism to cut down an individual's speech.

And yet that is what the Petitioners argue, "that buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech." *NetChoice v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022). YouTube blocks and demonetizes users who support certain political candidates or content creators that Google does not favor. Twitter dropped the New

York Post for accurate reporting ahead of a consequential election. Facebook even removed posts that shared a study published by the British Medical Journal—one of the oldest and most prestigious medical journals in the world—because the platformed believe the study was disinformation for calling some of Pfizer's data on its COVID-19 vaccines' effectiveness into question.

Twitter, now X, "unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community . . . ." *Paxton*, 49 F.4th at 445. X is not alone in that regard. Mark Zuckerberg describes his company as "more like a government than a traditional company," and he is the king. Henry Farrell, Margaret Levi, & Tim O'Reilly, *Mark Zuckerberg Runs a Nation-State, And He's The King*, Vox (Apr. 10, 2018, 7:44 AM), *available at* https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king.

Indeed, the power of social media platforms eclipses that of any sitting president or government. When evaluating whether the First Amendment prevented President Donald Trump from blocking individual users from accessing his Twitter profile, Justice Thomas lamented that "[a]ny control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account 'at any time for any or no reason.'" *Biden v. Knight First Amendment Institute at Columbia University et al.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J. Concurrence). He stated that "Twitter barred Mr. Trump not only from interacting with a few users, but removed him from the entire platform, thus barring all Twitter users from interacting with his messages." *Id.* at 1221.

Justice Thomas's concerns targets the platforms' inherent contradiction. On the one hand, they say they have every right to act as publishers to curate their platforms any way they see fit. On the other hand, they want to assume none of the liability for those actions and even seek legal immunity designated for those acting as neutral conduits of speech. In short, these platforms want their cake and to eat it, too. Like kings, these few platforms want to and will decide what you see and do on the Internet and there is nothing you can do about it.

It is under this backdrop and the lack of federal leadership that compelled the Texas legislature to place non-discriminatory obligations on the largest firms to prevent censorship based solely on a Texas users' viewpoint. Tex. Bus. & Com. Code § 120.002.

Congress and the States have passed non-discrimination laws before—and so the covered social media platforms claim that they, and they alone, are special and exempt. But there are no purple cows to First Amendment protections and the Court should refrain from making Big Tech one here. Crafting some new, special immunity for the largest social media platforms would hand them a sword they could use to void every legislative proposal directed at them.

The Institute strongly and respectfully urges the Court to follow its own jurisprudence applying non-discrimination laws to communications platforms and reject the Petitioners' new-found interpretation of the First Amendment.

SUMMARY OF ARGUMENT

Social media platforms have enveloped every aspect of our lives. There is no escaping them. These platforms are "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). We use these communications firms to make plans with friends, share videos and articles, text via their direct messaging features, and engage in spirited public debates. These platforms also serve as our primary distributers of news and current events. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, Pew Research (Dec. 10, 2018), *available at* https://www.pewresearch.org/short-reads/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/.

To address the private censorship occurring online, the Texas legislature enacted HB 20, a non-discrimination law that applies only to the nation's largest social media platforms. Specifically, HB 20, *inter alia*, prohibits the largest social media platforms from "block[ing], ban[ning], remov[ing], deplatform[ing], demonetiz[ing], de-boost[ing], restrict[ing], deny[ing] equal access or visibility to, or otherwise discriminat[ing] against expression" based solely on a Texas user's viewpoint. Tex. Bus. & Com. Code § 143A.004(a)-(b). And it only applies to social media platforms that have "50 million active users in the United States in a calendar month . . . ." *Id.* § 143A.003(c).

HB 20 also subjects these platforms to transparency disclosures that requires them to be earnest on why they denied a user access to their platforms and provide disclosures to ensure that they are following the law. *Id.* § 120.001(4). If a covered platform nonetheless discriminates, then users and the State may subject the covered platform to equitable remedies, such as declaratory or injunctive relief, to reinstitute an account or stop the discriminatory practice entirely.

The State's interest in enacting HB 20 is to "protect[] . . . the free exchange of ideas and information in [Texas] . . . ." *Id.* § 1(2).[2] The Texas legislature found these measures necessary due to the fact that the covered platforms "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." *Id.* § 1(3). The law also pointed specifically to the covered platforms' "market dominance." *Id.* § 1(4).

Applying these types of non-discrimination requirements to private platforms is far from a novel concept. For instance, commercial airlines cannot refuse the service of a paying customer based on race, gender, or ancestry. 49 U.S.C. § 40127(A). This is also true for parcel services, such as FedEx or USPS, where federal law prohibits denying service or discriminating against a parcel sender or recipient based on political belief. *E.g.*, Press Release, FedEx, FedEx Responds to

2. Unlike in Florida's SB 7072 that seeks to primarily protect politicians' speech, HB 20 does not limit its protections to democrats, republicans, men, women, LGBTQ, or any type of speaker. It protects all speech and speakers across the board equally.

Questions on the National Rifle Association, Gun Safety and Policy (Feb. 26, 2018), available at https://newsroom.fedex.com/newsroom/global-english/fedex-responds-questions-national-rifle-association-gun-safety-policy (writing "FedEx is a common carrier under Federal law and therefore does not and will not deny service or discriminate against any legal entity regardless of their policy positions or political views."). Washington, D.C., too, prevents private entities from discriminating based on an individual's "political affiliation" in places of public accommodation. D.C. Code § 2-1402.31.

Petitioners, however, would have the Court believe that applying a non-discrimination measure to them is barred by the First Amendment. They argue that HB 20's censorship and disclosure provisions unconstitutionally compel an Internet platform to speak. Petitioners' claim that these provisions, in effect, compel the platforms to take positions they would not ordinarily take, which violates the First Amendment via the "compelled speech" doctrine.

Just to be clear, Petitioners are saying that prohibiting a platform's viewpoint censorship is effectively the same as forcing students in public schools to salute the American flag and recite the Pledge of Allegiance.

Poppycock!

The government must be able to pass and enforce non-discrimination laws against communications platforms, and it cannot compel the speech of an entity that claims it does *not* speak in the first instance.

As we explain herein, the social media platforms covered by HB 20 are communications platforms that do not speak, that the covered social media platforms have represented as much to the people of this country and the courts of our nation, that the compelled speech doctrine does not apply when a communications platform is already not speaking, and that the covered social media companies are no different than any other communications platform for purposes of the First Amendment.

ARGUMENT

I. The Covered Social Media Platforms Are Communications Platforms, *i.e.*, Conduits of Others' Communications

Most obviously, the social media platforms at issue are not themselves generating content. They do not do the reporting. They do not write the articles. They do not create the posts that generate viral interest or thousands of likes. The content on these platforms is user generated.

None of these platforms hold themselves out as a news agency or a content provider. This is because, as the Fifth Circuit observed, ". . . the Platforms are communications firms" that only intend to connect users. *Paxton*, 49 F.4th at 474. For First Amendment purposes, social media services are akin to AT&T or Verizon connecting your call or sending your text to an intended recipient. That is to say that just as a telecommunications company does not express its own personal view or endorsement when an individual sends a text message to her loved one, social media companies hold the same position when that same individual shares an article on her Facebook feed or tweets her opinions. Both services simply connect dots.

A. The Covered Social Media Platforms Tell the Public They Are Mere Communications Platforms

By their own admissions, social media companies are communications platforms. For example, Mark Zuckerberg said in a congressional hearing that Facebook's goal is to "offer a platform for all ideas." *See Online Platforms and Market Power, Part 6: Hearing Before the Subcomm. on Antitrust, Com. and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 33 (2020) (testimony of Mark Zuckerberg, CEO, Facebook, Inc.). In 2014, he told the New York Times that Facebook "explicitly view[s] [itself] as not editors . . . ." Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES, Oct. 26, 2014, https://nyti.ms/3ommZXb. Zuckerberg then doubled down on that statement when he said Facebook "do[es]n't want to have editorial judgment over the content that's in your feed." *Id.*

And in turn, Facebook's terms of service says that its intended purpose is to allow its users to "communicate with friends, family, and others." Facebook Terms, § 1, *available at* https://www.facebook.com/legal/terms?paipv=0&eav=AfaiT3bYQZZLgS80Lr8T2_77b1ql6ERZZg1NqQnUlOGWOLwSoGThtpqi6qItjNvtC60&_rdr. X, too, says that its purpose is to host "Content" and "communications." X Terms, § 3. They do not say they are doing more than that when providing their services, let alone say their services intend to convey their own message.

Or as the Fifth Circuit put it: "[T]he platforms permit any user who agrees to their boilerplate terms

of service to communicate on any topic, at any time, and for any reason . . . [and] virtually none of this content is meaningfully reviewed or edited in any way." *Paxton*, at 461.

And it is true. Nowhere in these platforms' terms of service will you find language suggesting that its users' speech is their speech. Or that their platforms' curation practices are intended to convey a corporate message. Or phrases like "our company is a Christian organization that only hosts content consistent with our religious beliefs." Instead, we get policies, like Facebook's, that say its stated goal for its curation process and restrictions are to ensure that other users can "express *themselves* and to share content that is important to *them*." Facebook Terms, § 3(2) (emphasis added). Hence, the platforms themselves describe their services as mere content distribution, like any other communications service.

B. The Covered Social Media Platforms Tell the Courts They Are Mere Communications Platforms

The covered social media platforms also consistently argue in court proceedings that they are platforms (known as "interactive computer services") as opposed to "information content providers" under Section 230 of the Communications Act. Section 230(c)(1) shields an "interactive computer service" from certain civil liability when hosting content from someone using their services, *i.e.*, an "information content provider." *Id.* § 230 (c)(1).

That law is intended to protect online communications platforms, like Internet service providers and websites

dedicated to hosting third-party content, not those firms expressing their own message. As Former Representative Chris Cox (R-CA) and Senator Ron Wyden (D-OR)—generally credited as the authors of Section 230—explain: "Section 230 is not the source of legal protection for platforms that wish to express a point of view." Hon. Chris Cox & Hon. Ron Wyden, Reply Comments to the Federal Communications Commission, RM-11862 at p. 18 (2020), available at https://www.fcc.gov/ecfs/document/10917190303687/1. They go on to say that "[w]hen a website expresses its own opinion, it is, with respect to that expression, a content creator and, under Section 230, not protected against liability for that content." *Id.*

This distinction is in turn written into the law: Section 230(f)(2) defines an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). In other words, they are merely a conduit to access an Internet service. Compare that to the statute's definition of a "information content provider," which is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

Justice Thomas has agreed with the lawmakers' view that the law is intended to protect communications platforms (*i.e.*, conduits of communications) as opposed to content creators. In *Malwarebytes, Inc. v. Enigma Software Group U.S.A., LLC*, Justice Thomas notes that Section 230 is a response to the ruling in *Stratton Oakmont, Inc. v. Prodigy Services Co. See* 141 S. Ct.

13 (2021) (Thomas, J. Concurrence). *Stratton Oakmont* considered whether to apply distributor liability to the then-nascent Internet platforms, like AOL or Netscape, when they refuse to take down offensive or illegal content. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, *3 (Sup. Ct. N.Y., May 24, 1995). To Justice Thomas, this implied that Congress did not believe that ". . . an Internet provider . . . become[s] the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content." *Enigma Software Group*, 141 S. Ct. at 14.

As applied to Internet platforms, the Fifth Circuit further explained that "Section 230 reflects Congress's judgement that the Platforms do not operate like traditional publishers and are not 'speak[ing]' when they host user-submitted content." *Paxton*, 49 F.4th at 465-66. As the Fifth Circuit reasoned, "[social media companies have] told courts—over and over again—that they simply 'serv[e] as conduits for other parties' speech.'" *Paxton*, at 460. (citing Brief for Appellees at 1, *Klayman v. Zuckerberg*, No. 13-7017 (D.C. Cir. Oct. 25, 2013)); *see also, e.g.*, Notice of Motion and Motion to Dismiss at 10 n.5, *Fields v. Twitter, Inc.*, No. 3:16-cv-00213 (N.D. Cal. Apr. 6, 2016) (stating Twitter is "a service provider acting as a conduit for huge quantities of third-party speech").

Indeed, the social media companies have repeatedly invoked section 230 and claimed the protection of a communications platform. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65-67 (2nd Cir. 2019) (claiming to not be liable for hosting Hamas Facebook pages because of its interactive computer services status); *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021) (claiming to not

be liable for its YouTube hosting ISIS videos because of its interactive computer services status).

To guard against an overreading of Section 230, the courts have distinguished between communications platforms—that reap the benefits of the law's protection—and those companies that provide a "material contribution" to the content they transmit. For a party to show that an interactive computer service provider has materially contributed to the content, they must show that the provider did more than "merely . . . augment[] the content . . . [but instead] materially contribut[ed] to its alleged unlawfulness." *Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008). In essence, the platform must actually engage with the content and take responsibility for it. When a social media service provides a "material contribution," it is acting akin to a traditional publisher and, therefore, stripped of its liability protection under the statute. *E.g.*, *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016).

No surprise, the covered social media platforms have repeatedly and zealously argued that their curation methods do not amount to a "material contribution" to ensure they can avail themselves to legal immunity under Section 230(c)(1). In *Calise v. Meta Platforms, Inc.*, Meta claimed to have not materially contributed to the offensive content of third-party advertisers hosted on its platform. 2022 WL 1240860 (N.D. Cal. 2022). Again, in *Force v. Facebook, Inc.*, Meta asserted that it was not engaging in speech activities when using its algorithms to push Hamas members' Facebook pages to its users. 934 F.3d 53, 65-67 (2nd Cir. 2019). Google's YouTube argued for the same

relief on similar grounds in *Gonzalez v. Google* where Google asserted that it was not engaging in speech when using its editorial discretion to push ISIS videos nor was it engaging in speech activities when the platform failed to delete those videos. *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021). TikTok made the same claim to shield it from liability for the death of a young girl as a result of TikTok's "blackout challenge." *Anderson v. TikTok, Inc.*, 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022).

These representations in other courts are admissions that social media platforms merely serve to "provide[] or enable[] computer access by multiple users to a computer server." *See* 47 U.S.C. §230(f)(2). Nothing more. At any time, the platforms could have held themselves out as information content providers to distinguish their services from an interactive computer service (such as an Internet service provider), but they instead have held themselves out as communications platforms that do not materially contribute to the speech on their platforms—even when they engage in promoting, blocking, elevating, highlighting, monetizing, de-monetizing, or otherwise pushing that content.

II. Because Communications Platforms Do Not Speak, Applying Non-Discrimination Laws to Them Does Not Compel Speech

When a communications platform is not speaking itself but merely transmitting the speech of others, the First Amendment has long allowed the government to apply non-discrimination laws. Telephone companies are prohibited from discriminating against callers. 47 C.F.R. § 202. The courts have upheld non-discrimination

provisions imposed on Internet service providers. *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014). And this Court has held that even a property owner must allow expressive activities on his property. *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74, 87 (1980).

This Court has even gone several steps further, finding permissible a law that required cable operators, who must necessarily (based on limited transmission capacity) select the speakers allowed to access their platform, transmit the speech of a limited set of speakers chosen by Congress. The Court in *Turner* justified this finding by noting that cable operators are "conduits of speech," *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 657 (1994) (citing *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557 (1975))—a subset of communications platforms—who do not necessarily favor some content over any other nor do they claim the content transmitted over its platform is their published speech. What is more, users are highly unlikely of mistaking the transmissions of other user content as the service provider's own speech. *Turner*, 512 U.S. at 655.

Core to the Petitioners' compelled speech claim is that the platforms are indeed speaking when taking down posts or promoting content. *See* Petitioners Merits Brief at p. 35. But therein lies the Petitioners' fundamental flaw when claiming that HB 20 compels these platforms' speech: The government cannot compel the speech of an entity that claims it *does not speak* in the first instance.

A. The Compelled Speech Doctrine Does Not Apply to Communications Platforms

Courts have employed the compelled speech doctrine to protect traditional publishers (*e.g.*, T*he New York Times* or *Newsweek*) from state actions that would compel them to host content with which they disagree. The two leading cases on applying the doctrine to companies—and ones on which Petitioners rely—are *Miami Herald Publishing Co. v. Tornillo* and *Pacific Gas and Electric Co. v. Public Utilities Commission (PG&E).*

In *Tornillo*, the State of Florida had given political candidates a "right to reply" to certain published articles they disagreed with—and required the original publisher of that article to publish the reply. 418 U.S. 241 (1974). The U.S. Supreme Court invalidated the law, finding that requiring a publisher (in this case the *Miami Herald*) to publish content it disagreed with was equivalent to compelled speech. *Id.*

In *PG&E*, the California Public Utilities Commission disliked that PG&E included newsletters from its own perspective alongside customer bills. 475 U.S. 1 (1986). To try and get around *Tornillo*, the Commission ordered PG&E to include content from its critics on the envelopes that bore that customer's bills. *Id.* Again, the Supreme Court found that this practice amounted to compelled speech: It required PG&E to publish speech alongside its own publication and penalized the company for expressing its own viewpoint. *Id.*

But here is the rub: the platforms are not publishers. Indeed, they have repeatedly disclaimed any intent to be

published. They claim to not endorse any message posted by their users. They claim they do not host content with a particular message in mind. And they disclaim any responsibility for that speech. Instead, the platforms themselves have said they are mere conduits of speech that distribute information on a neutral basis.

In truth, these social media platforms' circumstances are more like the instances occurring in *Turner* and *PruneYard* than *PG&E* and *Tornillo*.

In *Turner*, the FCC promulgated "must-carry" regulations that require cable operators to "devote a specified portion of their channels to the transmission of local commercial and public broadcast stations." *Turner*, at 622. On similar grounds as Petitioners', cable operators alleged that the FCC's regulations compelled their speech by forcing them to carry channels that they would not otherwise. *Id.* at 644. The Court found the FCC's must-carry requirements did not compel cable operators' speech, because, "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655.

The Court considered multiple factors when reaching its decision. Not least of which, the Court found that the "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility" as a clear indication that the FCC's rules could not compel speech when cable operators do not speak. *Id.* at 656. The Court reasoned that this factor is what distinguished the cable

operators' situation from *Tornillo* because "no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that 'the safe course is to avoid controversy' . . . ." *Id.* (citing *Tornillo,* 418 U.S. at 257).

In *PruneYard*, a shopping center security guard removed a group of student activists from the property for passing out literature and soliciting signatures for a petition to oppose a United Nation's resolution against Zionism. *PruneYard*, 447 U.S. at 74. The students had apparently violated the owner's rule against "publicly expressive" activities. *Id.* The students sued the shopping center under California's Constitution that maintained a First Amendment provision that "permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited . . . ." *Id.* at 76. The property owner countered the suit under the federal First Amendment claiming that it prevents California from "us[ing] his property as a forum for the speech of others." *Id.* at 86.

This Court did not find the owner's argument persuasive and sided with the State. Pertinent to this case, the Court held that "the shopping center by choice of its owner is not limited to the personal use . . . . It is instead a business establishment that is open to the public to come and go as they please." *Id.* at 87. Further, these facts made it clear that the public will likely not ascribe the views of students "with those of the owner." *Id.* Hence, if a company holds itself out as open to the public, then they invite limited First Amendment protections because their stated purpose is not to convey its own message.

Just as it was true in *PruneYard*, the platforms, by choice, hold themselves out to the public to come and go as they please. As the Fifth Circuit explained:

> Platforms also hold themselves out to serve the public. They permit any adult to make an account and transmit expression after agreeing to the same boilerplate terms of service. They've thus represented a 'willingness to carry [anyone] on the same terms and conditions.' *Paxton*, at 474 (citing *Semon v. Royal Indem. Co.*, 279 F.2d. 737, 739 (5th Cir. 1960)).

HB 20 only asks that the platforms to do as they say in their terms of services—to allow their users to communicate with one another. And like any other conduit of speech, the platforms have disclaimed all viewpoints in their curation practices and users' speech. Hence, there is no inducement as there was in *Tornillo* because the platforms do not exercise the same "editorial control and judgment" as the Miami Herald. Nor is the law asking it to host a message to counterbalance as there was in *PG&E* because, like the owner in *PruneYard*, no member of the public assumes the social media platforms stand behind any one user's statement.

Members of this Court, too, have found that these platforms do not make editorial judgements like a newspaper. The Court has not only described these platforms as the "modern public square," *Packingham*, 137 S. Ct. at 1737, but has also said they "hold themselves out as organizations that focus on distributing the speech of the broader public." *Knight First Amendment Inst.*, at 1224.

In short, communications platforms like the covered social media platforms in this case cannot be compelled to speak via a non-discrimination law because they are not speaking in the first place.

B. The Covered Social Media Platforms are No Different from other Communications Platforms

The Petitioners in the course of this litigation have tried to distinguish social media platforms from other communications firms, such as an Internet service provider or a telephone company.

Petitioners argue that a social media platform's automated algorithmic functions, such as arranging a list of posts in chronological order or searching its database using the query terms provided by a user, and decisions to block a user are inherently different than what any other communications platform does. They argue that these functions are tantamount to a publisher's "editorial discretion," much in the same way a newspaper decides to publish an article or host an oped. Pet. Merits Brief p. 19.

Another attempt to distinguish these social media platforms from other communications platforms comes from the Department of Justice, which writes that "[u] nlike telephone companies and broadband providers, social-media platforms do not merely provide a service for transmitting speech; instead, they shape third-party speech into expressive compilations by editing, annotating, and arranging it." Merits Brief of *Amicus Curiae* of the United States at p. 25, *NetChoice v. Paxton* (Nos. 22-227 & 22-555).

Balderdash!

When a user searches Facebook to find a friend, Meta is using no editorial discretion in providing the results. When a user follows an influencer on TikTok or Instagram, the platform's role is ministerial. When a user views a stream on YouTube (or reads the comments there), Google has not edited that content nor annotated it nor arranged it. And when X offers a chronological list of posts by the people a user is following, there is no more editorial discretion than when AT&T or Verizon alphabetically organizes the White Pages.

Petitioners next claim they are exercising editorial discretion by arguing that "Facebook, Google, and Twitter took action on over 5 billion accounts or user submissions—including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech." Pet. Merits Brief at p.8. (quoting Pet.App.173a; J.A.102a). But that's not peculiar for them. Airlines have dress codes; parcel carriers prohibit the shipment of illegal drugs; mall owners limit pamphleting; and Verizon's terms of service prohibit users from disseminating illegal materials (*e.g.*, child pornography), spamming consumers, or "violate any rule, policy or guideline of Verizon . . . ." Verizon Acceptable Use Policy, *available at* https://www.verizon.com/about/terms-conditions/acceptable-use-policy. Upholding the barest minimum standards of society (and prohibiting illegal conduct) is not the same as exercising broad editorial discretion.

In short, the Petitioners "halfheartedly suggest that they are not members of the communications industry

because their mode of transmitting expression differs from what other industry members do." *Paxton*, at 474 (internal quotation marks omitted). That's a distinction without a difference.

Petitioners provide more insight in their reasoning when attempting to distinguish their case from *Turner Broadcasting Sys., Inc. v. F.C.C.* Petitioners argue that "*Turner* involved very different circumstances: a content-neutral law regulating government-franchised cable-television operators, which had a 'physical connection' providing a 'bottleneck' that could be used to 'obstruct readers' access to other competing publications.'" Pet. Merits Brief. at p. 15. They go on to say that "[a] cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." *Id.* at 42.

Start with the most obvious problem with this argument: Social media platforms can silence the voice of a competing speaker with the mere flick of a switch too. In fact, they can silence hundreds of such voices or, in some ways worse, suppress the reach of thousands of speakers without any notice or knowledge that it is happening. As Justice Thomas succinctly put it, social media companies can "remove [an] account 'at any time for any or no reason.'" *See Knight First Amendment* Institute, 141 S.Ct. at 1222.

Next, the "bottleneck" may have been physical but at least it was transparent and easy to fix. After all, any cable viewer that switched to a newly blocked channel knew that the channel had disappeared and had the option to switch to over-the-air viewing to watch that same

broadcast. For many, it was as simple as . . . flicking a switch and then changing to that same channel. But if a X restricts access to a post from a prominent newspaper, even viewing that newspaper's own feed may not reveal the suppression. Meanwhile, reaching that same audience is no trivial manner, as it must first alert the audience of the issue and then convince each of them to use an entirely different platform to access that content. In other words, a bottleneck is a bottleneck, physical or otherwise.

And then there's the issue of market concentration. Big Tech's size is undeniable. Facebook, alone, is wealthier than 150 countries around the world. Ruslana Lishchuk, *How Large Would Tech Companies Be If They Were Countries?*, Mackeeper (updated Aug. 13, 2021), *available at* https://mackeeper.com/blog/tech-giants-as-countries/. Google is even larger and comes in with a market cap that exceeds Australia's GDP by more than $14 billion. *Id.* A Pew Study found that more people get their news from social media companies than newspapers, like the *Wall Street Journal* or the *New York Times*. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, Pew Research (Dec. 10, 2018), *available at* https://www.pewresearch.org/short-reads/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/.

This makes their First Amendment case even more problematic because that factor weighs in favor of government regulation. For example, the Court in *Turner* found that there was "[t]he potential for abuse of this private power over a central avenue of communication . . . ." *Turner*, at 657 (citing *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557 (1975)).

The social media market is hyper concentrated, even more so than the cable market circa 1996. As the Fifth Circuit rightly noted, "Texas reasonably determined that the largest social media platforms' market dominance and network effects make them uniquely in need of regulation to protect the widespread dissemination of information." *Paxton*, at 484.

So we are left with a handful of the nation's largest companies, with significant market power, whose terms of service and legal representations illustrate that they make precisely the same promise to consumers as Internet service providers or telephone companies—to allow consumers to communicate with one another. The Fifth Circuit was right to find that "the Platforms are no different than Verizon or AT&T." *Paxton*, at 474. Social media platforms are just communications platforms. Nothing more.

* * *

Let's be frank. Neither Petitioners nor their member companies truly care about free speech. They intend to hide behind a false distinction to make the Court feel like there are merely applying the law. But what Petitioners are asking is for the Court to make social media companies into a purple cow to afford them even more protections than any other communications platform. To not mince words, their aim is to contort the application of the First Amendment to create more protections for Big Tech that only apply to Big Tech.

Holding for Petitioners would mean that all social media platforms could use the First Amendment as a

sword to cut down any legislative measures aimed at promoting users' free speech online. The Court would, in effect, create a compelled speech doctrine that applies only to social media companies. They will then use this newly created right to censor more speech online.

Put another way, the Petitioners are asking the Court to flip the First Amendment to read that social media platforms (and social media platforms alone) have a First Amendment right (even when they claim to not be speaking) to avoid non-discrimination laws and suppress the speech of users. This is an untenable result, and not one ever contemplated by the Americans who ratified our First Amendment.

CONCLUSION

For the foregoing reasons, this Court should hold that laws like Texas's HB 20 comport with the First Amendment.

Respectfully submitted,

Joel Thayer
Counsel of Record
Digital Progress Institute
1255 Union Street NE, 7th Floor
Washington, DC 20002
(760) 668-0934
joel@digitalprogress.tech

Counsel for Amicus Curiae