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, 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 COURTS OF APPEALS FOR THE ELEVENTH AND FIFTH CIRCUITS

BRIEF OF *AMICUS CURIAE* AMERICAN PRINCIPLES PROJECT IN SUPPORT OF PETITIONERS IN NO. 22-277 AND RESPONDENT IN NO. 22-555

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae American Principles Project is a nonprofit corporation organized exclusively to promote social welfare under section 501(c)(4) of the Internal Revenue Code. American Principles Project advocates against policies that are detrimental to parents and children, including online threats to free speech, believing that defending free speech is a critical component of representing the institution of the family. It conducts research, publishes policy papers, and authors articles regarding the large technology platforms and their effects on American society.

SUMMARY OF ARGUMENT

NetChoice asserts that there is a legal tradition extending back to colonial times, which protects "editorial discretion." This tradition, it claims, protects the absolute prerogative of any business to refuse to carry others' messages and "disseminat[ing] others' speech." NetChoice (No, 22-555) Br. 18. The Texas law challenged, HB 20, which prohibits social media platforms, from discriminating in their provision of service, interferes with this purported right of editorial discretion.

In fact, no such right exists for social media platforms because users' messages belong to users who write them, not the social media platforms that transmit them. Just

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.

as a letter in the mail belongs to the sender rather than to the United States Postal Service, users' social media content belongs to those users.

Chief Justice Roberts explained this principle of hosted third-party speech in *Rumsfeld v. FAIR,* a case involving a federal legal requirement that law schools refrain from discriminating against military employers. "[B]ecause the schools are not speaking when they host interviews and recruiting receptions," *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc. [FAIR],* 547 U.S. 47, 64 (2006), schools cannot claim that non-discrimination recruiting requirements affect their First Amendment rights.

The same principle applies here. HB 20's prohibition on discrimination does not affect platforms' speech because the platforms "are not speaking when they host" their users' speech. *Id.* Just last Term, the Court affirmed this principle, finding that the social media platforms do not adopt their users' posts as their own but rather appear to have with the users a relationship of "passive nonfeasance." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 500 (2023). Conversely, the principles established in *303 Creative v. Elenis,* 600 U.S. 570 (2023), show that the platforms cannot claim a user's speech as their own.

Contrary to NetChoice's claim that "[t]he First Amendment prevents governmental efforts to compel people to disseminate others' speech." NetChoice (22-555) Br. 18, such legal requirements are and always have been an everyday part of American law. Common carriers, FedEx, and other delivery services must disseminate and deliver all letters they receive without discrimination. *Mitchell v. United States*, 313 U.S. 80, 94–95 (1941);

Fed. Express Corp. v. Dep't of Commerce, 486 F. Supp. 3d 69, 75 (D.D.C. 2020). Cable companies must transmit local broadcasters' programming and public interest, educational, and government ("PEG") programming. 47 U.S.C.A. § 531. A "telegraph company, or a telephone company, must serve all members of the public without discrimination." *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966, 968 (D.D.C 1949).

Rather than express a "curated" experience, as NetChoice claims, NetChoice (22-555) Br. 31, the platforms are in the business of performing a specific act: carrying their users' messages. The platforms cannot shield themselves from antidiscrimination laws, which nearly every other business must follow, by labeling their conduct "speech" or "editorial discretion."

Indeed, if the Court were to equate the act of carrying messages with expression, the Court would extend a First Amendment exemption to the platforms from all antidiscrimination laws. It would give the platforms a power they have already claimed in judicial proceedings—namely, an expressive right to throw women, Blacks, and religious people off their networks.

NetChoice is judicially estopped from arguing that HB 20 regulates its speech. NetChoice argued to the lower courts in countless Section 230 actions that user speech, as well as their content moderation of such user speech, was speech "of another." 47 U.S.C. § 230(c)(1). They cannot now claim that user speech and their content moderation is their own.

The platforms are regulable as common carriers consistent with the First Amendment because they are businesses that carry customers' messages—just like telegraphs and telephones.

ARGUMENT

I. Editorial discretion, which has a relatively recent history at the Court, receives First Amendment protection when it communicates a clear message; otherwise, *Rumsfeld* controls.

NetChoice urges the Court to expand First Amendment protection for "editorial discretion," which it claims social media platforms exercise when they transmit their users' speech. NetChoice (22-555) Br. 18. Contrary to NetChoice's assertion, there is no established "history" or "tradition" of absolute First Amendment protection for a communications business's choice of message to carry.

NetChoice relies on relatively recent cases: *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995); *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622 (1994); and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), which involved a parade, cable programming line-up, and newspaper op-ed page, respectively. In each case, the speaker (whether parade organizer, cable operator, or newspaper editor) vetted and chose participants to convey a particular overall message. A hypothetical viewer can comprehend in its entirety a parade, a list of cable operators, and an op-ed page, and perceive a message. To disrupt these component selections would change the conveyed message.

But it does not follow that requiring a firm or organization to carry a message typically infringes on the expressive rights of that firm. Rather, in *Rumsfeld,* Chief Justice Roberts, writing for the Court, explained the limits of the constitutional protection in these "editorial discretion" cases:

(i) The First Amendment protection only applies when the "complaining speaker's own message was affected by the speech it was forced to accommodate," *Rumsfeld,* 547 U.S. at 63;

(ii) the message the editor communicates must be "overwhelmingly apparent," *id.* at 66; and,

(iii) "[t]he expressive component of . . . actions is ... created by the conduct itself . . . [not] by the speech that accompanies it," *id.*

Platforms' viewpoint-based censorship fails these tests and does not receive First Amendment protection. The platforms can express any view they wish — HB 20 does not affect their speech. Because user speech is not that of the platform, carrying users' speech cannot affect the platform's "own message." *Id.* at 63. The platforms' content moderation is often invisible to users, as with prioritized boosting or so-called "shadow-banning," undercutting the claim that these practices convey any message, let alone one that is "overwhelmingly apparent." *Id.* at 66. Instead, these censorship practices only convey a message with reference to the platforms' public statements and separately stated policies that sometimes "accompan[y]" these practices. *Id.*

A. There is no long-established "history and tradition" of First Amendment protection for "editorial discretion."

NetChoice and its *amici* argue that there is a great "history and tradition" of protecting "editorial discretion." NetChoice (22-555) Br. 18; Engine Advocacy Br. 9 n.1; Int'l Ctr. for L. & Econ. Br. 19. To support this claim, NetChoice quotes from three Founding Era texts: Benjamin Franklin's *Autobiography*; an essay by William Livingston; and a Virginia state legislature minority resolution supporting the infamous Alien and Sedition Acts. None of these items has anything to do with HB 20's viewpoint discrimination prohibition or NetChoice's concept of absolute First Amendment protection of "editorial discretion."

Quoted in full, both Franklin's *Autobiography* and the Virginia minority report discuss declining to publish libel or unlawful material. They are off-point, as HB 20 does not require publication of libel—nor have common carrier non-discrimination regulations required carriage of unlawful or immoral material.[2]

HB 20 *allows* platforms to ban content like libel, but the platforms must do so in a viewpoint-neutral way. HB 20 tracks the difference between viewpoint and content-based regulation the Court has established. "A speech

2. Telegraphs and telephones could always refuse to carry libelous or otherwise unlawful posts. *See, e.g.,* Allan L. Schwartz, *Right of Telephone or Telegraph Company to Refuse, or Discontinue Service Because of Use of Improper Language*, 32 A.L.R.3d 1041 (1970); *see generally* Bruce Wyman, *Illegality as an Excuse for Refusal of Public Service,* 23 HARV. L. REV. 577 (1910).

regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 169 (2015). Similarly, Livingston's quotation refers to refusing the public certain types of content—which is lawful under HB 20. Under the Texas statute, platforms can ban objectionable content, but not objectionable viewpoints.

Rather than boasting an ancient pedigree, the First Amendment protection of the editorial discretion rights of firms in the business of carrying others' speech is a relatively modern invention, first appearing in the 1970s. The Court has used the phrases "editorial control" or "editorial discretion" in three distinct ways.

First, the phrase "editorial control" appeared in Justice Brennan's dissent to *Columbia Broad. Sys., Inc. v. Dem. Nat'l Comm.*, 412 U.S. 94 (1973). In that case, the Court approved the right of broadcasters to refuse, with approval from the FCC, to sell any part of their advertising time to groups or individuals wishing to speak out on controversial issues of public importance. 414 U.S. at 98-100. The term "editorial control," however, did not refer to the broadcasters' speech or its decision to exclude advertisers, but to advertisers' speech, i.e., third-party speech. Justice Brennan thought that advertisers should share editorial control over broadcasting with stations and networks. *Id.* at 189-90 (Brennan, J., dissenting).

Second, the Court's initial uses of the term "editorial discretion" referred not to platforms' First Amendment-protected expression but to a limit on government regulation. For instance, in *FCC v. Midwest Video Corp.*,

440 U.S. 689, 705-07 (1979), the Court used the term "editorial discretion" interchangeably with the term "editorial control." *Id.* There, the Court reviewed an FCC rule mandating cable systems to carry "public, educational, local governmental ["PEG" programming], and leased-access." *Id.* at 691. The Court used "editorial discretion" to denote the broadcasters' power over programming—but not that this power had First Amendment significance, a matter about which the Court "express[ed] no view." *Id.* at 709 n.19.

Third, later Court statements emphasized that editorial discretion should not be equated with pure speech. In *City of L.A. v. Preferred Commc'ns, Inc.*, 476 U.S. 488 (1986), a cable system challenged a municipal cable licensing system on First Amendment grounds. In this brief opinion, the Court allowed the claim to proceed, recognizing the First Amendment protected "editorial discretion," but the Court recognized such discretion was not speech, as "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Id.* at 494-95.

B. *Rumsfeld* limits the social media platforms' First Amendment protection.

NetChoice relies on a group of three cases (*Hurley*, *Turner I,* and *Tornillo*) for its claims about "editorial discretion." In *Hurley,* the Court ruled that the Massachusetts public accommodation law that prohibited discrimination based on sexual orientation impinged upon parade organizers' choice of participants. 515 U.S. at 570. In *Turner I*, the Court ruled that the First Amendment

protected cable operators' "editorial discretion" in creating a lineup of cable programmers. 512 U.S. at 636. In *Tornillo,* the Court said the First Amendment protected the "editorial control and judgment" of a newspaper op-ed page and declared unconstitutional a Florida law requiring newspapers to print replies to their editorials. 418 U.S. at 258.

But NetChoice ignores the Court's limits to the First Amendment protection of "editorial discretion." Commenting on these cases, Chief Justice Roberts, writing for a unanimous Court in *Rumsfeld v. FAIR*, cabined these cases' scope. *Rumsfeld* decided a First Amendment challenge to the Solomon Amendment, a federal statute with antidiscrimination requirements analogous to HB 20. The amendment required that if an institution of "higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." *Rumsfeld,* 547 U.S. at 51.

In *Rumsfeld,* Chief Justice Roberts started with basic principles: "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Because the Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," the Court extends "First Amendment protection only to conduct [that is *inherently expressive.*" 547 U.S. at 65-66 (emphasis added).

Under these principles, when the government "force[s an entity] . . . to host or accommodate another speaker's message," the First Amendment only comes into play when three conditions are met. *Id.* at 63. None of those conditions is present here.

First, the "[t]he compelled-speech violation" did not "resul[t] from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. Chief Justice Roberts reasoned that including certain types of recruiters is not speech because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters." *Id.* at. 65.

In this case, nothing about opening a user's account and transmitting speech suggests the platforms agree with any speech that their users write. And just as "nothing in the Solomon Amendment restricts what the law schools may say about the military's policies," *id.*, nothing in HB 20 restricts what the platforms can say on their platforms or anywhere else.

Second, the message the platforms' editorial discretion communicates must be "overwhelmingly apparent." *Id.* at 66. But just as an ISP's transmission of an email does not communicate the ISP's message, a social media platform's transmitting a message does not communicate a *platform* message—let alone one that is "overwhelmingly apparent."

NetChoice argues that its members' at-scale editorial techniques, such as shadow-banning, in which a platform hides an individual's message from all other users without informing that individual, or boosting the visibility of certain content through secret algorithms,

create a "curated experience." NetChoice (22-555) Br. 31. NetChoice apparently believes its "curated experience" conveys an "overwhelmingly apparent" message.

Acts that are invisible or impossible to comprehend cannot speak — let alone be overwhelmingly apparent. Professor Eugene Volokh argues that common carrier regulation is constitutional for social media firms because they fail to express a "coherent speech product." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 411, 422 (2021). Unlike broadcasters or a newspaper, "[t]he major platforms . . . are not generally in the business of providing 'coherent and consistent messaging.'" *Id.* at 405.

Third, the "expressive component of . . . actions [can] not [be] created by the conduct itself . . . The fact that . . . explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection." *Rumsfeld*, 547 U.S. at 66. The platforms claim that their "terms of service" render their editorial decisions expressive. NetChoice (22-555) Br. 5. But just as the law school's statements concerning which recruiters they will allow on campus fail to make the law schools' discriminatory acts expression, so do terms of service fail to transform the platforms' discriminatory acts into expression.

C. *Tornillo, Turner,* and *Hurley* do not apply here.

Billions of users contribute content to the social media platforms without the platforms' permission or input. The platforms perform often invisible, but always after-the-fact, editing, which cannot be viewed *in toto*. This process

cannot form a message of the platforms that is "their own," *Rumsfeld,* 547 U.S. at 66, let alone a "coherent speech product," Volokh, *supra,* at 411. These acts do not communicate a message that is "overwhelmingly apparent," nor do they express anything without the platforms' extraneous explanations. *Rumsfeld*, 547 U.S. at 66.

In contrast, in *Hurley*, *Turner,* and *Tornillo,* each editor at issue explicitly decided to include the parade marcher, cable programmer, or op-ed, respectively. Significantly, they vetted all those who wished to appear on their respective forums, exercising primary and initial control over their content—something the social media firms do not do.

Unlike the social media platforms' "curated experiences," NetChoice (22-555) Br. 31, The Miami Herald's acts of editorial discretion to include particular op-eds endorsed its own message and communicated to its readers that the included op-eds are significant and relevant to the day's issues as well as being within the broad editorial outlook of the paper. In *Turner,* the cable operators' decision to create a specific lineup of cable networks expressed their own views. In other words, "ABC (local affiliate), ESPN, A&E, and MSNBC" expresses something different from the cable programmer network lineup, "ESPN, A&E, and Fox News." In *Hurley,* the "coherent speech product" was the lineup of marchers which can communicate an apparent message without additional explanation. 515 U.S. at 570. *See* Adam Candeub, *Editorial Decision-Making and the First Amendment*, 2 J. Free Speech L. 157, 176 (2022).

D. Under *303 Creative,* social media platforms' voices do not combine with their users' voices to create First Amendment-protected expression.

NetChoice argues that the First Amendment protects the social media platforms' right to refuse to transmit content with which they disagree, and renders invalid the viewpoint discrimination prohibition in Section 7 of HB 20, TEX. CIV. PRAC. & REM. CODE § 143A.002. NetChoice claims the Court's opinion in *303 Creative v. Elenis,* 600 U.S. 570 (2023), stands for the proposition that because private actors do not "'forfeit constitutional protection simply by combining multifarious voices' in a single communication," they have First Amendment rights in choosing which users' speech to transmit and which subscribers to serve — as their voice "combin[es]" with their users'. NetChoice (22-555) Br. 20 (quoting *303 Creative*, 600 U.S. at 588 (quoting *Hurley*, 515 U.S. 569)).

But social media companies do not "combin[e]. . . voices" with their users' voices. Rather, as *303 Creative* shows, when a private actor—either a web design firm as in *303 Creative* or a social media firm—hosts others' speech, the Court has placed a high bar for when their voices combine. Because in *303 Creative* Lori Smith planned to vet her clients and create individualized original graphics and pictures intended to express her own vision of marriage, the Court ruled that her voice was part of her customers' webpages. The Colorado Anti-Discrimination Act (CADA) required Smith, a web designer, to create websites for weddings to which she had moral objections, and the Act thereby interfered with *her* speech.

The Court in *303 Creative* set forth the conditions under which any individual or entity hosting others' speech—whether a website service like Ms. Smith's or a social media platform—makes third-party hosted speech into his or "her speech" for First Amendment purposes. *303 Creative*, 600 U.S. at 588. The factors the Court identified apply to this case's central question: whether the posts that social media platforms host are their speech and thereby deserving of First Amendment protection or whether the platforms simply transmit their users' speech.

First, if an entity, such as a website, goes beyond hosting third party user speech but also authors and develops it, then the speech is that of the host as well as of the third party. Ms. Smith helps to develop and author each website so that "[t]hey are not solely their users' creations." *303 Creative*, 600 U.S. at 579. Rather, she represented that "all of the text and graphics on these websites will be 'original,' 'customized,' and 'tailored' creations." *Id.*

In contrast, social media users are responsible for authoring their own messages. Facebook, unlike Ms. Smith, does not work with its users to develop content. The platforms themselves recognize this point. When seeking the protection of Section 230 of the Communications Act of 1996, 47 U.S.C. § 230, which only relieves the platform of liability for "information provided by another," 47 U.S.C. § 230(c)(1), the platforms disclaimed that they are "responsible, in whole or in part, for the creation or development" of their users' content. *See* 47 U.S.C. § 230(f)(3). In these cases, Google and Facebook have stated repeatedly that they do "not materially contribute to third-party . . . statements by selecting and distributing

those statements for publication." Br. Def.-Appellee Google LLC, *Waters v. Facebook,* No. 21-1582, (1st Cir. Nov. 15, 2021) 2021 WL 5410901. The platforms represent that they use "neutral tools [to] filter or arrange third-party content" and they do not "creat[e]" or "develop[]" any third-party content. Defs'. Reply Supp. Jt. Mot. to Dismiss the Third Am. Compl., *Colon v. Twitter, Inc.*, No. 6:18-CV-005150-CEM-GJK, 14 F.4th 1213 (11th Cir. 2021), 2019 WL 7835413.

Second, all of Ms. Smith's websites are attributable to her — as well as to her customers. Viewers know "that the websites are [Ms. Smith's] original artwork" because "the name of the company she owns and operates by herself will be displayed on every one." *303 Creative*, 600 U.S. at 579. As NetChoice explains, "graphic and website design" appear alongside "the name of the company," such that "[v]iewers will know" the website is responsible for the expression on it." NetChoice (22-555) Br. 4-5 (quoting *303 Creative*, 600 U.S. at 579, 582).

In contrast, no one attributes social media user speech to the social media firms — just as no one attributes a phone conversation with one's mother to Verizon.

Third, Ms. Smith's websites are "expressive in nature" because they are designed "to communicate a particular message." 600 U.S. at 577. The websites "express Ms. Smith's and 303 Creative's message celebrating and promoting her view of marriage," *id.* at 582 (quotations omitted), which she believes to proceed from the "biblical truth . . . . that marriage is a union between one man and one woman." *Id.*

But the large social media platforms do not communicate any "particularized message." Users cannot detect an obvious meaning in how Facebook or X arranges posts. Rather, users chose their followers and block others. Users, not platforms, "curate" their own experiences and generate online experiences, and the platforms' editorial actions are either invisible or ambiguous.

Fourth, Ms. Smith's business plan requires that she "ve[t] each prospective project to determine whether it is one she is willing to endorse." 600 U.S. at 588. The platforms make a public offering of their services; they don't vet any content. It's difficult to attribute "speech" or find expressive a platform that invites the world to use it. Without vetting, it is hard to see how a platform forms its own message.

In sum, the websites were Ms. Smith's own speech because she authors and develops them, and they communicate a "particular message," *id.* at 577, that she determined by pre-selecting her clients. Ms. Smith could claim, therefore, a First Amendment violation when compelled to create websites with which she disagreed. Because the social media platforms do the very opposite with their users' content, they cannot claim a First Amendment violation when transmitting content with which they disagree.

II. NetChoice is judicially estopped from arguing that HB 20 regulates its members' own speech.

Judicial estoppel commands that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not

thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The purpose of judicial estoppel is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993).

In countless cases seeking Section 230 liability protection, the platforms maintained that they are simply neutral conduits of speech "of another," *see* 47 U.S.C. § 230(c)(1), rather than expressing their own viewpoint or message. The platforms state their editorial discretion consists of "neutral tools" that perform editorial acts that "[m]erely arrang[e] and displa[y] others' content." Appellees Br. 57, *Clayborn v. Twitter*, No. 19-15043 (9th Cir. June 22, 2021), 2019 WL 4132224; *see also* Defs.' Reply Supp. Jt. Mot. to Dismiss 12, *Colon v. Twitter, Inc.*, No. 6:18-CV-515-CEM (M.D. Fla. Dec. 20, 2019), 2019 WL 7835413 (Platforms asserting they use "neutral tools [to] filter or arrange third-party content" and they do not "creat[e]" or "develop[]" any third-party content).

The Court found last Term that "[a]ll the content on [the social media] platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself. As presented here, the algorithms appear agnostic as to the nature of the content." *Twitter, Inc. v. Taamneh,* 598 U.S. 471, 499 (2023). The platforms, like telephone and telegraph companies which enjoy protection from liability for the content of their users' messages because they simply transmit them, cannot claim their users' posts as their own, First Amendment-protected,

speech. *See* Adam Candeub, *Common Carrier Law in the 21st Century*, 90 Tenn. L. Rev. 813, 838-45 (2024).

As the Fifth Circuit pointed out, the "Platforms' position, in this case, is a marked shift from their past claims that they are simple conduits for user speech and that whatever might *look* like editorial control is, in fact, the blind operation of 'neutral tools.'" *NetChoice v. Paxton*, 49 F.4th at 467 (emphasis in original). The Fifth Circuit found it a "fair point" that "the Platforms are therefore judicially estopped from asserting that their censorship is First-Amendment-protected editorial discretion" *Id.* at 467–68.

III. "Editorial Discretion" is an act performed upon the speech of others, and the First Amendment does not protect discriminatory acts.

Classifying the platforms' discriminatory acts as First Amendment-protected "editorial discretion" leads to absurdity. If the First Amendment protects discriminatory conduct, platforms can discriminate against Christian, African American, gay, or Jewish users. This is not a theoretical position; it is one the platforms have frankly avowed to the Court[3] and about which one *Amicus curiae*

3. For instance, Twitter claimed in state court that "the First Amendment would give Twitter the right, just like it would give a newspaper the right, to choose not to run an op-ed page from someone because she happens to be a woman." The Court probed counsel about the First Amendment and Twitter's right to discriminate.

Court: "[Y]our position is absolutist; that Twitter has an absolute First Amendment right to remove anybody from its platform, even if doing so would be discriminatory on the basis of religion, gender[?]"

has expressed concern. *See generally* Lawyers' Comm. for Civ. Rts. Under Law Br.

The platforms are in the business of providing communications services in exchange for the opportunity for advertisers to communicate with users. These services are regulable like other public-facing businesses, which, of course, have non-discrimination obligations under the public accommodation laws and civil rights laws. These services can and should be regulated as any other business.

IV. The platforms are regulable as common carriers consistent with the First Amendment.

For two and a half centuries, since relying on common carrier law in one of its first decisions, the Court has upheld the "peculiar law respecting . . . common carriers." *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 361 (1803); *see also Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 33 (1795).

Most recently, Justice Thomas, in a concurring opinion, summarized the tests the Court has used to classify common carriers: (1) whether the entity regulated is part of the transportation or communications industry; (2) whether an industry is "affected with the public interest;" (3) whether a firm exercises market power; (4) whether the industry receives countervailing benefits from the government, such as liability protection or rights to eminent domain; or (5) whether the firm holds itself out

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Twitter's counsel answered: "Yes." *See Taylor v. Twitter, Inc.*, Tr. Hr'g, No. CGC-18-564460 (Cal. Super. Ct. S.F. Cnty., June 14, 2018).

as providing service to all. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222-24 (2021) (Thomas, J., concurring in grant of certiorari, vacation of judgment, and remand (GVR)).

Social media qualifies under these tests, and so "[g]iven the firm rooting of common carrier regulation in our Nation's constitutional tradition, any interpretation of the First Amendment that would make Section 7 [of HB 20] facially unconstitutional would be highly incongruous." *NetChoice*, 49 F.4th at 469.

A. "Editorial Filtering" and "Indiscriminate Access" are irrelevant to common carrier status.

Rather than discuss these tests, NetChoice and its *Amici* argue that because the platforms "hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering," they cannot be regulated as common carriers. NetChoice (22-555) Br. 31; Chamber of Commerce Br. 13-17; Yoo Br. 9; Int'l Ctr. L. & Econ Br. 11-12.

But that's not a widely accepted claim — nor does one *Amicus* cite Court precedent supporting the claim that "[t]he most universally accepted definition of common carriage turns on whether the firm eschews exercising editorial discretion over the content it carries." Yoo Br. 2. Definitions of common carrier did not historically address "editorial discretion." Rather, common carriers made choices and decisions about the passengers and messages they carried and applied them to all customers. As the Fifth Circuit stated,

> The relevant inquiry isn't whether a company *has* terms and conditions; it's whether it offers the "*same* terms and conditions [to] any and all groups." *Semon [v. Royal Indem Co.]*, 279 F.2d [737,] at 739 [(5th Cir. 1960)]. …. Here, it's undisputed the Platforms apply the same terms and conditions to all existing and prospective users.

NetChoice, 49 F.4th at 474 (emphasis original).

Common carriers do exercise "editorial discretion"—at least in the way NetChoice uses the word. As the Fifth Circuit explains, telegraph companies censored content that they deemed hurtful to their business. States and, finally, the federal government passed laws "prohibiting" discrimination—with some exceptions. And the Court upheld such laws.

The Court of Appeals put it this way:

> To the extent the Platforms are arguing that they are not common carriers because they filter some obscene, vile, and spam-related expression, this argument lacks any historical or doctrinal support. For example, phone companies are privileged by law to filter obscene or harassing expression, and they often do so. 47 U.S.C. § 223; *see, e.g., Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987). Yet they're still regulated as common carriers. Similarly, transportation providers may eject vulgar or disorderly passengers, yet States may

> nonetheless impose common carrier regulations prohibiting discrimination on more invidious grounds. *E.g., Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).

NetChoice, 49 F.4th at 474.

In short, common carrier status does not turn on "editorial filtering."

B. Discrimination and individualized treatment and the limits of common carrier law

Amici state that "just as the government cannot compel a platform to *remain* a common carrier, it cannot force it to become one." Found. for Indiv. Rts. & Expression [FIRE] Br. 15 (emphasis in original). That claim lacks historical support. Neither telegraphs nor telephones were originally common carriers, but later became regulated as such.[4] And they were required to remain as common carriers, with government permission required for them to end service[5]

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4. *State v. Atl. Coast Line R. Co.*, 59 Fla. 612, 628–29 (1910) ("It is settled law that the duties of a common carrier may arise out of usage as well as from statutory enactments, and when once established the obligation of such carriers to perform them is as binding in the one case as in the other.").

5. *See, e.g.,* 47 U.S.C. § 214 ("No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate").

Amici's claim that a common carrier can *choose* to make a public offering is not historically supported. Chamber of Commerce Br. 13-17; Yoo Br. 2, 7, 8; Cox & Wyden Br. 11-12. Rather than turn on whether the firm decides, in its discretion, to offer nondiscriminatory services, the test is whether the good or service is of the type that the firm has adequate capacity and capital investment to make generalized offerings. *Memphis & Little Rock R.R. v. S. Express Co.*, 117 U.S. 1, 20 (1886) (the *Express Cases*).

In the 19th and early 20th century, courts found certain types of service incapable of making generalized public offerings, such as express services or circus trains, *Denver & R.G.R. Co. v. Whan*, 39 Colo. 230, 241–42 (1907). but other services quite capable, e.g., passenger train service or dedicated private telegraphy, *Postal Tel.-Cable Co. v. Associated Press*, 228 N.Y. 370, 382–83 (1920) (Cardozo, J.). When a firm had the capacity and capital investment to make a public offering of a service, like dedicated telegraph lines, the service could be regulated as a common carrier.

In the *Express Cases*, the Court ruled that express services could not be regulated as common carriers. The express services were the 19th century version of FedEx. They made contracts with railroads and other transportation firms for a reserved amount of cargo space or number of passenger tickets so as to provide letter or package delivery services anywhere in the world.

The *Express Cases* observed that no "railroad company in the United States has ever held itself out as a common carrier of express companies" and "with very few

exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time." *Express Cases,* 117 U.S. at 21. A public offering of express services was impossible, given the capacity of the railroad companies and the contractual complexity of a public offering of express services, which would be more complicated than simply offering passenger tickets.

Following that principle, railroads did not have the capacity to make special offerings to "circus trains." As a result, courts did not impose common carrier status on circus train service. "The hauling of a train composed of cars belonging to a circus, made up and loaded by the employees of the circus, to be hauled usually at night, and carrying horses, elephants, and wild and savage beasts, is not the *ordinary business* of a common carrier." *Sasinowski v. Bos. & M.R.R.*, 74 F.2d 628, 631 (1st Cir. 1935) (emphasis added). Similar reasoning held for hauling luxury Pullman sleeping cars. *Denver & Rio Grande R.R. v. Whan*, 89 P. 39, 42 (Colo. 1907).

Conversely, where a firm has the *capacity* and *capital investment* to offer its service to all without discrimination, common carrier obligations can apply. The New York Court of Appeals required telegraph companies to offer "private wires," which were dedicated telegraph lines used for certain businesses, to all on the same terms—even though telegraph companies never held themselves out as providing the service on equal terms. Because the nature of the business's capital investment allowed them to make a standardized offering to all, private wires "must be offered to those who need them with even-handed impartiality. . . . What it grants to one, it must, in like conditions, when detriment would follow

preference, grant impartially to all, *within the limits of capacity*." *Postal Tel.-Cable Co.*, 127 N.E. at 383 (emphasis added).

C. Section 223 does not evidence congressional intent towards State law.

Particularly puzzling is NetChoice's argument that Congress has gone out of its way to enable websites to weed out objectionable content, and "exclude speech," citing 47 U.S.C. § 230(c), and has specifically "disclaimed any intent to treat such websites as common carriers," citing 47 U.S.C. § 223(e)(6). NetChoice (22-555) Br. 32.

Section 223(e)(6) amended 47 U.S.C. § 223 as part of the Telecommunications Act of 1996 revision to communications law. Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996) (codified throughout 47 U.S.C.). The provision simply states that Section 223, which addresses transmission of child pornography and obscenity, itself does not make websites into common carriers — it does not state that they cannot be treated as common carriers under other sections of the Telecommunications Act or by other jurisdictions.

To the contrary, 47 U.S.C. § 230(e), which is also part of the Telecommunications Act of 1996, contemplates a role for State law. It states that "[n]othing in this subsection shall preclude any State or local government from governing conduct not covered by this section." 47 U.S.C § 230(f)(3).

CONCLUSION

The Court should uphold the respective State laws, reversing the Eleventh Circuit in case no. 22-277 and affirming the Fifth Circuit in case no. 22-555.

Respectfully submitted,

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