Nos. 22-277 and 22-555

In The Supreme Court of the United States

ASHLEY MOODY,
Attorney General of Florida, et al.,

Petitioners,

v.

NETCHOICE, LLC, et al.,

Respondents.

NETCHOICE, LLC, et al.,

Petitioners,

v.

KEN PAXTON, Attorney General of Texas,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eleventh And Fifth Circuits

AMICUS CURIAE BRIEF OF DR. CHRISTOS A. MAKRIDIS IN SUPPORT OF PETITIONERS IN NO. 22-277 AND RESPONDENT IN NO. 22-555

JONATHAN S. GOLDSTEIN
Counsel of Record
SHAWN M. RODGERS
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
610.949.0444
jgoldstein@goldsteinlp.com

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INTERESTS OF AMICUS[1]

Christos A. Makridis serves as an Associate Research Professor at the W. P. Carey School of Business and Research Affiliate at the Global Security Initiative (both in Arizona State University), a Professor at the Vienna University of Economics and Business, a Digital Fellow at the Digital Economy Lab in Stanford University, and a Non-resident Fellow at the Institute for Religious Studies at Baylor University. Dr. Makridis previously served on the White House Council of Economic Advisers managing cybersecurity, technology, and space activities. He holds doctorates in economics and management science & engineering, both from Stanford University. Makridis' academic research focuses on the digital economy. He has an interest that current economic understanding be incorporated into this Court's rulings. These views do not reflect those of any affiliated institutions.

SUMMARY OF ARGUMENT

H.B. 20 prohibits the largest social media platforms from engaging in viewpoint discrimination. Importantly from economists' perspectives, H.B. 20 makes explicit findings about market power, stating, "social media platforms and interactive computer

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

services with the largest number of users are common carriers by virtue of their market dominance." Section 1(4).

Social media's market power plays a key part in the analysis demonstrating the constitutionality of H.B. 20 as a legitimate exercise of Texas's authority to regulate common carriers. While there are many tests for common carrier status that this Court has upheld, some courts require the existence of market power for the lawful application of common carrier regulation. They set forth that "the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

Nowhere does NetChoice suggest that the firms that H.B. 20 covers lack market power. In fact, NetChoice and its amici all avoid the topic. At best, one group of economists urges care in analyzing market power. *See* Economists as Amici Curiae in Support of Neither Party Br. The purpose of this brief is to investigate the available evidence on the presence of market power in the hands of the firms covered by H.B. 20.

This brief argues that there has been a secular increase in market power and that social media firms hold and may be exercising that market power. If that is at least partially true, then H.B. 20 satisfies the test for common carrier application. *Williamson v. Lee*

Optical, Inc., 348 U.S. 483, 491 (1955), holds that a court must uphold a legislature's determination, unless the statutory determination is so arbitrary and capricious as to be without a rational basis. Texas's finding is not arbitrary or capricious. Rather, mainstream economic thought, as well as numerous judicial rulings, support Texas's legislative findings and H.B. 20, which flows from those findings.

NetChoice challenged H.B. 20 on facial grounds. That means it alleged that the law is unconstitutional in all of its applications. If at least one firm subject to H.B. 20—i.e., Facebook, Instagram, or TikTok—reasonably might have and exercise market power, then H.B. 20 is a legitimate common carrier regulation, and NetChoice's facial challenge must be dismissed.

If it is unwilling to accept Texas's finding, the Court should hold, at least, common carrier laws regulating social media platforms are constitutional on an as-applied basis, as appropriately interpreted by a trial court, and/or remand for a fuller examination of central factual issues, such as whether the social media platforms enjoy market power. The Court used this general approach in the *Turner* cases, reviewing a statute of similar importance in public discourse, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.). Allowing further factual development reflects the approach to these legal

issues that their importance demands if the Court does not hold for Texas outright.

ARGUMENT

In enacting H.B. 20, the Texas legislature made explicit findings about market power, stating that "social media platforms and interactive computer services with the largest number of users are common carriers by virtue of their market dominance." Sec. 1(4).

In support of this legislative finding, this brief reviews the evidence that there has been a decline in competitiveness and a concomitant rise in concentration over time in the social media platform technology sector and markets more generally. Christos Makridis & Joel Thayer, *Data as Currency: A Reevaluation of the Consumer Welfare Standard for Digital Markets* (July 17, 2023).[2] There have been numerous judicial and administrative findings about the market power of Facebook and other social media companies that fall under H.B. 20's ambit.

Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955), holds that courts should uphold a legislature's determination, unless the statutory determination lacks a rational basis. The Texas statute expressly finds that "social media platforms with the largest number of users are common carriers by virtue of their

[2] Available at SSRN: https://ssrn.com/abstract=4512410 or http://dx.doi.org/10.2139/ssrn.4512410.

market dominance." Sec. 1(4). Far from "arbitrary and capricious," the Texas legislature's determination is grounded in economic and judicial understandings of market dominance and the players in the social media platform market. Furthermore, recent writing from Brendan Carr and Nathan Simington, Commissioners at the Federal Communications Commission (FCC), are consistent with this interpretation: H.B. 20 is an appropriate response if the countervailing firm exhibits evidence of market power. Brendan Carr & Nathan Simington, *The First Amendment Does Not Prohibit The Government From Addressing Big Tech Censorship*, Yale J. On Regulation: Notice And Comment Blog, Jan. 11, 2024, http://tinyurl.com/3662cpmp.

I. Judicial findings concerning market power enjoyed by social media firms covered by H.B. 20

Social media firms are generally considered part of the information services industry sector. For example, international bodies have discussed the matter as follows: "If a platform is not charging an explicit fee to either the consumer or producer, they could be considered an advertising and data driven platform. This is because they are likely deriving their revenue from selling advertising space or information sourced from collected data." In this sense, a social media firm could fall under the classification of an advertiser in the information services sector. However, industry classification remains an active area of inquiry, so the literature has instead focused on looking at specific incidents

that may meet a standard. For example, the district court agreed with the Economists Amicus that market power must be shown in terms of time, users, and revenue and rule DOJ's allegation. (*See* Economists as Amici Curiae in Support of Neither Party Br. at 2–8). We nonetheless explore additional measurement issues in the latter part of the brief.

Numerous courts and other tribunals, both within and outside the United States, have upheld claims that Facebook exercises market power, although it may be exercised in unusual ways, as in "degrad[ing] privacy to levels unsustainable in the earlier competitive market. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 55 (2019). For instance, in dismissing Facebook's Motion to Dismiss, the U.S. District Court for the District of Columbia found adequate allegations of Facebook's market power and its exercise of that power. These include the claims that the relevant market for considering Facebook's market power is "personal social networking" (PSN) services, defined as "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space." *Fed. Trade Comm'n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 44–45 (D.D.C. 2022). Other online services like LinkedIn, YouTube, Spotify, and Netflix are inadequate substitutes for Facebook, thus demonstrating Facebook's market power as a service for which there is no

adequate substitute. *Id*. at 45–46. The Court found allegations that the 60% market share of the PSN market, combined with allegations of market share exceeding 70% of daily average users (DAUs) and exceeding 65% of monthly average users (MAUs)—as well as an allegation of 80% of all time spent using PSN services was on Facebook—sufficient to proceed with the FTC's antitrust action. *Id*. at 47.

Outside the United States, tribunals have ruled that Facebook enjoys market power. To give but two examples: the U.K.'s Competition and Markets Authority (CMA) ordered Meta, which operates Facebook, WhatsApp, and Instagram, to sell GIF provider Giphy, finding that the takeover of Giphy would degrade competition between social media platforms; and the European Court of Justice ruled that Facebook's actions concerning user data constituted an "abuse of that company's dominant position on the market for online social networks for private users." EU Court of Justice, C-252/21, Opinion, *Meta Platforms and Others*, Sept. 9, 2022, Para. 30, http://tinyurl.com/2hwf7ax9.

II. Evidence suggests large social media firms enjoy market power

Although the empirical economics literature has not had the data to fully investigate the rise of market power in every sector (versus overall), there is growing evidence that market power is concentrated among digital intermediaries, like social media companies. While social media company services

generally implicate multiple sectors, their core intellectual property and activities reside within information services. For example, out of roughly 800 acquisitions among Google, Amazon, Facebook, and Apple since 2000, only three received significant scrutiny (i.e., Waze, WhatsApp, and Instagram). Makridis & Thayer, *supra* at 8 (citing Luis Cabral, *Merger Policy in Digital Industries*, 54 INFO. ECON. & POL'Y 1 (2021)). These firms, particularly Facebook, have made many acquisitions that have increased its market share. For instance, Facebook acquired Instagram in 2012, which competed directly with Facebook Blue. As Makridis & Thayer, *supra*, explain, Facebook's CEO, Mark Zuckerberg, felt that it was easier to purchase a competitor than to compete. If new startups get bought up by one or two companies, then that is a demonstration of market power. Although it is unclear as to how many unique users Instagram has brought to Facebook, what is clear is that Facebook can now gather far more unique personal data with Instagram's migration onto each one of its servers.

Facebook also acquired WhatsApp in February 2014 for approximately $16 billion, broken down into $4 billion in cash and about $12 billion in Facebook shares. At the time of the purchase, WhatsApp was a "leading and rapidly growing real-time mobile messaging service" and a formidable competitor to Facebook's Messenger since it hosted over 450 million monthly subscribers and added 1 million new registered users daily. This acquisition is also consistent with the behavior of a monopolist that buys up its competition.

Economists and social scientists have studied the effects of mergers and acquisitions (M&A) for decades. Scholars generally recognize that takeovers occur in periods of economic recovery, rapid credit expansion, and in response to regulatory and/or technological changes, providing a sense of allocative efficiency and churn in the market. Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANKING & FIN. 2148, 2148–49 (2008). This means that naïve comparisons of organizations before and after an M&A will produce especially large statistical bias that prevents a causal interpretation: the acquired companies are not only non-random and correlated with underlying firm fundamentals, but also more likely to be acquired during periods of higher economic output and, therefore, more likely to be associated with growth. Addressing these statistical challenges has been a major priority in leading studies evaluating the effects of acquisitions on innovation.

While industry concentration and market power are different, they are nonetheless correlated. Gábor Koltay et al., *Concentration and Competition: Evidence from Europe and Implications for Policy*, 19 J. COMPETITION L. & ECON. 466 (2023). More importantly, the correlation is strongest at the top of the distribution—that is, in highly concentrated sectors, the incidence of market power is also higher. For example, Koltay et al. find that the positive correlation between concentration and incumbent intervention is present only in the sample with over 50% concentration. *Id.* They also

find that concentration grew the fastest between 1998 and 2019 in the communication sector, which we recognize does not map fully to social media companies, but is still the closest fit. *Id.*

III. Empirical evidence of market concentration and declining competitiveness in the general economy

Price-adjusted gross domestic product (GDP) grew by 9.8% in the digital economy versus 5.9% in the overall economy between 2005 and 2021, accounting for $3.7 trillion in increased GDP in 2021, according to the Bureau of Economic Analysis. Tina Highfill and Christopher Surfield, *New and Revised Statistics of the U.S. Digital Economy*, 2005–2021, Bureau of Economic Analysis, Department of Commerce (Nov. 2022), www.bea.gov/system/files/2022-11/new-and-revised-statistics-of-the-us-digital-economy-2005-2021.pdf.

There is a growing body of empirical evidence that points toward growing concentration in the economy generally in the past three decades, driven in part by the upper tail of the distribution of firms.[3] Using data

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[3] Sam Peltzman, *Industrial Concentration under the Rule of Reason*, 57 J.L. & ECON. S101, S120 (2014); Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (2019); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020); Matias Covarrubias et al., *From Good to Bad Concentration? US Industries over the Past 30 Years* (NBER Macroeconomics Ann., Working Paper No. 25983, 2020); Sharat Ganapati,

on publicly traded firms and administrative data from the Census Bureau, the most sophisticated economic analyses suggest that the economy is becoming more, not less, concentrated. Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020). Profitability among publicly traded firms has also increased substantially, rising from an average profit rate of 1% to 8% between 1955 and 2016. Although overhead costs have undoubtedly grown over time, they cannot account for the rise in concentration.

One concern with the methodological approach of De Loecker et al. (2020)—among nearly all other studies in this literature—is that the measure of industry has deteriorated in its reliability over more recent years with the rise of digital businesses, goods, and services. That is, technology companies in particular span multiple sectors, classified under several North American Industry Classification Standard (NAICS) codes, so measures of concentration may be too stringent and fail to reflect the extent of competition that exists among other digital competitors. However, a new and forthcoming article demonstrates that there has been a rise in market power and it has been net negative for consumers even accounting for changes in market classifications.[4] This result is significant because it not

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Growing Oligopolies, Prices, Output, and Productivity, 13 AM. ECON. J.: MICROECONOMICS 309 (2021).

[4] Jan De Loecker, Jan Eeckhout, and Simon Mongey, 2022. Quantifying market power and business dynamism in the macroeconomy. Review of Economic Studies, acceptance. Earlier

only estimates firm markups above marginal cost independent of traditional market structure NAICS codes (with the potential to vary over time), but also decomposes the relative welfare gains that accrue to consumers from more companies that have become more concentrated (and any efficiency gains that it confers) and the losses from a decline in business dynamism. In particular, they find that the effect of technological change on concentration has allowed for a 5% increase in output, but a countervailing 15% decline in relative welfare gains due to the higher markups. In this sense, though there are some gains, they are outweighed by the higher markups that they can levy due to, for instance, market power.

While measuring digital goods and services is challenging and there is limited empirical research on concentration in the technology sector (as discussed earlier), there is still important evidence to review. For example, Calligaris et al. use data between 2001 and 2014 across 26 countries in Europe, finding that the markup rate grew from roughly zero in 2001 to 6% in 2014 within digitally intensive sectors, whereas it has only grown to 4% in other sectors. Sarah Calligaris et al., *Mark-Ups In The Digital Era* (OECD Sci., Tech. & Indus., Working Paper No. 2018/10, 2018). The rise in markups was driven nearly exclusively by firms in the top of the markup distribution and by firms in more digitally intensive sectors. These results are also

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version is available at https://www.simonmongey.com/uploads/6/5/6/6/65665741/deloecker_eeckhout_mongey__wp_2022_.pdf.

consistent with recent work that there has been an increase in concentration even in Europe. *See* Koltay, *supra*.

To put the synthesis of the literature simply, there is overwhelming evidence of an increase in market power, particularly in the technology sector, and case evidence that the dominant players in the sector are benefiting from this market power by making acquisitions of startups that enter the market.

IV. At the very least, factual development is required to determine the constitutionality of H.B. 20

"A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a result, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

Second, facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "anticipate a question of constitutional

law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Third, "[f]acial challenges . . . invite judgments on fact-poor records." *Sabri v. United States*, 541 U.S. 600, 609 (2004).

Finally, facial challenges can undermine democratic decision-making by preventing duly passed laws from being implemented as the Constitution requires. "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (citations omitted).

H.B. 20 presents two factual questions: whether the covered social media platforms have market power and whether H.B. 20 regulates speech or non-communicative acts that lack First Amendment protection. As the *Turner* decisions establish, the First Amendment analysis is different for firms with market power from those that lack it. And while *Hurley* and *Tornillo* may apply to speech, H.B. 20 regulates action—a platform's decision to include or exclude others' speech *without* creating a message of its own. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), would apply.

Even though there is more to learn about the competitive effects of digital platforms, a vast body of evidence demonstrates the growth of market power and the decline in competition. This evidence supports Texas's finding—certainly under the deferential

Williamson standard under which "it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it" and prevents courts from "strik[ing] down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson*, 348 U.S. at 488.

But if the Court wishes to apply a higher standard to the factual questions about market power or whether H.B. 20's viewpoint neutrality requirement would affect the message any social media user would or could perceive, the Court should allow legal and factual development in an as-applied challenge.

And there is precedent for the Court adjudicating First Amendment challenges to complex communication regulations that impact political discourse at a national level. In determining the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.), the Court engaged in a two-step process. First, in *Turner Broad. Sys., Inc. v. F.C.C.* (*Turner I*), 512 U.S. 622 (1994), the Court established that must-carry provisions, which required cable operators to carry local television broadcast stations, served substantial government interests by preserving free broadcast television. But the Court found that genuine issues of material fact exist on whether the cable industry constituted a genuine competitive threat to broadcasting as well as whether less restrictive means of achieving governmental

availability are effective. The Court remanded the cases to develop a factual record to answer these questions. The Court then eventually resolved the case on appeal in *Turner Broad. Sys., Inc. v. F.C.C.* (*Turner II*), 520 U.S. 180 (1997).

CONCLUSION

H.B. 20 and the Texas legislature's finding about the market power of the largest social media does not merely have a "rational relation" to the goal of ensuring free and robust public discourse—it is firmly rooted in the existing economic evidence. The Fifth Circuit's judgment should be upheld or this case remanded for further proceedings as herein described.

Respectfully submitted,

JONATHAN S. GOLDSTEIN
Counsel of Record
SHAWN M. RODGERS
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
610.949.0444
jgoldstein@goldsteinlp.com
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