No. 23-1993

In the Supreme Court of the United States

NetChoice L.L.C., *PETITIONER*, v.

Ken Paxton, *RESPONDENT*

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

James Patterson McBaine Honors Moot Court Competition

2023 Record

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This packet also includes "Questions Presented" based on the Petitioner's petition for writ of certiorari. For your brief, you may choose to edit the questions presented as you see fit, though their substance should remain the same. Outside of the material in this packet, you should not attempt to access the underlying briefs or petitions from ***these cases or any other related case,*** in accordance with the rules of the competition.

QUESTIONS PRESENTED

1. Whether strict scrutiny under the First Amendment applies to a law that prohibits large social media platforms from moderating content based on a user's viewpoint?

2. Whether the Constitution permits states to enact laws that prohibit large social media platforms from moderating content based on a user's viewpoint?

49 F.4th 439
United States Court of Appeals, Fifth Circuit.

NETCHOICE, L.L.C., a 501(c)(6) District of Columbia organization doing business as NetChoice; Computer Communications Industry Association, a 501(c)(6) non-stock Virginia Corporation doing business as CCIA, Plaintiffs—Appellees,

v.

Ken PAXTON, in his official capacity as Attorney General of Texas, Defendant—Appellant.

No. 21-51178
|
FILED September 16, 2022

Procedural Posture(s): On Appeal; Motion for Preliminary
Opinion: Andrew S. Oldham, Circuit Judge:

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

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

The implications of the platforms' argument are staggering. On the platforms' view, email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business. What's worse, the platforms argue that a business can acquire a dominant market position by holding itself out as open to everyone—as Twitter did in championing itself as "the free speech wing of the free speech party." Blue Br. at 6 & n.4. Then, having cemented itself as the monopolist of "the modern public square," *Packingham v. North Carolina*, —— U.S. ——, 137 S. Ct. 1730, 1737, 198 L.Ed.2d 273 (2017), Twitter unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community, Oral Arg. at 22:39–22:52.

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

I.

A.

This case involves HB 20, a Texas statute that regulates large social media platforms.[1] The law regulates platforms[2] with more than 50 million monthly active users ("Platforms"), such as Facebook, Twitter, and YouTube. TEX. BUS. & COM. CODE § 120.002(b). In enacting HB 20, the Texas legislature found that the Platforms "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." It further found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance."

Two sections of HB 20 are relevant to this suit. First is Section 7, which addresses viewpoint-based censorship of users' posts. Section 7 provides: A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; ***446** (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state. TEX. CIV. PRAC. & REM. CODE § 143A.002(a). "Censor" means "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). For Section 7 to apply, a censored user must reside in Texas, do business in Texas, or share or receive expression in Texas. *Id.* § 143A.004(a)–(b).

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

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

[Discussion of Section 2 has been omitted]

B.

NetChoice and the Computer & Communications Industry Association are trade associations representing companies that ***447** operate Platforms covered by HB 20. They sued the Attorney General of Texas ("Texas") on September 22, 2021, before HB 20 went into effect.

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

[Discussion of Section 2 and the procedural posture has been omitted]

II.

[Discussion of the standard of review has been omitted]

III.

The Platforms contend that Section 7 of HB 20 is facially unconstitutional. We disagree. We (A) first reject the Platforms' facial overbreadth challenge because Section ***448** 7 does not chill speech; if anything, it chills censorship. Then we (B) turn to the First Amendment's text and history, which offer no support for the Platforms' claimed right to censor. Next, applying Supreme Court precedent, we (C) hold that Section 7 does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct.* Our decision (D) is reinforced by 47 U.S.C. § 230, which reflects Congress's judgment that the Platforms are not "speaking" when they host other people's speech. Our decision (E) is still further reinforced by the common carrier doctrine, which vests the Texas Legislature with the power to prevent the Platforms from discriminating against Texas users. Finally, even if all of that's wrong and Section 7 does regulate the Platforms' speech, it (F) satisfies the intermediate scrutiny that applies to content-neutral rules.

A.

[Discussion of the First Amendment overbreadth doctrine has been omitted]

B.

[Discussion of the First Amendment's original meaning has been omitted]

C.

Rather than mount any challenge under the original public meaning of the First Amendment, the Platforms instead focus their attention on Supreme Court doctrine. And under that doctrine, the Platforms ***455** contend, Section 7 somehow burdens their right to *speak.* How so, you might wonder? Section 7 does nothing to prohibit the Platforms from saying whatever they want to say in whatever way they want to say it. Well, the Platforms contend, when a *user* says something using one of the Platforms, the act of hosting (or rejecting) that speech is the *Platforms'* own protected speech. Thus, the Platforms contend,

Supreme Court doctrine affords them a sort of constitutional privilege to eliminate speech that offends the Platforms' censors.

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

1.

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

But the State can regulate conduct in a way that requires private entities to host, transmit, or otherwise facilitate speech. Were it otherwise, no government could impose nondiscrimination requirements on, say, telephone companies or shipping services. *But see* 47 U.S.C. § 202(a) (prohibiting telecommunications common carriers from "mak[ing] any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services"). Nor could a State create a right to distribute leaflets at local shopping malls. *But see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (upholding a California law protecting the right to pamphleteer in privately owned shopping centers). So First Amendment doctrine permits regulating the conduct of an entity that hosts speech, but it generally forbids forcing the host itself to speak or interfering with the host's own message. Five Supreme Court cases elucidate this distinction. The first is *Miami Herald.* It involved a Florida law providing that when a newspaper article criticizes the character or record of a political candidate, the newspaper must offer the candidate equal space in the paper to reply to the criticism. 418 U.S. at 244, 94 S.Ct. 2831. The Court held that this "right-of-reply" law violated the First Amendment. *Id.* at 258, 94 S.Ct. 2831.

The Court explained that the law interfered with the newspaper's speech by imposing a content-based penalty on it. *See id.* at 256, 94 S.Ct. 2831 ("The Florida statute exacts a penalty on the basis of the content of a newspaper."). If the newspaper chose to speak about most topics, there was no penalty—but if it spoke critically about a political candidate, it was penalized with the "cost in printing and composing time and materials" necessary to give the candidate a free and equally prominent response column. *Ibid.* Moreover, the reply would "tak[e] up space that could be devoted to other material the newspaper may have preferred to print." *Ibid.* This interference would disincentivize the newspaper's speech: Faced with these penalties, "editors might well conclude that ***456** the safe course is to avoid controversy" and reduce coverage of political candidates altogether. *Id.* at 257, 94 S.Ct. 2831.

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

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. *Id*. at 258, 94 S.Ct. 2831.

Because a newspaper prints a curated set of material selected by its editors, everything it publishes is, in a sense, the newspaper's own speech. And the newspaper has a right to "editorial control and judgment" over its speech. *Ibid.* Newspapers thus cannot be compelled to "publish that which reason tells them should not be published." *Id.* at 256, 94 S.Ct. 2831 (quotation omitted).

The second case is *PruneYard.* That case involved a group of high school students who sought to distribute pamphlets and solicit signatures at a local shopping mall. The California Supreme Court held that California law protected the right to "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 447 U.S. at 78, 100 S.Ct. 2035 (quotation omitted). The mall objected on First Amendment grounds, arguing that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Id.* at 85, 100 S.Ct. 2035.

The Supreme Court rejected the shopping mall's challenge. It found the state law exacted no penalty on the basis of the mall's speech, and the mall could "expressly disavow any connection with the [pamphleteers'] message by simply posting signs in the area where the speakers or handbillers st[oo]d." *Id.* at 87–88, 100 S.Ct. 2035. Nor did California law impermissibly compel the mall itself to speak. To the contrary, because the mall was open to anyone, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures . . . will not likely be identified with those of the owner." *Id.* at 87, 100 S.Ct. 2035. The Court also emphasized California's neutrality among viewpoints: Because "no specific message is dictated by the State to be displayed on appellants' property," there was "no danger of governmental discrimination for or against a particular message." *Ibid.*

The mall relied in part on *Miami Herald*, but the *PruneYard* Court easily found that case inapplicable. The Court stated that *Miami Herald* "rests on the principle that the State cannot tell a newspaper what it must print," and it emphasized the "danger in [*Miami Herald*] that the statute would dampen the vigor and limit the variety of public debate by deterring editors from publishing controversial political statements that might trigger the application of the statute." *Id.* at 88, 100 S.Ct. 2035. Those concerns were "obviously . . . not present" in *PruneYard. Ibid.*

The third case is *PG&E.* A utility company, PG&E, had a longstanding practice of including a monthly newsletter in its billing envelopes. 475 U.S. at 5, 106 S.Ct. 903 (plurality op.). "In appearance no different from a small newspaper," the newsletter included political editorials and stories on matters of public interest alongside tips on energy conservation and information about utility services. *Id.* at 5, 8, 106 S.Ct. 903. Concerned that the expense of PG&E's political speech was falling on customers, the California Public Utilities ***457** Commission ("Commission") decided to apportion the billing envelopes' "extra space"— that is, the space occupied by the company's newsletter—and permit a third-party group

representing PG&E ratepayers to use that space for its opposing messages four months per year. *Id.* at 5–6, 106 S.Ct. 903. PG&E objected, arguing that the First Amendment prevented the Commission from forcing it to include an adverse party's speech in its billing envelopes.

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

> [B]ecause access is awarded only to those who disagree with appellant's [PG&E's] views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at [a third-party's] discretion—to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote. *Id*. at 14, 106 S.Ct. 903 (quoting *Miami Herald*, 418 U.S. at 257, 94 S.Ct. 2831).

The plurality also found that the Commission's order impermissibly "require[d] [PG&E] to associate with speech with which [it] may disagree." *Id.* at 15, 106 S.Ct. 903. Because the third party could "use the billing envelopes to discuss any issues it chooses," PG&E "may be forced either to appear to agree . . . or to respond." *Ibid.* "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16, 106 S.Ct. 903.

Finally, the *PG&E* plurality found *PruneYard* distinguishable for two reasons. First, *PruneYard* did not involve a concern that the challenged law "might affect the shopping center owner's exercise of his own right to speak." *Id.* at 12, 106 S.Ct. 903. Second, the right of access at issue in *PruneYard* was not content-based. *Ibid.*[7]

The fourth case is *Hurley.* GLIB, an organization of Irish-American gay, lesbian, and bisexual individuals, sought to march in a St. Patrick's Day parade in Boston. 515 U.S. at 561, 115 S.Ct. 2338. The parade was organized by a private group, the South Boston Allied War Veterans ***458** Council ("Council"). *Id.* at 560, 115 S.Ct. 2338. The Council refused to admit GLIB, citing "traditional religious and social values." *Id.* at 562, 115 S.Ct. 2338 (quotation omitted). But the Supreme Judicial Court of Massachusetts held that the parade was a public accommodation under state law, so the Council had to let GLIB participate. *Id.* at 564, 115 S.Ct. 2338. The Council argued that this application of Massachusetts's public accommodation law violated the First Amendment, and the Supreme Court agreed. *Id.* at 566, 115 S.Ct. 2338.

The Court concluded that the parade was a "form of expression" that receives First Amendment protection. *Id.* at 568, 115 S.Ct. 2338. That's because "[r]ather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574, 115 S.Ct. 2338. And it didn't matter that the Council was "rather lenient in admitting participants," because "a private speaker does not forfeit constitutional protection

simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569–70, 115 S.Ct. 2338.

The cornerstone of the Court's reasoning was that the parade sponsors were "intimately connected" to the message communicated by the parade. *Id.* at 576, 115 S.Ct. 2338. This intimate connection was crucial, the Court held, because forcing the sponsors to include a particular float was tantamount to forcing the sponsors to speak: "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576, 115 S.Ct. 2338; *see also id.* at 573, 115 S.Ct. 2338 (emphasizing that "a speaker has the autonomy to choose the content of his own message," including by "decid[ing] what not to say") (quotation omitted).

The final case that's particularly relevant to our discussion is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). Certain law schools sought to restrict military recruiting on their campuses because of the military's policies on sexual orientation. *Id.* at 51, 126 S.Ct. 1297. Congress responded by enacting the Solomon Amendment, which denied federal funding to schools that did not give military recruiters "access to students that is at least equal in quality and scope to the access provided other potential employers." *Id.* at 54, 126 S.Ct. 1297 (quotation omitted). An organization of law schools sued, arguing that the Solomon Amendment violated the First Amendment. The Supreme Court disagreed. It unanimously held that "the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement," and the statute thus did not place an unconstitutional condition on the receipt of federal funds. *Id.* at 60, 126 S.Ct. 1297.

The Court first held that the Solomon Amendment did not impermissibly force the law schools to speak. *Id.* at 61–62, 126 S.Ct. 1297. The Court recognized that "recruiting assistance provided by the schools often includes elements of speech"—like sending emails or posting bulletin board notices on the recruiter's behalf. *Id.* at 61, 126 S.Ct. 1297. But the Court determined that this speech was "plainly incidental to the Solomon Amendment's regulation of conduct" and was nothing like a "Government-mandated pledge or motto" as in *Barnette* and *Wooley.* ****459*** *Id.* at 62, 126 S.Ct. 1297. Congress could therefore compel this "incidental" speech without violating the First Amendment. *Ibid.*
The Court then held that the Solomon Amendment did not impermissibly interfere with the schools' own speech, distinguishing *Miami Herald, PG&E*, and *Hurley. Id.* at 63–65, 126 S.Ct. 1297. It acknowledged that those three cases "limited the government's ability to force one speaker to host or accommodate another speaker's message." *Id.* at 63, 126 S.Ct. 1297. But it then explained that these "compelled-speech violation[s] . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Ibid.*; *see also id.* at 63–64, 126 S.Ct. 1297 (explaining how the challenged laws "interfere[d] with a speaker's desired message" in *Miami Herald, PG&E*, and *Hurley*). In *Rumsfeld*, by contrast, "accommodating the military's message [did] not affect the law schools' speech, because the schools [were] not speaking when they host interviews and recruiting receptions." *Id.* at 64, 126 S.Ct. 1297. That was true despite the risk that students might mistakenly interpret the law schools' conduct as sending the message that they see nothing wrong with the military's policies. *Id.* at 64–65, 126 S.Ct. 1297. In sum, even though it required law schools to host and accommodate others' speech, the

Solomon Amendment was constitutional because it "neither limit[ed] what law schools may say nor require[d] them to say anything." *Id.* at 60, 126 S.Ct. 1297.

2.

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

a.

Let's start with compelled speech. In *Miami Herald*, the Supreme Court held that Florida's right-of-reply law was unconstitutional because it compelled newspapers to speak. Crucially, the Court emphasized that "[a] newspaper is more than a passive receptable or conduit for news, comment, or advertising." *Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831. Rather, a newspaper curates and publishes a narrow "choice of material" in accordance with the "editorial control and judgment" of its editors. *Ibid.* Thus, when a newspaper affirmatively chooses to publish something, it says that particular speech—at the very least—should be heard and discussed. So forcing a newspaper to run this or that column is tantamount to forcing the newspaper to speak.

The Platforms are nothing like the newspaper in *Miami Herald.* Unlike newspapers, the Platforms exercise virtually no editorial control or judgment. The Platforms use algorithms to screen out certain obscene and spam-related content.[8] And then virtually everything else is just posted to the Platform with *zero* editorial control or judgment. "Something well north of 99% of th[is] content . . . never gets reviewed further. The content on a site is, to that extent, invisible to the [Platform]." ***460** *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021). Thus the Platforms, unlike newspapers, are primarily "conduit[s] for news, comment, and advertising." *Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831. And that's why the Supreme Court has described them as "the modern public square." *Packingham*, 137 S. Ct. at 1737; *see also Biden v. Knight First Amend. Inst.*, —— U.S. ——, 141 S. Ct. 1220, 1224, 209 L.Ed.2d 519 (2021) (Thomas, J., concurring) (noting Platforms are also "unlike newspapers" in that they "hold themselves out as organizations that focus on distributing the speech of the broader public").

The Platforms' own representations confirm this.[9] They've told their users: "We try to explicitly view ourselves as not editors . . . . We don't want to have editorial judgment over the content that's in your feed."[10] They've told the public that they "may not monitor," "do not endorse," and "cannot take responsibility for" the content on their Platforms.[11] They've told Congress that their "goal is to offer a platform for all ideas."[12] And they've told courts—over and over again—that they simply "serv[e] as conduits for other parties' speech."[13]

It is no answer to say, as the Platforms do, that an observer might construe the act of hosting speech as an expression of support for its message. That was the precise contention the Court rejected in both *PruneYard* and *Rumsfeld*: Neither the shopping mall nor the law schools wanted to endorse the hosted speech. The *Rumsfeld* Court dismissed that concern out of hand because even schoolchildren know the difference between sponsoring speech and allowing it. *See* 547 U.S. at 65, 126 S.Ct. 1297 (citing *Bd. of*

Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990)). That's precisely why even the Platforms concede that "objective observer[s]" would not "conclude that [Platforms] intended . . . to promote terrorism" when they host terrorist content. Motion to Dismiss at 23, *Gonzalez v. Twitter, Inc.*, No. 4:16-cv-03282 (N.D. Cal. Jan. 13, 2017).

***461** Recognizing that their compelled-speech analogy to newspapers is a stretch, the Platforms turn to parades and the *Hurley* case. The Platforms contend that Section 7 forces them to host speech that's inconsistent with their corporate "values." But of course, the Platforms do not contend that they carefully curate users' speech the way a parade sponsor or composer "selects . . . expressive units . . . from potential participants." *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338. Nor do they suggest that they are "intimately connected with the communication" Section 7 requires them to host. *Id.* at 576, 115 S.Ct. 2338. The Platforms instead contend that their censorship is protected because *Hurley* creates a freewheeling right for speech hosts to discriminate against messages they don't like.

Hurley said nothing of the sort. The Court instead carefully limited its holding to a speech host (like a parade organizer or composer) who is "intimately connected" with the hosted speech (like a parade or a symphony). *Ibid.* And the Platforms are nothing like such hosts. They don't pick content to "mak[e] some sort of collective point," even an abstract one like "what merits celebration on [St. Patrick's] day." *Id.* at 568, 574, 115 S.Ct. 2338. Rather, the Platforms permit any user who agrees to their boilerplate terms of service to communicate on any topic, at any time, and for any reason. And as noted above, virtually none of this content is meaningfully reviewed or edited in any way.

Nor can the Platforms point to the content they *do* censor and claim that makes them akin to parade organizers. In *Rumsfeld*, for example, the law schools argued that their denial of access to military recruiters was protected expressive conduct because it "expressed" the schools' disagreement with the military. 547 U.S. at 66, 126 S.Ct. 1297. But the Court held that the denial of access was not *inherently* expressive, because such conduct would only be understood as expressive in light of the law schools' speech explaining it. *See ibid.* Otherwise, observers wouldn't know that the denial of access stemmed from an ideological disagreement—they might instead conclude, for example, that "the military recruiters decided for reasons of their own that they would rather interview someplace else." *Ibid.*
The same reasoning applies here.[14] If a Platform censors a user's post, the expressive quality of that censorship arises only from the Platform's *speech* (whether on an individualized basis or in its terms of service) stating that the Platform chose to censor the speech and explaining how the censorship expresses the Platform's views. Otherwise, as in *Rumsfeld*, an observer might just as easily infer that the user himself deleted the post and chose to speak elsewhere. In terms of the conduct's inherent expressiveness, there is simply no plausible way to distinguish the targeted denial of access to only military recruiters ***462** in *Rumsfeld* from the viewpoint-based censorship regulated by HB 20. Section 7 does not compel the Platforms to speak.

b.

Nor does it do anything to prohibit the Platforms from speaking. That's for three independent reasons. First, the Platforms have virtually unlimited space for speech, so Section 7's hosting requirement does nothing to prohibit the Platforms from saying what they want to say. Contrariwise, both *Miami Herald*

and *PG&E* involved "forum[s] of inherently limited scope"—a newspaper and newsletter with significant space constraints. *PG&E*, 475 U.S. at 24, 106 S.Ct. 903 (Marshall, J., concurring in the judgment). So when the State appropriated space in the newspaper or newsletter for a third party's use, it necessarily curtailed the owner's ability to speak in its own forum. *See Miami Herald*, 418 U.S. at 256, 94 S.Ct. 2831 ("[T]he compelled printing . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print."); *see also Rumsfeld*, 547 U.S. at 64, 126 S.Ct. 1297 (explaining the results in *Miami Herald* and *PG&E* in these terms). Accordingly, when a "speaker's own message [is] affected by the speech it [is] forced to accommodate," the speaker may invoke the First Amendment to protect their own ability to speak. *Rumsfeld*, 547 U.S. at 63, 126 S.Ct. 1297. By contrast, "space constraints on digital platforms are practically nonexistent"—unlike with newspapers, cable companies, and many of the other entities the Platforms invoke by analogy. *Knight*, 141 S. Ct. at 1226 (Thomas, J., concurring). For this reason, the Platforms can host users' speech without giving up their power or their right to speak their own message(s).

Second, the Platforms are free to say whatever they want to distance themselves from the speech they host. The Supreme Court has been very careful to limit forced-affiliation claims by speech hosts. After all, *any* speech host could *always* object that its accommodation for speech might be confused for a coerced endorsement of it. But the Court rejected that forced-affiliation argument in *PruneYard*, where the shopping mall owner was not required to affirm the pamphleteers' expression in any way, and was "free to publicly dissociate [himself] from the views of the speakers or handbillers." 447 U.S. at 88, 100 S.Ct. 2035. Similarly, in *Rumsfeld*, the law schools argued "that if they treat military and nonmilitary recruiters alike . . . they could be viewed as sending the message that they see nothing wrong with the military's policies." 547 U.S. at 64–65, 126 S.Ct. 1297. But the Supreme Court easily rejected this argument, because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65, 126 S.Ct. 1297. Rather, to win a forced-affiliation claim, the speech host must show that it's "intimately connected with the communication" and hence *cannot* dissociate itself from it. *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338. Here, the Platforms remain free to expressly disavow, distance themselves from, or say whatever they want about any expression they host. For example, Platforms can add addenda or disclaimers—containing their own speech—to users' posts. And many of them already do this, thus dramatically underscoring that Section 7 prohibits *none* of their speech.

Third, Section 7 does not impose a content-based penalty on the Platforms' speech. Recall that the right-of-reply law in *Miami Herald* burdened newspapers with the duty to publish a response column ***463** if they published an article questioning the character or record of a political candidate. 418 U.S. at 244, 94 S.Ct. 2831. As the *PG&E* plurality explained, this imposed a content-based penalty on the newspaper's speech in two distinct senses: First, the penalty was "triggered by a particular category of newspaper speech"; and second, access "was awarded only to those who disagreed with the newspaper's views." 475 U.S. at 13, 106 S.Ct. 903; *see also id.* at 14, 106 S.Ct. 903 (explaining that the Commission's order in *PG&E* was content-based in the second sense). Here, by contrast, no category of Platform speech can trigger any additional duty—or obviate an existing duty —under Section 7. And Section 7 does not create a special privilege for those who disagree with the Platforms' views. *Cf. id.* at 14, 106 S.Ct. 903 (billing envelope space was awarded only to a single entity formed to oppose PG&E's views). Rather, it gives the exact same protection to all Platform users regardless of their viewpoint.

c.

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

Both premises in that syllogism are flawed. Premise one is faulty because the Supreme Court's cases do not carve out "editorial discretion" as a special category of First-Amendment-protected expression. Instead, the Court considers editorial discretion as one relevant consideration when deciding whether a challenged regulation impermissibly compels or restricts protected speech. Take, for example, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("*Turner I*"). There the Court noted a cable operator "exercis[es] editorial discretion over which stations or programs to include in its repertoire." *Id.* at 636, 114 S.Ct. 2445 (quotation omitted). For this reason, among others, the Court concluded that selecting a limited repertoire of cable channels to transmit constitutes First-Amendment-protected speech. *See id.* at 636–37, 114 S.Ct. 2445. Similarly, *Miami Herald* emphasized newspapers' "exercise of editorial control and judgment" to support its holding that their close affiliation with the speech they publish gives them the right not to publish "that which reason tells them should not be published." 418 U.S. at 256, 258, 94 S.Ct. 2831 (quotation omitted). But both cases treated editorial discretion as a relevant consideration supporting their legal conclusions about the presence or absence of protected *speech.* Neither case implied that editorial discretion is *itself* a freestanding category of constitutionally protected expression.[15]

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

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

First, an entity that exercises "editorial discretion" accepts reputational and legal responsibility for the content it edits. In the newspaper context, for instance, the Court has explained that the role of "editors and editorial employees" generally includes "determin[ing] the news value of items received" and taking

responsibility for the accuracy of the items transmitted. *Associated Press v. NLRB*, 301 U.S. 103, 127, 57 S.Ct. 650, 81 L.Ed. 953 (1937). And editorial discretion generally comes with concomitant legal responsibility. For example, because of "a newspaper's editorial judgments in connection with an advertisement," it may be held liable "when with actual malice it publishes a falsely defamatory" statement in an ad. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 386, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). But the Platforms strenuously disclaim any reputational or legal responsibility for the content they host. *See supra* Part III.C.2.a (quoting the Platforms' adamant protestations that they have no responsibility for the speech they host); *infra* Part III.D (discussing the Platforms' representations pertaining to 47 U.S.C. § 230).

Second, editorial discretion involves "selection and presentation" of content *before* that content is hosted, published, or disseminated. *See* ***465** *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998); *see also Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831 (a newspaper exercises editorial discretion when selecting the "choice of material" to print). The Platforms do not choose or select material before transmitting it: They engage in viewpoint-based censorship with respect to a tiny fraction of the expression they have already disseminated. The Platforms offer no Supreme Court case even remotely suggesting that *ex post* censorship constitutes editorial discretion akin to *ex ante* selection.[17] They instead baldly assert that "it is constitutionally irrelevant at what point in time platforms exercise editorial discretion." Red Br. at 25. Not only is this assertion unsupported by any authority, but it also illogically equates the Platforms' *ex post* censorship with the substantive, discretionary, *ex ante* review that typifies "editorial discretion" in every other context.[18] In sum, even if "editorial discretion" is a protected legal category, it's far from clear why (even viewpoint-agnostic) content arrangement and (even infrequent and *ex post*) censorship should be the criteria for qualification. And in any event, the Supreme Court has never recognized "editorial discretion" as a freestanding category of First-Amendment-protected expression. Rather, the applicable inquiry is whether Section 7 forces the Platforms to speak or interferes with their speech. Section 7 does neither of those things. It therefore passes constitutional muster.

D.

We have no doubts that Section 7 is constitutional. But even if some were to remain, 47 U.S.C. § 230 would extinguish them. Section 230 provides that the Platforms "shall [not] be treated as the publisher or speaker" of content developed by other users. *Id.* § 230(c)(1). Section 230 reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not "speak[ing]" when they host user-submitted content. Congress's judgment reinforces our conclusion that ***466** the Platforms' censorship is not speech under the First Amendment.

Congress enacted Section 230 in 1996 to ease uncertainty regarding online platforms' exposure to defamation liability for the content they host. One leading case, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), held that an online platform could not be liable absent knowledge of the defamatory statements, because it was a distributor that did not exercise meaningful editorial control. *See id.* at 139–40. But then a different case, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), accepted an argument very similar to the Platforms' argument here. It noted that Prodigy's online platform had "content guidelines" prohibiting certain obscene and offensive content. *Id.* at *2. And Prodigy used an "automatic software screening program" as well as manual review

"to delete notes from its computer bulletin boards" that violated the guidelines. *Id.* at *4. The court held that this conduct "constitute[d] editorial control" over the platform, so the platform was akin to a newspaper and Prodigy could be held liable for defamation on that basis. *Ibid.*

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

Section 230 undercuts both of the Platforms' arguments for holding that their censorship of users is protected speech. Recall that they rely on two key arguments: first, they suggest the user-submitted content they host is *their speech*; and second, they argue they are *publishers* akin to a newspaper. Section 230, however, instructs courts *not* to treat the Platforms as "the publisher or speaker" of the user-submitted content they host. *Id.* § 230(c)(1). And those are the exact two categories the Platforms invoke to support their First Amendment argument. So if § 230(c)(1) is constitutional, how can a court recognize the Platforms as First-Amendment-protected speakers or publishers of the content they host?
The Platforms respond that they *in fact* are speakers and publishers, and Congress simply instructed courts to *pretend* they aren't for purposes of publishing-related liability. Moreover, the legislature can't define what constitutes "speech" under the First Amendment—otherwise, for example, it could abrogate *Miami Herald* by simply defining newspapers as "not publishers." Because the legislature may not define what constitutes First-Amendment-protected speech, the Platforms argue § 230 has no bearing on the constitutional questions in this case.

It's obviously true that a legislature can't define what speech is or is not protected by the First Amendment. *Cf.* ***467** *Marbury*, 5 U.S. at 177. It's also irrelevant because that's not what § 230 purports to do. The First Amendment generally precludes liability based on the content of someone's speech or expression. *E.g., Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Defamation liability for publishers is one of the several exceptions to this rule. *See generally New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (relationship between defamation liability and the First Amendment). But § 230 creates an *exemption* from that *exception* for the "interactive computer services" that fall within its scope, including the Platforms. And it does so by stating that they should not be treated as publishers. Thus, § 230 is nothing more (or less) than a statutory patch to a gap in the First Amendment's free speech guarantee. Given that context, it's strange to pretend that § 230's declaration that Platforms "shall [not] be treated as . . . publisher[s]" has no relevance in the First Amendment context.

Moreover, Congress's factual determinations do carry weight in constitutional adjudication. As the

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

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

The Platforms' position in this case is a marked shift from their past claims that they are simple conduits for user speech and that whatever might *look* like editorial control is in fact the blind operation of "neutral tools." Two amici argue that the Platforms are therefore judicially estopped from asserting that their censorship is First-Amendment-protected editorial discretion.[22] ***468** *See In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004) ("Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation."). That's a fair point. But in any event, the Platforms' frequent affirmation of Congress's factual judgment underlying § 230 makes us even more skeptical of their radical switcheroo that, in this case, they *are* publishers. *Cf. ibid.* (doctrine of judicial estoppel "protect[s] the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest" (quotation omitted)).

The Platforms' only response is that in passing § 230, Congress sought to give them an unqualified right to control the content they host—including through viewpoint-based censorship. They base this argument on § 230(c)(2), which clarifies that the Platforms are immune from defamation liability even if they remove certain categories of "objectionable" content. But the Platforms' argument finds no support in § 230(c)(2)'s text or context. First, § 230(c)(2) only considers the removal of limited categories of content, like obscene, excessively violent, and similarly objectionable expression.[23] It says nothing about viewpoint-based or geography-based censorship. Second, read in context, § 230(c)(2) neither confers nor contemplates a freestanding right to censor. Instead, it clarifies that censoring limited categories of content does not remove the immunity conferred by § 230(c)(1). So rather than helping the Platforms' case, § 230(c)(2) further undermines the Platforms' claim that they are akin to newspapers for First Amendment purposes. That's because it articulates Congress's judgment that the Platforms are not like publishers *even when they engage in censorship*.[24]

In sum, § 230 reflects Congress's judgment that the Platforms are not acting as speakers or publishers when they host user-submitted content. While a statute may not abrogate constitutional rights, Congress's factual judgment about the role of online platforms counsels against finding that the Platforms "publish"

(and hence speak) the content that other users post. And that's particularly true here, because the Platforms have long relied on ***469** and vigorously defended that judgment—only to make a stark about-face for this litigation. Section 230 thus reinforces our conclusion that the Platforms' censorship is not protected speech under the First Amendment.

E.

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

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

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

1.

[Discussion of the history of the common carrier doctrine has been omitted.]

2.

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

To state the obvious, the Platforms are communications firms. The Platforms ***474** halfheartedly suggest that they are not "members of the 'communications industry'" because their mode of transmitting expression differs from what other industry members do. But that's wrong. The whole purpose of a social media platform—as aptly captured in HB 20's definitional provisions—is to "enable[ ] users to communicate with other users." TEX. BUS. & COM. CODE § 120.001(1). The Platforms' own representations confirm this—for example, Facebook's Terms of Service indicates its purpose is to enable

users to "communicate with friends, family, and others."[25] In that sense, the Platforms are no different than Verizon or AT&T. The Platforms also hold themselves out to serve the public.[26] They permit any adult to make an account and transmit expression after agreeing to the same boilerplate terms of service. They've thus represented a "willingness to carry [anyone] on the same terms and conditions." *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960).

The Platforms resist this conclusion, arguing that they have not held themselves out to serve the public equally. That's so, they contend, because they are only willing to do business with users who agree to their terms of service. But requiring "compliance with their reasonable rules and regulations" has never permitted a communications firm to avoid common carrier obligations. *Chesapeake*, 7 A. at 811. The relevant inquiry isn't whether a company *has* terms and conditions; it's whether it offers the "*same* terms and conditions [to] any and all groups." *Semon*, 279 F.2d at 739 (emphasis added). Put differently, the test is whether the company "make[s] individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979) (quotation omitted). Here, it's undisputed the Platforms apply the same terms and conditions to all existing and prospective users.

The Platforms also contend they are not open to the public generally because they censor and otherwise discriminate against certain users and expression. To the extent the Platforms are arguing that they are not common carriers because they filter some obscene, vile, and spam-related expression, this argument lacks any historical or doctrinal support. For example, phone companies are privileged by law to filter obscene or harassing expression, and they often do so. 47 U.S.C. § 223; *see, e.g., Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987). Yet they're still regulated as common carriers. Similarly, transportation providers may eject vulgar or disorderly passengers, yet States may nonetheless impose common carrier regulations prohibiting discrimination on more invidious grounds. *E.g., Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).
The Platforms nonetheless contend that they cannot be regulated as common carriers because they engage in viewpoint-based censorship—the very conduct common carrier regulation would forbid. This contention is upside down. The Platforms appear to believe that any enterprise can avoid common carrier obligations by violating those same obligations. That is obviously wrong and would rob the common carrier doctrine of any content.

The Platforms' contention also involves a fair bit of historical amnesia. As discussed ***475** earlier, telegraph companies once engaged in extensive viewpoint-based discrimination, but that did not immunize them from common carrier regulation. Rather, for most legislators and courts, it made such regulation all the more urgent. *See* Lakier, *supra*, at 2322–23. And nearly every other industry historically subjected to common carrier regulation initially discriminated against their customers and sought the right to continue to do so. *See, e.g., Messenger*, 37 N.J.L. at 532–33 (railroad); *Munn*, 94 U.S. at 119–20 (grain elevators); *Webster*, 22 N.W. at 238 (telephone); *Portland Nat. Gas & Oil Co. v. State ex rel. Kern*, 135 Ind. 54, 34 N.E. 818, 818 (1893) (gas); *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N.E. 118, 121 (Ill. 1899) (water). The Platforms offer no reason to adopt an ahistorical approach under which a firm's existing desire to discriminate against its customers somehow gives it a permanent immunity from common carrier nondiscrimination obligations.

Texas also reasonably determined that the Platforms are "affected with a public interest." Numerous members of the public depend on social media platforms to communicate about civic life, art, culture, religion, science, politics, school, family, and business. The Supreme Court in 2017 recognized that social media platforms "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737. The Court's "modern public square" label reflects the fact that in-person social interactions, cultural experiences, and economic undertakings are increasingly being replaced by interactions and transactions hosted or facilitated by the Platforms. And if anything, the Platforms' position as the modern public square has only become more entrenched in the four years between *Packingham* and the Texas legislature's finding, as the public's usage of and dependance on the Platforms has continued to increase.[27]

The centrality of the Platforms to public discourse is perhaps most vividly illustrated by multiple federal court of appeals decisions holding that the replies to a public official's Twitter feed constitute a government "public forum" for First Amendment purposes. *See Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated*, —— U.S. ——, 141 S. Ct. 1220, 209 L.Ed.2d 519 (2021) (mem.); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1178-79 (9th Cir. 2022).[28] These decisions reflect the modern intuition that the Platforms are the forum for political discussion and debate, and exclusion from the Platforms amounts to exclusion from the public discourse. And for many, the Platforms are also no less central to quotidian discussions about matters like school, family, and business, than they are to debates about politics, science, and religion.

In addition to their social importance, the Platforms play a central role in American ***476** economic life. For those who traffic in information—journalists, academics, pundits, and the like—access to the Platforms can be indispensable to vocational success. That's because in the modern economy, the Platforms provide the most effective way to disseminate news, commentary, and other information. The same is true for all sorts of cultural figures, entertainers, and educators, a growing number of whom rely for much or all of their income on monetizing expression posted to the Platforms. Finally, even people and companies who traffic in physical goods often lean heavily on the Platforms to build their brand and market their products to consumers. That's why the Platforms, which earn almost all their revenue through advertising, are among the world's most valuable corporations. Thus, just like the telephone a century ago, the Platforms have become a key "factor in the commerce of the nation, and of a great portion of the civilized world." *Webster*, 22 N.W. at 239. Or at the very least, one cannot say the Texas legislature's judgment to that effect was unreasonable.

It's also true that each Platform has an effective monopoly over its particular niche of online discourse. Many early telephone companies did not have legal monopolies, but as a practical matter, they monopolized their geographic area due to the nature of the telephone business. *See id.* at 238. Likewise with the Platforms: While no law gives them a monopoly, "network effects entrench these companies" because it's difficult or impossible for a competitor to reproduce the network that makes an established Platform useful to its users. *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Academics have explored this concept in depth,[29] but to those familiar with the Platforms, a few concrete examples can easily demonstrate the point. To effectively monetize, say, carpet cleaning instructional videos (a real niche), one needs access to YouTube. Alternatively, sports "influencers" need access to Instagram. And

political pundits need access to Twitter. It's thus no answer to tell the censored athlete, as the Platforms do, that she can just post from a different platform. As Justice Thomas has aptly pointed out, that's like telling a man kicked off the train that he can still "hike the Oregon Trail." *Id.* at 1225. The Platforms' entrenched market power thus further supports the reasonableness of Texas's determination that the Platforms are affected with a public interest. *Cf. Munn*, 94 U.S. at 131 (market dynamics supported state legislature's affectation finding when nine firms controlled the fourteen major grain elevators serving Chicago).

The Platforms and their amici make three counterarguments that merit additional responses. First, they suggest that common carrier regulations are impermissible—or at least disfavored—unless the government has contributed to a carrier's monopoly, such as by licensing a legal monopoly or acquiring property for the carrier through eminent domain. That's obviously wrong. Recall that in Hale's original formulation, common carrier treatment was appropriate if a proprietor operated the "only [wharf] licensed by the queen" *or* if there was simply "no other wharf in that port." Hale, *supra*, at 77. American courts followed this formulation and did not require a government-conferred monopoly. *E.g., Webster*, 22 N.W. at 238. ***477** Even if the Platforms were right, however, the government *has* conferred a major benefit on the Platforms by enacting § 230. *See supra* Part III.D. As the Platforms have acknowledged, "Section 230 made it possible for every major internet service to be built."[30] By their own admission, the Platforms are just as dependent on § 230's liability shield as the old railroad companies were on the ability to traverse land acquired via eminent domain. Accordingly, the Texas legislature reasonably determined that the Platforms "have enjoyed governmental support in the United States" and that this supports common carrier regulation.[31]

Second, the Platforms rely on a handful of modern precedents. Chief among them is *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017). There, Judge Srinivasan and then-Judge Kavanaugh sparred over the validity of the FCC's net neutrality rule, which purported to use the FCC's authority under the Telecommunications Act of 1996 to impose common carrier obligations on internet service providers. *See id.* at 418 (Kavanaugh, J., dissenting from the denial of rehearing en banc). Because the primary question was one of a federal agency's regulatory authority, *see id.* at 418–26, the case has little relevance to a *State's* invocation of the deeply rooted common carrier doctrine.[32] And while it's true that then-Judge Kavanaugh also argued that the net neutrality rule violated the First Amendment, that was because "the FCC ha[d] not even tried to make a market power showing." *See id.* at 418; *see also id.* at 435 (rule would be constitutional upon showing of market power). Here, the Texas legislature found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance," and this finding is reasonable. *See supra* at 475-76.

At any rate, *Turner I* is the closest Supreme Court case from the modern era, and it provides no help to the Platforms. There the Court, by a 5-4 vote, refused to hold unlawful federal regulations requiring cable operators to set aside certain channels for commercial broadcast stations. *See* 512 U.S. at 661–68, 114 S.Ct. 2445. Most significant for our purposes, even the four dissenting Justices believed Congress could have permissibly imposed more modest common carrier regulations, rather than singling out broadcasters for preferential treatment as it had done. *Id.* at 684, 114 S.Ct. 2445 (O'Connor, J., concurring in part and dissenting in part); *see also ibid.* ("[I]t stands to reason that if Congress may demand that telephone companies operate ***478** as common carriers, it can ask the same of cable companies; such an approach

would not suffer from the defect of preferring one speaker to another.").

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

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

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

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

This is simply another version of the argument that social media is too complicated a medium to bear common carrier nondiscrimination obligations. Common carriers have not normally been able to discharge their duties by hosting or transmitting communications *per se.* Rather, they've been required to do so without discriminating—with "impartiality and good faith," as required by many state laws concerning telegraph transmission. *W. Union*, 162 U.S. at 651, 16 S.Ct. 934. States could even require telegraph companies to "transmit all d[i]spatches in the order in which they are received." Act of April 12, 1848, ch. 265, § 12, 1848 N.Y. LAWS 392, 395. Section 7 thus imposes ordinary common carrier nondiscrimination obligations, drafted to fit the particularities of the Platforms' medium.

At bottom, the Platforms ask us to hold that in the long technological march from ferries and bakeries, to barges and gristmills, to steamboats and stagecoaches, to railroads and grain elevators, to water and gas lines, to telegraph and telephone lines, ***479** to social media platforms—that social media marks the point

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

3.

The Platforms next argue that even if Section 7 is a valid common carrier regulation, it's still unconstitutional. That's wrong for two reasons. First, it's instructive that federal courts have been generally skeptical of constitutional challenges to States' common carrier nondiscrimination rules. Indeed, it appears that federal courts have only ever sustained such challenges for the now-discredited purposes of imposing racial segregation and enforcing a *Lochner*-era conception of private property rights. *See supra* Part III.E.1. Significantly, the Platforms rely on the dissenting opinion in *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934), a case in which a majority of the Court began to repudiate *Lochner.* They cite Justice McReynolds's dissent for the proposition that "a state may not by legislative fiat convert a private business into a public utility." Red Br. at 36 (quoting *Nebbia*, 291 U.S. at 555, 54 S.Ct. 505 (McReynolds, J., dissenting)).[33] Section 7 imposes a nondiscrimination requirement that comes nowhere close to making the Platforms public utilities. But more importantly, the Supreme Court has rejected *Lochner* and Justice McReynolds's position. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). This court may not resurrect it, and the Platforms' arguments provide little reassurance that we could hold Section 7 unconstitutional without doing so.

Second, the fact that the Platforms fall within the historical scope of the common carrier doctrine further undermines their attempt to characterize their censorship as "speech." As discussed at length earlier, the Platforms' primary constitutional argument is that they so closely oversee the speech on their Platforms that they exercise "editorial discretion" akin to a newspaper. But the same characteristics that make the Platforms common carriers—first, holding out their communications medium for the public to use on equal terms; and second, their well-understood social and economic role as facilitators of *other people's* speech—render them not newspapers but instead indispensable conduits for transporting information. Put differently, it's bizarre to posit that the Platforms provide much of the key communications ***480** infrastructure on which the social and economic life of this Nation depends, and yet conclude each and every communication transmitted through that infrastructure still somehow implicates the Platforms' own speech for First Amendment purposes.

F.

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

1.

Even if Section 7 burdens the Platforms' First Amendment rights, it does so in a content-neutral way. Such "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" under the First Amendment. *Turner I*, 512 U.S. at 642, 114 S.Ct. 2445 (quotation omitted).

The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Ibid.* Accordingly, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643, 114 S.Ct. 2445. But "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Ibid.* Or as the Court put it more recently, "the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015); *accord City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, —— U.S. ——, 142 S. Ct. 1464, 1471–74, 212 L.Ed.2d 418 (2022).

Section 7 is content-neutral. Even assuming viewpoint-based censorship is speech, the burden Section 7 imposes on that speech does not depend on "the ideas or views [it] expresse[s]." *Turner I*, 512 U.S. at 643, 114 S.Ct. 2445. In other words, Section 7's burden in no way depends on what message a Platform conveys or intends to convey through its censorship. That's because Section 7 applies equally regardless of the censored user's viewpoint, and regardless of the motives (stated or unstated) animating the Platform's viewpoint-based or geography-based censorship.

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

> (i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and
>
> (ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described by Subparagraph (i). TEX. BUS. & COM. CODE § 120.001(1)(C).

This definition does not render HB 20 content-based because the excluded websites are fundamentally dissimilar mediums. And "the fact that a law singles out a certain medium . . . is insufficient by itself ***481** to raise First Amendment concerns." *Turner I*, 512 U.S. at 660, 114 S.Ct. 2445 (quotation omitted). HB 20 defines "social media platform" to sweep in websites that exist primarily to host and transmit user-generated speech. Section 120.001(1)(C)(i) does not create a content-based exemption from Section 7's coverage. Rather, it excludes the distinct medium of websites whose primary purpose is not the sharing of user-generated speech but rather the dissemination of information "preselected by the provider." Under *Turner I*, targeting a particular medium does not render Section 7 content-based.

Second, the Platforms argue Section 7 is content-based because it permits certain narrow kinds of censorship. Section 7 permits Platforms to censor, for example, expression directly inciting criminal activity and specific threats of violence. *See* TEX. CIV. PRAC. & REM. CODE § 143A.006(a). But the Platforms offer no evidence whatsoever that Texas permitted these narrow categories of censorship "because of agreement or disagreement with the message [such censorship] conveys." *Turner I*, 512 U.S. at 642, 114 S.Ct. 2445 (quotation omitted). Rather, Section 7 permits censorship of expression that's unprotected by the First Amendment. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447–48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (incitement unprotected). So it's clear that the narrow permission to censor afforded by § 143A.006 is not "based on hostility—or favoritism —towards the underlying message expressed" by the Platforms' censorship. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Section 143A.006 therefore does not render Section 7 content-based.

Third, the Platforms argue that Section 7 triggers strict scrutiny because it targets only the largest social media platforms: those with more than 50 million users. They contend this alone requires strict scrutiny, relying principally on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). *Minneapolis Star* involved a challenge to Minnesota's "use tax" on paper and ink products used by the press. 460 U.S. at 577, 103 S.Ct. 1365. Because the tax exempted the first $100,000 of paper and ink used, only the largest eleven or so publishers incurred any tax liability in a given year. *Id.* at 578, 103 S.Ct. 1365. The Court held that "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* at 591, 103 S.Ct. 1365. Similarly, in *Arkansas Writers' Project*, the Court held unconstitutional another tax that "target[ed] a small group within the press," this time by imposing a sales tax on magazines but exempting religious, trade, professional, and sports magazines. 481 U.S. at 229, 107 S.Ct. 1722; *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 251, 56 S.Ct. 444, 80 L.Ed. 660 (1936) (holding unconstitutional a tax singling out newspapers with weekly circulations above 20,000). These taxation cases are inapposite. As the Court later explained, *Minneapolis Star* and *Arkansas Writers' Project* "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). But "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas," as "was ***482** the case in *Grosjean, Minneapolis Star*, and *Arkansas Writers' [Project].*" *Id.* at 453, 107 S.Ct. 1722. Section 7's focus on a particular subset of firms is not directed at *suppressing* particular ideas or viewpoints, as Minnesota's and Arkansas's discriminatory taxes were. Rather, the law aims at *protecting* a diversity of ideas and viewpoints by focusing on the large firms that constitute "the modern public square." *Packingham*, 137 S. Ct. at 1737. Nor is there any evidence in the record before us that Section 7 could in fact suppress any constitutionally protected speech by anyone. *See supra* Part III. A. *Minneapolis Star* and *Arkansas Writers' Project* thus provide no basis for subjecting Section 7 to strict scrutiny.

Finally, the Platforms argue that Section 7 impermissibly targeted the largest social media platforms because of the Texas legislature's particular disagreement with those Platforms' partisan censorship efforts. This argument fails on both the facts and the law. On the facts, the Platforms present no real evidence of the Texas legislature's alleged improper motives. Instead, they simply ask us to infer an improper motive from various unexplained amendments to the user threshold number and the fact that HB

20 lacks legislative findings regarding the user threshold. But it's just as plausible to infer that the legislature simply picked a number that would sweep in the largest platforms most salient to public discussion and debate in Texas. And on the law, we may not hold unconstitutional "a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). We thus hold that even if Section 7 regulated the Platforms' speech, intermediate scrutiny would apply.

2.

Section 7 satisfies intermediate scrutiny. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189, 117 S.Ct. 1174. We hold that Section 7's regulation of viewpoint-based censorship meets each of these requirements.

First, Section 7 advances an important governmental interest. HB 20's legislative findings assert that Texas "has a fundamental interest in protecting the free exchange of ideas and information in this state." And Supreme Court precedent confirms that this is "a governmental purpose of the highest order." *Turner I*, 512 U.S. at 663, 114 S.Ct. 2445; *see ibid.* ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); *Turner II*, 520 U.S. at 189, 117 S.Ct. 1174 ("promoting the widespread dissemination of information from a multiplicity of sources" is an important government interest); *see also Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.").

The Platforms argue *Miami Herald* shows that Section 7 does not further any sufficient government interest to satisfy intermediate scrutiny. That's because the *Miami Herald* Court considered Florida's argument that "the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues" yet found that interest insufficient to justify the right-of-reply law. 418 U.S. at 250, 94 S.Ct. 2831. But the *Miami Herald* ***483** Court never discussed or applied intermediate scrutiny, and it didn't suggest Florida's interest was unimportant. Rather, Florida's law was unconstitutional because it imposed an obvious content-based penalty on the newspaper's speech. *Id.* at 256, 94 S.Ct. 2831. And at any rate, because it only protected the speech of political candidates the newspaper disfavored, it would have done little to advance the State's broader interest in public debate. *Miami Herald* thus does not bear on the importance of Texas's asserted interest in this case.

The Platforms also rely on *Hurley*, but that case also did not apply intermediate scrutiny or weigh the strength of the governmental interest at stake. And *Hurley* distinguished *Turner I* by invoking the inherently expressive nature of a parade, as compared to "cable's long history of serving as a conduit for broadcast signals." 515 U.S. at 575–77, 115 S.Ct. 2338 (quotation omitted). The Platforms do not exercise the same editorial discretion and control that cable operators do—for example, they do not make *ex ante* decisions to select a limited repertoire of expression. *See supra* Part III.C.2.c. So if *Hurley* distinguished *Turner I* on that basis, then *Hurley a fortiori* doesn't fit this case. In sum, the Platforms' cases—none of which even applied intermediate scrutiny—do not undercut the Court's holding that the

widespread dissemination of information from a multiplicity of sources is "a governmental purpose of the highest order." *Turner I*, 512 U.S. at 663, 114 S.Ct. 2445.

Second, Section 7 is "unrelated to the suppression of free speech" because it aims to protect individual speakers' ability to speak. *Turner II*, 520 U.S. at 189, 117 S.Ct. 1174. The Platforms resist this conclusion only by insisting that Section 7 curtails the Platforms' own speech. That conflates the criteria for triggering intermediate scrutiny with the requirements for satisfying it. Intermediate scrutiny only kicks in when a law curtails speech, so the Platforms' test would mean that no law triggering intermediate scrutiny could ever satisfy that standard. And that would make little sense. Section 7 is plainly unrelated to the suppression of free speech because at most it curtails the Platforms' censorship—which they call speech—and only to the extent necessary to allow Texans to speak without suffering viewpoint discrimination.[34]

Third, Section 7 "does not burden substantially more speech than necessary to further [Texas's] interests." *Ibid.* This is perhaps best illustrated by considering the Platforms' main argument to the contrary: that "[i]f the State were truly interested in providing a viewpoint-neutral public forum, ***484** the State could have created its own government-run social-media platform." The same network effects that make the Platforms so useful to their users mean that Texas (or even a private competitor) is unlikely to be able to reproduce that network and create a similarly valuable communications medium. *See supra* at 475–76 & n.29. It's almost as absurd to tell Texas to just make its own Twitter as it would have been to tell broadcasters to just make their own cable systems. And aside from this bizarre claim, the Platforms offer no less restrictive alternative that would similarly advance Texas's interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner II*, 520 U.S. at 189, 117 S.Ct. 1174.[35]

The Platforms also suggest Section 7 is inadequately tailored because it's under-inclusive. Specifically, they claim Texas could've applied Section 7 to smaller social media platforms too and could've excised the carveouts where the Platforms are still permitted to censor (like specific threats of violence). But Texas reasonably determined that the largest social media platforms' market dominance and network effects make them uniquely in need of regulation to protect the widespread dissemination of information. And regulating smaller platforms would intrude more substantially on private property rights and perhaps create unique constitutional problems of its own. *See PruneYard*, 447 U.S. at 101, 100 S.Ct. 2035 (Powell, J., concurring in part and in the judgment) (implying hosting rules would raise additional First Amendment concerns if applied to small entities). With regard to carveouts, the Platforms do not explain how requiring them to host, say, specific threats of violence or direct incitement of criminal activity would have meaningfully advanced Texas's interest in protecting a widespread marketplace of ideas—especially when such speech enjoys no constitutional protection. *See, e.g., Brandenburg*, 395 U.S. at 447–48, 89 S.Ct. 1827.

Section 7 thus serves Texas's important interest in protecting the widespread dissemination ***485** of information, is unrelated to the suppression of free expression, and does not burden substantially more speech than necessary to advance Texas's interest. Section 7 therefore satisfies intermediate scrutiny and would be constitutional on that basis *even if* its censorship prohibitions implicated the Platforms' First Amendment rights.

IV.

[Discussion of Section 2 has been omitted]

V.

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

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

A.

[Discussion of Florida's law has been omitted]

B.

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

1.

The Eleventh Circuit reasoned that the Supreme Court's decisions in *Miami Herald, PG&E, Turner I*, and *Hurley* establish an "editorial-judgment principle" under which a private entity has a First Amendment right to control "whether, to what extent, and in what manner to disseminate third-party-created content to the public." *NetChoice*, 34 F.4th at 1212. But this purported rule is never mentioned by the cases the Eleventh Circuit relied on. And it's flatly contradicted by other Supreme Court cases that the Eleventh Circuit addressed only as an afterthought.

First, none of the cases the Eleventh Circuit relied on recognize an "editorial-judgment principle" or a distinct category of First Amendment protection for "editorial judgment." Instead, each case explains how the challenged regulation either compelled or restricted *speech.* In *Miami Herald*, for example, Florida's right-of-reply law both forced the *Miami Herald* to implicitly convey an editorial endorsement of speech it opposed and limited its opportunity to engage in other speech it would have preferred. *See*418 U.S. at 256–58, 94 S.Ct. 2831. Likewise in *Turner I*, the Court explained that "must-carry rules regulate cable

speech" because they obstruct cable operators' ability to express or convey the particular messages or programs they've chosen. ***491** 512 U.S. at 636–37, 114 S.Ct. 2445; *see also PG&E*, 475 U.S. at 9–16, 106 S.Ct. 903; *Hurley*, 515 U.S. at 572– 77, 115 S.Ct. 2338.

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

Second and more importantly, the Eleventh Circuit's "editorial-judgment principle" conflicts with *PruneYard* and *Rumsfeld.* The Eleventh Circuit tries to square its rule with *PruneYard* by noting that there, the forum owner didn't make an editorial-judgment argument. *NetChoice*, 34 F.4th at 1215. Perhaps, although that writes *PruneYard* out of the U.S. Reports by making the precedent irrelevant as long as a speech host chants the magical incantation "editorial judgment!" But then we get to *Rumsfeld*, where the forum owner *did make* the editorial-judgment argument: The law schools claimed a "First Amendment right to decide whether to disseminate or accommodate a military recruiter's message" in their forum. 547 U.S. at 53, 126 S.Ct. 1297. Yet the Supreme Court unanimously rejected the claimed right to choose who speaks in the law schools' forum because "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything." *Id.* at 60, 126 S.Ct. 1297.

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

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

Next, logic: If a firm's core business is disseminating others' speech, then that should weaken, not strengthen, the firm's argument that it has a First Amendment right to censor that speech. In *PruneYard*, for example, the shopping mall was open to the public —but for the purpose of shopping, not sharing expression. So it was perhaps tenuous for the State to use the public nature of the mall to justify a *speech*-hosting requirement. *Cf. PruneYard*, 447 U.S. at 95, 100 S.Ct. 2035 (White, J., concurring in part) (noting that California's hosting requirement involved communication "about subjects having no connection with the shopping centers' business"). But here, the Platforms are open to the public *for the specific purpose* of disseminating the public's speech. It's rather odd to say that a business has more rights to discriminate when it's in the speech business than when it's in some altogether ***492** non-speech business (like shopping or legal education).

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

basis in history, logic, or law for distinguishing *Rumsfeld* on the ground that law schools' core business is not disseminating speech.

The Eleventh Circuit also distinguished *Rumsfeld* on the ground that social media platforms, unlike law schools, disseminate "curated collections of speech." *NetChoice*, 34 F.4th at 1216. This curation means that social media platforms are engaged in "editorial judgment" while law schools are not. But that's backwards. The law schools in *Rumsfeld* deliberately reviewed the content and viewpoint of bulletin board notices and emails before disseminating them to students on behalf of employers. But social media platforms, after algorithmic screening to filter obscenity and spam, arrange and transmit expression to users while remaining agnostic as to far more than 99% of that expression's content and viewpoint. *See Moody*, 546 F. Supp. 3d at 1091–92. If either entity is "curating" expression in the ordinary sense—that is, engaging in substantive, discretionary review to decide what merits inclusion in a collection—it's the law schools. A person's social media feed is "curated" in the same sense that his mail is curated because the postal service has used automated screening to filter out hazardous materials and overweight packages, and then organized and affixed a logo to the mail before delivery. And it has never been true that content-agnostic processing, organizing, and arranging of expression generate some First Amendment license to censor. Were it otherwise, not only would *Rumsfeld* have come out the other way, but all sorts of nondiscrimination obligations currently imposed on communications firms and mail carriers would be unconstitutional.

2.

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

The Eleventh Circuit did not discuss the glaring distinctions between the Platforms' censorship and the editorial judgment described in *Miami Herald* and *Turner I.* For example, cable operators "exercise substantial editorial discretion in the selection and presentation of their programming"—that is, they select (with great care) *beforehand* a limited repertoire of channels to transmit. *Ark. Educ.*, 523 U.S. at 673, 118 S.Ct. 1633. Newspapers similarly publish a narrow "choice of material" that's been reviewed and edited beforehand, and they are subject to legal and reputational responsibility for that material. *See Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831; *see also id.* at 261–62, 94 S.Ct. 2831 (White, J., concurring). The Eleventh Circuit did not suggest the Platforms operate similarly.

Instead, the Eleventh Circuit tried to equate the Platforms' censorship with the editorial processes of newspapers and cable operators by reasoning that "Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities." *NetChoice*, 34 F.4th at 1213. For example, ***493** YouTube censors some content to create a "welcoming community"; Facebook censors to "foster authenticity, safety, privacy, and dignity"; and Twitter censors "to ensure all people can participate in the public conversation freely and safely." *Ibid.* (quotation omitted). Because the Platforms censor speech to further these amorphous goals, the Eleventh Circuit held, the censorship is protected by the First Amendment. *See ibid.*

Recall that under the Eleventh Circuit's framework, the presence of editorial judgment generates a First Amendment right to censor. But now, censorship itself—as long as it's explained by a generalized appeal

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

3.

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

The Eleventh Circuit "confess[ed] some uncertainty" as to whether the State's position was "(a) that platforms are *already* common carriers" or "(b) that the State can, by dint of ordinary legislation, *make* them common carriers." *Id.* at 1220. It then rejected each position in turn. First, it reasoned that the Platforms are not already common carriers because pre-existing law did not already regulate them as such. *See ibid.* Moreover, the Platforms don't currently follow common carrier obligations.[42] And pre-SB 7072 and HB 20 judicial decisions note the lack of government regulation of internet forums.[43] Second, ***494** it reasoned that the State can't regulate them as common carriers because they are not already common carriers: That would give the "government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier." *Id.* at 1221.

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

* * *

The First Amendment protects speech: It generally prevents the government from interfering with people's speech or forcing them to speak. The Platforms argue that because they host and transmit speech, the First Amendment also gives them an unqualified license to invalidate laws that hinder them

from censoring speech they don't like. And they say that license entitles them to pre-enforcement facial relief against HB 20.

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

[Jones, J. Concurrence has been omitted]

Leslie H. Southwick, Circuit Judge, concurring in part and dissenting in part:

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

[Discussion of Section 2 has been omitted]

I also agree with my colleagues that the social media Platforms represented by NetChoice are "firms of tremendous public ***496** importance." The part they have chosen to play in modern public discourse is at times detrimental to the healthy exchange of competing ideas. The argument here is that the Platforms blatantly censor the views of those with whom they disagree, leaving no equivalent platform available to the speakers they scorn. The Platforms certainly have taken aggressive, inconsistent positions before legislative, regulatory, and now judicial bodies about the relevance of the First Amendment to their actions. They pursue maximum freedom to shape discourse while accepting no liability for the content they host.

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

The majority no doubt could create an image for the First Amendment better than what I just verbalized, but the description would have to be similar. We simply disagree about whether speech is involved in this case. Yes, almost none of what others place on the Platforms is subject to any action by the companies

that own them. The First Amendment, though, is what protects the curating, moderating, or whatever else we call the Platforms' interaction with what others are trying to say. We are in a new arena, a very extensive one, for speakers and for those who would moderate their speech. None of the precedents fit seamlessly. The majority appears assured of their approach; I am hesitant. The closest match I see is caselaw establishing the right of newspapers to control what they do and do not print, and that is the law that guides me until the Supreme Court gives us more.

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

I. Content moderation and the First Amendment

The critical question is whether the anti-discrimination provisions in Section 7 of HB 20 regulate non-expressive conduct or whether they regulate First Amendment-protected activity. The majority concludes that "Section 7 does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct.*" Maj. Op. at 448. The majority's perceived censorship is my perceived editing. The Platforms can act with obvious bias. The lack of First Amendment protection for their biases is not so obvious.

The majority has discussed the careful work of another circuit on the same essential questions. In assessing a similar law, the Eleventh Circuit held "a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment" and that "social-media ***497** platforms' content-moderation decisions constitute the same sort of editorial judgments and thus trigger First Amendment scrutiny." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022). I agree.

The question we must answer is similar. In explaining my answer, I begin with an overview of what the Platforms currently do with content and a reminder of the obligations imposed by Section 7. The Platforms admit they take an active role in determining which pieces of content reach individual users: "Platforms compile, curate, and disseminate a combination of user-submitted expression, platform-authored expression, and advertisements." To varying degrees, the Platforms all "control[ ] who can access their platforms, what kinds of content [are] available, and how that content is presented to users." Section 7 limits the ability of Platforms to engage in these activities by imposing anti-discrimination policies. Platforms "may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented . . . ; or (3) a user's geographic location." TEX. CIV. PRAC. & REM. CODE § 143A.002(a). "Censor" is a defined term that reaches many of the Platforms' core activities. *See id.*§ 143A.001. The Platforms may engage in the activities in varying frequency, but when the Platforms engage in any content moderation based on the views represented in the content, they "deny equal access or visibility to, or otherwise discriminate against expression" and violate the statute. *Id.*

These activities native to the digital age have no clear ancestral home within our First Amendment precedent. Their closest relative may be what the Supreme Court held newspapers were permitted to do in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). I see the

Platforms' curating or moderating as the current equivalent of a newspaper's exercise of editorial discretion. This view requires me to consider many of the same authorities reviewed by the majority and explain where my conclusions diverge from those of my colleagues.[1]

I start with *Miami Herald*, which considered a Florida statute that "grant[ed] a political candidate a right to equal space to reply to criticism . . . by a newspaper." 418 U.S. at 243, 94 S.Ct. 2831. The Miami newspaper sought declaratory relief that the law was unconstitutional.[2] The majority ***498** recounts the basic facts of the case, then quotes the following passage:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. *Id.* at 258, 94 S.Ct. 2831.

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

The majority sees the Court as having held that "[b]ecause a newspaper prints a curated set of material selected by its editors, everything it publishes is, in a sense, the newspaper's own speech," and that newspapers "cannot be compelled to 'publish that which reason tells them should not be published.'" *See* Maj. Op. at 456 (quoting *Miami Herald*, at 256, 94 S.Ct. 2831). The majority does not, though, understand the Court to have recognized the selection process itself as First Amendment expression. *See* Maj. Op. at 490-91. I do. There were at least two levels of publisher speech involved. Certainly, a traditional publisher cannot be forced to adopt speech with which they disagree. That was the first premise that underlay the *Miami Herald* holding. 418 U.S. at 256, 94 S.Ct. 2831. The Court went further, though. It recognized that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment" and that the Court did not see "how governmental regulation of this crucial process" was consistent with the First Amendment. *Id.* at 258, 94 S.Ct. 2831. I read this as establishing the selection process itself as First Amendment-protected activity.

Six years later, the Court considered the right of high school students to engage in their own First Amendment activity at a local shopping mall. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). After mall security told the students to stop distributing political literature, the students sued the shopping mall owner in state court for infringing on their speech rights under the California state constitution. *Id.* The students succeeded in state courts. *Id.* at 78, 100 S.Ct. 2035. At the Supreme Court, the owner of the shopping mall argued that being forced to host the students' speech by the State of California violated both the owner's property rights under the Fifth and Fourteenth Amendments and free speech rights under the First and Fourteenth Amendments. *Id.* at 76–77, 100 S.Ct. 2035.

In considering the shopping center owner's assertion that *Miami Herald* controlled the case, the Court stated that the precedent "rests on the principle that the State cannot tell a newspaper what it must print,"

and that the concerns present in *Miami Herald*— forced speech, chilling of debate — were not present because the plaintiffs sought "to exercise state-protected rights of expression and petition." *PruneYard*, 447 U.S. at 88, 100 S.Ct. 2035. The Court, though, made clear in a previous section of its opinion that the rights needed to be exercised in a situation where those "activities [did] not interfere with normal business operations." *Id.* at 78, 100 S.Ct. 2035.

***499** The Supreme Court qualified *PruneYard* just six years later in *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality op.) ("*PG&E*"). As the majority in our present case discusses, a plurality of the *PG&E* Court held that the California Public Utilities Commission's order to allocate space in PG&E's newsletter to third party groups that opposed PG&E's own messages at certain times throughout the year violated PG&E's First Amendment rights. *Id.* at 20–21, 106 S.Ct. 903. In doing so, the plurality explained the limits of *PruneYard*: "notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speech." *Id.* at 12, 106 S.Ct. 903. Justice Marshall, who contributed the fifth vote and concurred in the judgment, agreed, observing that the *PruneYard* mall's owner did not want speech by the students, but "he nowhere alleged that his own expression was hindered in the slightest." *Id.* at 24, 106 S.Ct. 903 (Marshall, J., concurring in the judgment). The regulations infringed on PG&E's speech, though; the order, affording rebuttal space to opposing parties could chill speech if PG&E found that "the safe course [was] to avoid controversy," and the regulations would "abridge [PG&E's] own rights in order to enhance the relative voice of its opponents." *Id.* at 14, 106 S.Ct. 903 (plurality op.).

The Court subsequently applied the principles outlined in those precedents in the context of cable television. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("*Turner I*"). The Court considered federal regulations requiring cable operators to set aside certain channels for commercial broadcast stations. *See id.* at 630, 114 S.Ct. 2445; *id.* at 674, 114 S.Ct. 2445 (Stevens, J., concurring in the judgment). Most obviously, these rules burdened cable *programmers* "by reducing the number of channels for which they [could] compete." *Id.* at 645, 114 S.Ct. 2445. Writing for a majority of the Court, though, Justice Kennedy further explained that cable *operators* also "engage in and transmit speech" when, "[t]hrough 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Id.* at 636, 114 S.Ct. 2445 (quoting *Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) (establishing the same)).[3] In other words, the must-carry provisions "interfere[d] with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," even though they did so in a way that did "not depend upon the content of the cable operators' programming." *Id.* at 643–44, 114 S.Ct. 2445.

As is relevant to Part II of this opinion, the *Turner I* majority then considered the level of scrutiny appropriate for the must-carry rules and whether the laws met that level of scrutiny. *Id.* at 641–61, 114 S.Ct. 2445. The majority rejected the Government's argument that rational basis scrutiny should apply, but also decided against the cable operators' contention that *Miami Herald* and *PG&E* dictated strict scrutiny. ***500** *Id.* at 640–41, 661–62, 114 S.Ct. 2445. As part of its scrutiny analysis, the majority found three considerations present in *Turner I* that were not present in *Miami Herald* and *PG&E*: (1) the rules

were "content neutral" because they were "not activated by any particular message spoken by cable operators"; (2) the rules would not "force cable operators to alter their own messages to respond to the broadcast programming they are required to carry"; and (3) there was "physical control" by the cable operators over a piece of communications infrastructure. *Id.* at 655–57, 114 S.Ct. 2445. These factors, together, suggested a lower tier of scrutiny should be applied. *Id.* at 661–62, 114 S.Ct. 2445.

In sum, First Amendment rights were exercised in two ways in *Turner I*: (1) the speech of cable programmers when they transmitted their own message, and (2) the exercise of "editorial discretion." *Id.* at 636, 114 S.Ct. 2445. The regulations were held to be content neutral regulations — though unquestionably regulations on First Amendment-protected expression — and the case was remanded for further factfinding to determine whether summary judgment for the Government was appropriate. *Id.* at 662–63, 114 S.Ct. 2445; *id.* at 669, 114 S.Ct. 2445 (Stevens, J., concurring in the judgment).[4] The must-carry rules were then upheld under the intermediate scrutiny standard for content neutral regulations on speech when the case returned to the Supreme Court. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224–25, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) ("*Turner II*").

The very next term, the Supreme Court decided *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). In considering whether a parade, recognized by Massachusetts's highest court as a public accommodation but organized by a private party, could be forced under state law to include participation by an organization of gay, lesbian, and bisexual individuals, the Court held that a parade was "a form of expression." *Id.* at 568, 115 S.Ct. 2338. In identifying protected expression, the *Hurley* Court did not stop there: "The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." *Id.* at 569, 115 S.Ct. 2338. The Court analyzed *Turner I* and *Miami Herald*, reiterating that "[c]able operators . . . are engaged in protected speech activities even when they only select programming originally produced by others," and that "the presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First Amendment security . . . as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper." *Id.* at 570, 115 S.Ct. 2338 (citing *Turner I*, 512 U.S. at 636, 114 S.Ct. 2445; *Miami Herald*, 418 U.S. at 258, 94 S.Ct. 2831; *New York Times v. Sullivan*, 376 U.S. 254, 265–66, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). This selection needed not be based on any particular theme, as the Court pointed out that one "does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the ***501** exclusive subject matter of the speech." *Id.* at 569–70, 115 S.Ct. 2338. This constituted the Court's clear statement that protected expression lies not merely in the message or messages transmitted but in the process of collecting and presenting speech.

Finally, there is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*"). In *FAIR*, the Court analyzed *Miami Herald, PG&E*, and *Hurley* in the context of a group of law schools seeking a declaratory judgment against the enforcement of the Solomon Amendment, a law that denied federal funding to schools that did not give military recruiters "access to students that is at least equal in quality and scope to the access provided other potential employers." *Id.* at 54, 63, 126 S.Ct. 1297 (quotation marks and citation omitted). In upholding the constitutionality of the Solomon Amendment, the Court held that "[t]he compelled speech violation in

each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63, 126 S.Ct. 1297. "[B]ecause the schools are not speaking when they host interviews and recruiting receptions," the regulation did "not affect the law schools' speech." *Id.* at 64, 126 S.Ct. 1297. This was because "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive" and "recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Id.* Further, as in *PruneYard*, there was "little likelihood that the views of those engaging in expressive activity would be identified with the [property] owner" because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65, 126 S.Ct. 1297.

This review of the authorities provides the material for my conclusion that the *Miami Herald* opinion is the most comparable to what is before us in this appeal. When the Platforms curate their users' feeds, which are the behaviors prohibited in Section 7 of HB 20, they are exercising their editorial discretion. That is a type of First Amendment-protected activity recognized in *Miami Herald, PG&E, Turner*, and *Hurley.* The majority disagrees that editorial discretion is a category, instead asserting that the Supreme Court has merely "treated editorial discretion as a factual consideration supporting their legal conclusions about the presence or absence of protected speech." Further, the majority concludes that "[n]either [*Miami Herald* nor *Turner I*] implied that editorial discretion is itself a freestanding category of constitutionally protected expression." Maj. Op. at 463 (emphasis omitted). Respectfully, such an interpretation disregards the Supreme Court's recognition that there may be more than one type of First Amendment activity occurring by the same speaker when, for instance, an article is selected and printed in a newspaper—or, in our context, a tweet posted or video listed. If anything, the majority's research and reasoning supports the Platforms' contention that First Amendment protections attend the publishing *process* as well as the actual published *content.*

I do not read *PruneYard* and *FAIR* to suggest anything to the contrary. The hosting mandate upheld by the *PruneYard* Court did not interfere with speech published and adopted by the shopping mall, nor did it interfere with a selection process for determining which speech was permitted. As the Eleventh Circuit recently remarked, "the only First Amendment interest that the mall owner asserted was the ***502** right 'not to be forced by the state to use [its] property as a forum for the speech of others.'" *NetChoice*, 34 F.4th at 1215 (quoting *PruneYard*, 447 U.S. at 85, 100 S.Ct. 2035)). *PG&E* and *Hurley* both suggest that this lack of alleged speech activity by the *PruneYard* proprietor was operative in the analysis. *See PG&E*, 475 U.S. at 11– 12, 106 S.Ct. 903; *Hurley*, 515 U.S. at 580, 115 S.Ct. 2338.

FAIR also demonstrates this distinction. In that case, the law schools attempted to draw an analogy to *Hurley*, arguing that hosting military recruiters unconstitutionally compelled the schools to accommodate the military's message. *FAIR*, 547 U.S. at 63, 126 S.Ct. 1297. The *FAIR* Court distinguished *Hurley* by making clear that "the expressive nature of a parade was central to [the] holding," and that because "'every participating unit affects the message conveyed by the . . . organizers,'" a law dictating inclusion of a particular group "alters the expressive content of the parade." *Id.* (quoting *Hurley*, 515 U.S. at 572–73, 115 S.Ct. 2338). There was no "inherently expressive" nature to a law school's decision to allow recruiters on campus, though. *Id.* at 64, 126 S.Ct. 1297. The Court explained that "a law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a

newspaper." *Id.* The same simply cannot be said for the Platforms. Expression is the very core of their identity and existence.

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

I see no importance to the fact that the Platforms' moderation will usually follow actual publication. *Contra* Maj. Op. at 464-65. In the Platforms' world, it is usually the only practical means to moderate content. Certainly, in those instances in which a particular speaker is barred entirely, the discretion is exercised in advance. Platforms may also use technology to screen out content they believe does not match their terms of service. Unlike traditional publications, though, where editorial discretion will precede publishing, the majority of decisions on moderating what has been posted can only be made, as a practical matter, after the appearance of the content on the Platform. As discussed later, Congress recognized this reality through the passage of Section 230. I am aware of no authority that denies First Amendment rights to otherwise-protected speech based on similar questions about timing. Editorial discretion is exercised when it is sensible and, in many situations, even possible to do so. The First Amendment fits new contexts and new technologies as they arise.

II. Implications of content moderation as speech

With the understanding that the Platforms are in fact engaging in First Amendment expression, I turn to the task of determining whether it is likely that HB 20 impermissibly infringes on that expression. As the Supreme Court discussed in a compelled-speech case last term, plaintiffs bringing facial challenges usually "must establish that no set of circumstances exists under which the [law] would be valid or show that the law lacks a plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta*, ––– U.S. ––––, 141 S. Ct. 2373, 2387, 210 L.Ed.2d 716 (2021) (quotation marks and citation omitted). "[T]he First Amendment context," though, implicates ***503** "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). Overbreadth analysis is proper in challenges to compelled speech as in *Bonta* and in challenges to statutory limitations on speech as was the case in *Stevens*, where the Court considered a law criminalizing the creation, sale, or possession of depictions of animal cruelty, widely defined. *See Stevens*, 559 U.S. at 464, 474, 130 S.Ct. 1577.

[Discussion of the overbreadth doctrine has been omitted]

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

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

> A content-neutral regulation will be sustained . . . [1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Turner I*, 512 U.S. at 662, 114 S.Ct. 2445 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

Texas can satisfy the first two elements if it establishes that Section 7 of HB 20 serves an important or substantial government interest unrelated to the suppression of free expression. Certainly, this does not mean Texas must adopt the "least restrictive alternative," a test for a different level of scrutiny, but these elements are significant demands. In *Turner II*, a plurality of the Court referred to three substantial governmental interests: "1) preserving the benefits of free, over-the-air local broadcast television, 2) promoting the widespread dissemination of information from a multiplicity of sources, and 3) promoting fair competition in the market for television programming."520 U.S. at 189, 117 S.Ct. 1174 (quotation marks and citation omitted); *see id.* at 226, 117 S.Ct. 1174 (Breyer, J., concurring in part) (accepting rationales 1 and 2 but recognizing that must-carry regulation "extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming.").

My able colleagues in the majority argue the second interest applies here — "promoting the widespread dissemination of information from a multiplicity of sources." Unlike in *Turner*, though, the Texas statute strives to promote speech by first targeting ***504** the content of others' speech, *i.e.*, it prohibits Platform "censorship" on the basis of viewpoint. (I acknowledge that, yet again, the fundamental division between my view and that of the majority is whether the Platforms are "speaking" when they exercise their editorial discretion.) Texas argues this satisfies the interest recognized in the *Turner* opinions because it will increase the multiplicity of views on the Platforms — arguably a good result. That justification, though, alters the interest that *Turner* actually recognized.

The *Turner* must-carry rules did not directly target cable-operators' editorial discretion. Instead, the must-carry rules supported the interest of the non-cable subscribing public in accessing information without needing to use the cable operators' platforms. The regulations sought to improve the viability of traditional commercial broadcast media in order "to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public." *Turner II*, 520 U.S. at 226, 117 S.Ct. 1174 (Breyer, J., concurring) (adding the fifth vote to affirm the Government's interest in "promoting widespread dissemination of information from a multiplicity of sources"). Indeed, any interference with the cable operators' speech to promote the traditional broadcaster's ability to speak was the "price" and not the purpose of the regulation. *Id.* Here, of course, interference with expressing views is both the purpose and the price. HB 20 directly interferes with the editorial choices the Platforms make—which I consider First Amendment expression—as both a means and end. In *Turner*, the cable operators could displace any programming they wanted in order to make room for local commercial broadcast media, thereby helping local broadcast stations survive that new technology. *See Turner I*, 512 U.S. at 636–37, 114 S.Ct. 2445 (acknowledging the set-aside for local broadcasters and that it would be "more difficult for cable programmers to compete for carriage on the

limited channels remaining").

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

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

Further regarding the relevance of unfairness, the majority considers it extraordinary that counsel for one of the Platforms at oral argument answered a question from the court by agreeing a Platform could, as the majority opinion states, "ban all pro-LGBT speech for no other reason than its employees want to ***505** pick on members of that community." Maj. Op. at 445. Extreme hypotheticals necessarily lead to extreme answers when a First Amendment right is involved. The First Amendment does not moderate its protections based on the content of the speech, with irrelevant exceptions.

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

Setting aside that the purpose of Texas's law is related to suppressing First Amendment activity, I also believe there is a strong likelihood that Section 7 burdens "substantially more speech than necessary in order to further [Texas's] legitimate interests." *See Turner I*, 512 U.S. at 662, 114 S.Ct. 2445. The scope of conduct prohibited by Section 7 is broad:

> A social media platform may not [block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against] a user, a user's expression, or a user's ability to receive the expression of another person based on [the user's viewpoint, the viewpoint represented, or geographic location]. TEX. CIV. PRAC. & REM. CODE, §§ 143A.001–002.

If Texas's interest is in "protecting the free exchange of ideas and information in this state," prohibitions (for example) on demonetization, de-boosting, "denying equal access or visibility to" or "otherwise discriminat[ing] against," likely go too far. If the goal is only to make more speech available, there is no reason that the Platforms should have to publish—as an extreme example—pro-Nazi expression, while monetizing, recommending, and giving equal treatment to such content as might be given to anti-Nazi expression. When Platforms elevate certain third-party content above other third-party content, they engage in their own First Amendment expression, and the broad-based prohibition against engaging in this editorial discretion whenever "viewpoint" is at issue is hardly narrow tailoring that "does not burden substantially more speech than necessary" to further a legitimate interest. *See Turner I*, 512 U.S. at 602, 114 S.Ct. 2431.

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

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

A common carrier designation, which I doubt is appropriate, would not likely change any of my preceding analysis. Few of the cases cited in the discussion on common carrier law concern the intersection of common carrier obligations and First Amendment speech rights. The only precedents that do discuss this intersection reinforce the idea common carriers retain their First Amendment protections for their own speech. *See id.* at 636, 114 S.Ct. 2445.

Section 230 also does not affect the First Amendment right of the Platforms to exercise their own editorial discretion through content moderation. My colleague suggests that "Congress's judgment" as ***506** expressed in 47 U.S.C. § 230 "reinforces our conclusion that the Platforms' censorship is not speech under the First Amendment." Maj. Op. at 465-66. That opinion refers to this language: "No provider or user of an interactive computer service" — interactive computer service being a defined term encompassing a wide variety of information services, systems, and access software providers — "shall be treated as the publisher or speaker of any information provided by another content provider." 47 U.S.C. § 230(c)(1). Though I agree that Congressional fact-findings underlying enactments may be considered by courts, the question here is whether the Platforms' barred activity is an exercise of their First Amendment rights. If it is, Section 230's characterizations do not transform it into unprotected speech.
The Platforms also are criticized for what my colleague sees as an inconsistent argument: the Platforms analogize their conduct to the exercise of editorial discretion by traditional media outlets, though Section 230 by its terms exempts them from traditional publisher liability. This may be exactly how Section 230 is supposed to work, though. Contrary to the contention about inconsistency, Congress in adopting Section 230 never factually determined that "the Platforms are not 'publishers.'" Maj. Op. at 467. As one of Section 230's co-sponsors—former California Congressman Christopher Cox, one of the amici here—stated, Section 230 merely established that the platforms are not to be treated as the publishers of pieces of content when they take up the mantle of content moderation, which was precisely the problem that Section 230 set out to solve: "content moderation . . . is not only consistent with Section 230; its protection is the very *raison d'etre* of Section 230." In short, we should not force a false dichotomy on the Platforms. There is no reason "that a platform must be classified for all purposes as *either* a publisher or a mere conduit." In any case, as Congressman Cox put it, "because content moderation is a form of editorial

speech, the First Amendment more fully protects it beyond the specific safeguards enumerated in § 230(c)(2).” I agree.

IV.

[Discussion of remaining preliminary injunction factors has been omitted.]

V. Conclusion

This is a difficult case. We are seeking the closest analogies among the precedents. The Supreme Court will, as always, have the final word. For now, I conclude Section 7’s anti-discrimination provisions are an unconstitutional infringement on ***507** the Plaintiffs’ rights to edit or remove, after the fact, speech that appears on their private Platforms. My understanding of their rights does not mean that “email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate or business,” as suggested by the majority. It does mean that when the social media Platforms who are in the business of speech make decisions about which speech is permitted, featured, promoted, boosted, monetized, and more, they are engaging in activity to which First Amendment protection attaches. Balance and fairness certainly would be preferable, but the First Amendment does not require it.

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

Footnotes

1 The full text of HB 20 can be viewed here: https://perma.cc/9KF3-LEQX. The portions of HB 20 relevant to this lawsuit are codified at TEXAS BUSINESS AND COMMERCE CODE §§ 120.001–151 and TEXAS CIVIL PRACTICE AND REMEDIES CODE §§ 143A.001–08.

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

3 [Omitted]

4 [Omitted]

5 [Omitted]

6 [Omitted]

7 Justice Marshall provided the fifth vote to invalidate the Commission's order. *See PG&E*, 475 U.S. at 21, 106 S.Ct. 903 (Marshall, J., concurring in the judgment). He emphasized two ways in which the Commission's order was different from the law upheld in *PruneYard.* First, the right of access created by the Commission was more intrusive than the one upheld in *PruneYard.* That's because the shopping mall owner in *PruneYard* had voluntarily opened his property up to the public, whereas PG&E "has never opened up its billing envelope to the use of the public." *Id.* at 22, 106 S.Ct. 903. Second, in *PruneYard*, the speech of the shopping mall owner was not "hindered in the slightest" by the public's pamphleteering right. *Id.* at 24, 106 S.Ct. 903. *PG&E*, by contrast, involved "a forum of inherently limited scope," such that the State's appropriation of that forum for a third party's use necessarily curtailed PG&E's ability to speak in that forum. *Ibid.* And this interference with PG&E's speech could not be justified by the State's goal of "subsidiz[ing] . . . another speaker chosen by the State." *Ibid.*

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

9 To the extent that these representations vary between Platforms, that further cuts against the propriety of this facial, pre-enforcement challenge. *Cf. supra* Part III.A. To establish associational standing, the plaintiff trade associations asserted in the district court that this suit "does not require individualized facts about any particular covered social media platform." ROA.645; *see also Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 377 (5th Cir.

2021) (stating the relevant rule). So the Platforms may not now rely on individualized facts to claim that, for example, one Platform operates like a newspaper even if the others don't.

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

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

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

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

14 To be clear, unlike in *Rumsfeld*, the Platforms in this case never argue that their acts of censorship constitute "expressive conduct." *Cf., e.g., Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (noting that expressive conduct may be protected by the First Amendment if the actor both has "an intent to convey a particularized message" and "the likelihood [is] great that the message would be understood by those who viewed it" (quotation omitted)). In fact, the phrase "expressive conduct" never even appears in their brief before our court. *Compare infra* at 490 n.41 (noting that the Platforms made such an argument before the Eleventh Circuit). But to the extent any such argument is latent in their reliance on *Hurley* or their claim of protected "editorial discretion," it's plainly foreclosed by the Supreme Court's reasoning in *Rumsfeld.* Moreover, the Platforms never suggest that their censorship could "convey a particularized message." *See Johnson*, 491 U.S. at 404, 109 S.Ct. 2533.

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

16 Our esteemed colleague in dissent makes a similar argument with a different label. The dissent reads *Miami Herald* to protect "two levels of publisher speech": the published speech itself as well as "the selection process" (or "publishing process") used to choose that speech. *Post*, at 497-99, 501. And it concludes that Section 7 impermissibly interferes with the Platforms' publishing

process. *Id.* at 501. It's of course true that the right to speak generally entails the right to select what to speak. But asserting that Section 7 obstructs the Platforms' "selection process" begs the question whether the Platforms' censorship *is* protected speech at all. If it's not, then there's no First Amendment right for censors to select their targets—just as there's no First Amendment right for law schools to select their recruiters, no First Amendment right for shopping malls to select their pamphleteers, and no First Amendment right for telephone companies to select which calls to drop.

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

18 Our esteemed colleague in dissent suggests that the timing of the Platforms' censorship doesn't matter because censorship decisions "can only be made, as a practical matter, after the appearance of the content on the Platform." *Post*, at 502. The dissent's factual premise is incorrect: Online platforms can and do moderate submissions before transmitting them. For example, the *New York Times* moderates online comments on its articles before posting them. *See* The Comments Section, N.Y. TIMES, https://help.nytimes.com/hc/en-us/articles/115014792387-The-Comments-Section (last visited Aug. 6, 2022). That's arguably the same form of *ex ante* curation that newspapers use for other material they publish and that enjoys constitutional protection under *Miami Herald.* If the Platforms wanted the same protections, they could've used the same *ex ante* curation process. Early online forums and message boards often preapproved all submissions before transmission. *See, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (noting Prodigy's early policy of "manually reviewing all messages prior to posting"). Later on, the Platforms made a judgment that jettisoning editorial discretion to allow instantaneous transmission would make their Platforms more popular, scalable, and commercially successful. The Platforms thus disclaimed *ex ante* curation—precisely because they wanted *users* to speak without editorial interference. That decision has consequences. And it reinforces that the *users* are speaking, not the Platforms.

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

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

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

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

23 Section 230(c)(2) refers to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material. To the extent the Platforms try to extract an unqualified censorship right from the phrase "otherwise objectionable" in isolation, that's foreclosed by the Supreme Court's repeated instruction that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (quotation omitted); *see also, e.g., Yates v. United States*, 574 U.S. 528, 545, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (plurality op.).

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

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

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

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

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

29 *See* James Alleman, Edmond Baranes & Paul Rappoport, *Multisided Markets and Platform Dominance, in* APPLIED ECONOMICS IN THE DIGITAL ERA (James Alleman et al. eds. 2020); Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051 (2017).

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

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

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

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

34 In a similar vein, our esteemed colleague in dissent argues that Section 7 does not further the important government interest recognized in the *Turner* cases because it "strives to promote speech by first targeting the content of others' speech." *Post*, at 503-04. By contrast, according to the dissent, "[t]he *Turner* must-carry rules did not directly target cable-operators' editorial discretion." *Ibid.* In our view, *Turner* is not so easily distinguishable. In *Turner*, the interference with cable operators' speech was not the point of the regulations, nor was it gratuitous—it was necessary to further the government's interest in "the widespread dissemination of information from a multiplicity of sources." *Turner I*, 512 U.S. at 662, 114 S.Ct. 2445. So too here. Section 7 does not "directly target" the Platforms' speech any more than the regulations in *Turner* targeted cable operators' speech. As in *Turner*, the law only obstructs the Platforms' expression to the extent necessary to protect the public's "access to a multiplicity of information sources." *Id.* at 663, 114 S.Ct. 2445. The Platforms and the dissent offer no evidence that Section 7 gratuitously targets the Platforms' speech or imposes a burden on the Platforms' speech that doesn't further the goal of protecting Texans' expression.

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

at 505 (quotation omitted). We disagree for several reasons. First, for some speakers who depend on advertising for their livelihoods, demonetization *is* tantamount to an outright ban because it dooms the financial viability of their enterprise and hence their speech. *See, e.g.*, Brief for Amici Curiae The Babylon Bee, LLC, et al. at 4 (explaining amici's reliance on monetization through social media platforms to disseminate speech). Second, demonetization and de-boosting, in addition to outright bans, also thwart "the widest possible dissemination of information from diverse and antagonistic sources," an interest the Supreme Court has recognized as "essential to the welfare of the public." *Turner I*, 512 U.S. at 663, 114 S.Ct. 2445 (quotation omitted). They do so by penalizing and disincentivizing the same diversity the Supreme Court has recognized as "essential." The dissent does not dispute the importance of Texas's interest. Yet it's hard to see how Texas can protect its interest in preserving a "multiplicity of information sources" if the Platforms may make them functionally invisible to users. *See ibid.* Finally, applying intermediate scrutiny, Texas must show only that its "statutory classification [is] substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). It need not be perfect, or even the "least restrictive alternative that can be used to achieve [Texas's] goal." *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). Even if one chooses to nitpick at Texas's enumeration of prohibited discriminatory acts, they are all at least "substantially related" to the furtherance of its concededly important interest. *Clark*, 486 U.S. at 461, 108 S.Ct. 1910.

36 [Omitted]

37 [Omitted]

38 [Omitted]

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

40 [Omitted]

41 The Eleventh Circuit also held, relying on its own precedent, that the Platforms' censorship constitutes protected expressive conduct. *See NetChoice*, 34 F.4th at 1212–13. As noted earlier, the Platforms have not made an expressive-conduct argument in this case. *See supra* at 461 n.14. Even so, we are perplexed by the Eleventh Circuit's holding that "social-media platforms engage in content moderation that is inherently expressive notwithstanding [*Rumsfeld*]." *NetChoice*, 34 F.4th at 1218. The Eleventh Circuit suggested that the Platforms' "targeted removal of users' speech" is different from law schools' targeted denial of access to military recruiters because "a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval." *Id.* at 1217; *see also id.* at 1217 n.15. But of course, a reasonable observer watching a law school eject a military recruiter would also infer a message of disapproval. The Supreme Court held that doesn't matter because an observer who merely sees the military recruiting off campus could not know *why* the recruiter was off campus. *See Rumsfeld*, 547 U.S. at 66, 126 S.Ct. 1297. Maybe it's more convenient; maybe it's because the law school ejected the military; maybe it's some other reason. Likewise with the Platforms. An

observer who merely sees a post on "The Democratic Hub," *NetChoice*, 34 F.4th at 1214, could not know *why* the post appeared there. Maybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason. Without more information, the observer has no basis for inferring a "particularized message" that Twitter disapproved the post. *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533. The Eleventh Circuit attempted to thread an eyeless needle.

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

43 The Eleventh Circuit primarily focused on *Turner I*, analogizing social media platforms to cable broadcasters. But nothing in *Turner I* suggests that regulating social media platforms as common carriers would be unconstitutional. The opposite is true: Even the *Turner I* dissenters—the Justices who were *more* protective of cable operators' speech rights —strongly suggested the First Amendment would not prevent regulating cable operators as common carriers. *See*512 U.S. at 684, 114 S.Ct. 2445 (O'Connor, J., concurring in part and dissenting in part) ("Congress might also conceivably obligate cable operators to act as common carriers for some of their channels . . . . [I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies.").

1 The majority analyzes several authorities when distinguishing between regulations on "hosting" speech and either requiring the "host" to speak or interfering with the host's own message. I add one more. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("*Turner I*"); *see* Maj Op. Part III.C.1. Although I think *Miami Herald* is the case closest to the matter at hand, I discuss *Turner I* here because it interpreted *Miami Herald* and served as a basis for the decision in the *Hurley* case. *See Turner I*, 512 U.S. at 636–41, 653–57, 114 S.Ct. 2445; *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Additionally, as discussed below, *Turner I* emphasizes that, in the modern communications context, an entity may "host" the speech of others while simultaneously engaging in First Amendment activity of its own. *See*512 U.S. at 636–37, 114 S.Ct. 2445. Further, I will not engage with the majority's analysis of the history of prior restraint. It is certainly a detailed review, with debatable points along the way. I limit my analysis to the extent needed to explain why I believe the Platforms are engaged in First Amendment-protected activity.

2 418 U.S. at 245, 94 S.Ct. 2831; *contra* Maj. Op. at 451 (including *Miami Herald* in the contention that all of NetChoice's cases "involved challenges to concrete applications of an allegedly unconstitutional law, raised by a defendant in state court proceedings").

3 Although the four dissenting Justices did not join this part of the opinion, they agreed that the must-carry rules implicated the First Amendment rights of cable operators. *Id.* at 675, 114 S.Ct. 2445 (O'Connor, J., dissenting). They would have labeled the rules as unconstitutional content-based restrictions on the cable operators' speech. *Id.* at 685, 114 S.Ct. 2445.

4 The majority gleans a separate insight from *Turner I*: "Most significant for our purposes, even the four dissenting Justices believed Congress could have permissibly imposed more modest common carrier regulations." *See* Maj. Op. at 477. I discuss common carrier treatment below. Most significant for me, though, is that all Justices — in the majority and dissent — understood that some degree of First Amendment scrutiny attended the must-carry rules. *See*512 U.S. at 675, 114 S.Ct. 2445 (O'Connor, J., dissenting).

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

573 F.Supp.3d 1092
United States District Court, W.D. Texas, Austin Division.

NETCHOICE, LLC d/b/a NetChoice, a 501(c)(6) District of Columbia organization, and Computer & Communications Industry Association d/b/a CCIA, a 501(c)(6) non-stock Virginia Corporation, Plaintiffs,

v.

Ken PAXTON, in his official capacity as Attorney General of Texas, Defendant.

1:21-CV-840-RP
|
Signed 12/01/2021

Procedural Posture(s): Motion for Preliminary Injunction; Motion to Dismiss for Lack of Standing; Motion to Strike.

ORDER

ROBERT PITMAN, UNITED STATES DISTRICT JUDGE
***1099** Before the Court is Plaintiffs NetChoice, LLC d/b/a NetChoice ("NetChoice"), a 501(c)(6) District of Columbia organization, and Computer & Communications Industry Association d/b/a CCIA ("CCIA"), a 501(c)(6) non-stock Virginia corporation's ("Plaintiffs") Motion for Preliminary Injunction, (Dkt. 12), Defendant Texas Attorney General Ken Paxton's (the "State") response in opposition, (Dkt. 39), and Plaintiffs' reply, (Dkt. 48). The Court held the preliminary injunction hearing on November 29, 2021. (Dkt. 47). After considering the parties' briefs and arguments, the record, and the relevant law, the Court denies the motion to dismiss and grants the preliminary injunction.

I. BACKGROUND

A. The Challenged Legislation: HB20

In the most recent legislative session, the State sought to pass a bill that would "allow Texans to participate on the virtual public square free from Silicon Valley censorship." Senator Bryan Hughes (@SenBryanHughes), TWITTER (Mar. 5, 2021, 10:48 PM), https://twitter.com/SenBryanHughes/status/1368061021609463812. Governor Greg Abbott voiced his support, tweeting "[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas." Greg Abbott (@GregAbbott_TX), TWITTER (Mar. 5, 2021, 8:35 PM), https://t.co/JsPam2XyqD. After a bill failed to pass during the regular session or the first special session, Governor Abbott called a special second legislative session directing the Legislature to consider and act on legislation "protecting social-media and email users from being censored." (Proclamation by the Governor of the State of Texas (Aug. 5, 2021), https://gov.texas.gov/uploads/files/press/PROC_second_called_session_87th_legislature_IMAGE_08-05-21.pdf. The Legislature passed House

Bill 20 ("HB 20"), and Governor Abbott signed it into law on September 9, 2021. (Prelim. Inj. Mot., Dkt. 12, at 16).

HB 20 prohibits large social media platforms from "censor[ing]" a user based on the user's "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002 ("Section 7"). Specifically, Section 7 makes it unlawful for a "social media platform" to "censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in this state or any part of this state." *Id.* § 143A.002(a)(1)-(3). The State defines social media platforms as any website or app (1) with more than 50 million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other "for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code §§ 120.001(1), 120.002(b); Tex. Civ. Prac. & Rem. Code § 143A.003(c). HB 20 applies to sites and apps like Facebook, Instagram, Pinterest, TikTok, Twitter, Vimeo, WhatsApp, and YouTube. (Prelim. Inj. Mot., Dkt. 12, at 11); (*see* CCIA Decl., Dkt. 12-1, at 3–4; ***1100** NetChoice Decl., Dkt. 12-2, at 3–4). HB 20 excludes certain companies like Internet service providers, email providers, and sites and apps that "consist[ ] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider" and user comments are "incidental to" the content. Tex. Bus. & Com. Code § 120.001(1)(A)–(C). HB 20 carves out two content-based exceptions to Section 7's broad prohibition: (1) platforms may moderate content that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment," and (2) platforms may moderate content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)–(3).

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

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

& Com. Code § 120.151.

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

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

Plaintiffs recently challenged a similar Florida law in the Northern District of Florida in *NetChoice v. Moody*, successfully obtaining a preliminary injunction to halt the enforcement of that law. The district court in that case described the Florida legislation as "an effort to rein in social-media providers deemed too large and too liberal." ***1101** No. 4:21CV220-RH-MAF, —— F.Supp.3d ——, ——, 2021 WL 2690876, at *12 (N.D. Fla. June 30, 2021). The Florida court concluded that

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

B. Procedural Background

Plaintiffs are two trade associations with members that operate social media platforms that would be affected by HB 20. (Compl., Dkt. 1, at 1–2); (Prelim. Inj. Mot., Dkt. 12, at 11). Plaintiffs filed their lawsuit on September 22, 2021, challenging HB 20 because it violates the First Amendment; is void for vagueness; violates the commerce clause, full faith and credit clause, and the Fourteenth Amendment's due process clause; is preempted under the supremacy clause by the Communications Decency Act, 47 U.S.C. § 230; and violates the equal protection clause of the Fourteenth Amendment. (Compl., Dkt. 1, at 31, 35, 38, 41, 44). In their motion for preliminary injunction, Plaintiffs request that this Court preliminarily enjoin the Texas Attorney General from enforcing Sections 2 and 7 of HB 20 against Plaintiffs and their members. (Dkt. 12, at 54).

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

Additionally, the State filed a motion to dismiss about two weeks after Plaintiffs filed their motion for preliminary injunction. (Mot. Dismiss, Dkt. 23). The State argues that Plaintiffs lack associational or organizational standing. (*Id.*). Plaintiffs respond that they have associational standing to represent their members covered by HB 20 and also have organizational standing. (Resp. Mot. Dismiss, Dkt. 28).

[Discussion of motion to strike and legal standards have been omitted]

III. DISCUSSION

A. Plaintiffs Have Standing To Bring This Suit

[Discussion on standing has been omitted]

B. Plaintiffs Have Shown Likelihood of Success on the Merits

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

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

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

More than twenty years ago, the Supreme Court recognized that "content on the Internet is as diverse as human thought," allowing almost any person to ***1106** "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. Am. C.L. Union*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). The *Reno* Court concluded that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* Disseminating information is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.")) (cleaned up).

Social media platforms have a First Amendment right to moderate content disseminated on their platforms. *See Manhattan Cmty. Access Corp. v. Halleck*, —— U.S. ——, 139 S. Ct. 1921, 1932, 204 L.Ed.2d 405 (2019) (recognizing that "certain private entities[ ] have rights to exercise editorial control over speech and speakers on their properties or platforms"). Three Supreme Court cases provide

guidance. First, in *Tornillo*, the Court struck down a Florida statute that required newspapers to print a candidate's reply if a newspaper assailed her character or official record, a "right of reply" statute. 418 U.S. at 243, 94 S.Ct. 2831. In 1974, when the opinion was released, the Court noted there had been a "communications revolution" including that "[n]ewspapers have become big business . . . [with] [c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns [being] the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 248–49, 94 S.Ct. 2831. Those concerns echo today with social media platforms and "Big Tech" all the while newspapers are further consolidating and, often, dying out. Back to 1974, when newspapers were viewed with monopolistic suspicion, the Supreme Court concluded that newspapers exercised "editorial control and judgment" by selecting the "material to go into a newspaper," deciding the "limitations on the size and content of the paper," and deciding how to treat "public issues and public officials—whether fair or unfair." *Id.* at 258, 94 S.Ct. 2831. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, the Supreme Court held that a private parade association had the right to exclude a gay rights group from having their own float in their planned parade without being compelled by a state statute to do otherwise. 515 U.S. 557, 572–73, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The Massachusetts law at issue —which prohibited discrimination in any public place of "public accommodation, resort[,] or amusement"—did not "target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals." *Id.* at 572, 115 S.Ct. 2338. The Court reasoned that the state's equal-access law "alter[ed] the expressive content" of the private organization. *Id.* "[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573, 115 S.Ct. 2338. The Court clarified: "Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, ***1107** but equally to statements of fact the speaker would rather avoid." *Id.*

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

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

This Court starts from the premise that social media platforms are not common carriers.[3] "Equal access obligations . . . have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 740 (D.C. Cir. 2016). Little First Amendment concern exists because common carriers "merely facilitate the transmission of speech of others." *Id.* at 741. In *United States Telecom*, the Court added broadband providers to its list of common carriers. *Id.* Unlike broadband providers and telephone companies, social media platforms "are not engaged in indiscriminate, neutral transmission of any and all users' speech." *Id.* at 742. User-generated content on social media platforms is screened and sometimes moderated or curated. The State balks that the screening is done by an algorithm, not a person, but whatever the method, social media platforms are not mere conduits. According to the State, our inquiry could end here, with Plaintiffs not needing to prove more to show they engage in protected editorial discretion. During the hearing, the Court asked the State, "[T]o what extent does a finding that these entities are common carriers, to what extent is that important from your perspective in the bill's ability to survive a First Amendment challenge?" (*See* Minute Entry, Dkt. 47). Counsel for the State responded, ***1108** "[T]he common carriage doctrine is essential to the First Amendment challenge. It's why it's the threshold issue that we've briefed . . . . It dictates the rest of this suit in terms of the First Amendment inquiry." (*Id.*). As appealing as the State's invitation is to stop the analysis here, the Court continues in order to make a determination about whether social media platforms exercise editorial discretion or occupy a purgatory between common carrier and editor.

Social media platforms "routinely manage . . . content, allowing most, banning some, arranging content in ways intended to make it more useful or desirable for users, sometimes adding their own content." *NetChoice*, —— F.Supp.3d at ——, 2021 WL 2690876, at *7. Making those decisions entails some level of editorial discretion, *id.*, even if portions of those tasks are carried out by software code. While this Court acknowledges that a social media platform's editorial discretion does not fit neatly with our 20th Century vision of a newspaper editor hand-selecting an article to publish, focusing on whether a human or AI makes those decisions is a distraction. It is indeed new and exciting—or frightening, depending on who you ask—that algorithms do some of the work that a newspaper publisher previously did, but the core question is still whether a private company exercises editorial discretion over the dissemination of content, not the exact process used. Plaintiffs' members also push back on the idea that content moderation does not involve judgment. For example, Facebook states that it makes decisions about "billions of pieces of content" and "[a]ll such decisions are unique and context-specific[ ] and involve some measure of judgment." (Facebook Decl., Dkt. 12-4, at 9).

This Court is convinced that social media platforms, or at least those covered by HB 20, curate both users and content to convey a message about the type of community the platform seeks to foster and, as such,

exercise editorial discretion over their platform's content. Indeed, the text of HB 20 itself points to social media platforms doing more than transmitting communication. In Section 2, HB 20 recognizes that social media platforms "(1) curate[ ] and target[ ] content to users, (2) place[ ] and promote[ ] content, services, and products, including its own content, services, and products, (3) moderate[ ] content, and (4) use[ ] search, ranking, or other algorithms or procedures that determine results on the platform." Tex. Bus. & Com. Code § 120.051(a)(1)–(4). Finally, the State's own basis for enacting HB 20 acknowledges that social media platforms exercise editorial discretion. "[T]here is a dangerous movement by social media companies to silence conservative viewpoints and ideas." *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, OFFICE OF THE TEX. GOVERNOR (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship. "Texans must be able to speak without being censored by West Coast oligarchs." Bryan Hughes (@SenBryanHughes), TWITTER (Aug. 9, 2021, 4:34 PM), https://twitter.com/SenBryanHughes/status/1424846466183487492. Just like the Florida law, a "constant theme of [Texas] legislators, as well as the Governor . . . , was that the [platforms'] decisions on what to leave in or take out and how to present the surviving material are ideologically biased and need to be reined in." *NetChoice*, —— F.Supp.3d at ——, 2021 WL 2690876, at *7. Without editorial discretion, social media platforms could not skew their platforms ideologically, as the State accuses them of doing. Taking it all together, case law, HB 20's text, and the Governor and state legislators' own statements all acknowledge that social media ***1109** platforms exercise some form of editorial discretion, whether or not the State agrees with how that discretion is exercised.

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

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

HB 20 prohibits social media platforms from moderating content based on "viewpoint." Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), 143A.002. The State emphasizes that HB 20 "does not prohibit content moderation. That is clear from the fact that [HB 20] has an entire provision dictating that the companies should create acceptable use policies . . . [a]nd then moderate their content accordingly." (*See* Minute Entry, Dkt. 47). The State claims that social media platforms could prohibit content categories "such as 'terrorist speech,' 'pornography,' 'spam,' or 'racism'" to prevent those content categories from flooding their platforms. (Resp. Prelim. Inj. Mot., Dkt. 39, at 21). During the hearing, the State explained that a social media platform "can't discriminate against users who post Nazi speech . . . and [not] discriminate against users who post speech about the anti-white or something like that." (*See* Minute Entry, Dkt. 47). Plaintiffs point out the fallacy in the State's assertion with an example: a video of Adolf Hitler making a speech, in one context the viewpoint is promoting Nazism, and a platform should be able to moderate that content, and in another context the viewpoint is pointing out the atrocities of the Holocaust, and a platform should be able to disseminate that content. (*See id.*). HB 20 seems to place social media platforms in the untenable position of choosing, for example, to promote Nazism against its wishes or ban Nazism as a content category. (Prelim. Inj. Mot., Dkt. 12, at 29). As YouTube put it, "YouTube will face an impossible choice between (1) risking liability by moderating content identified to violate its standards or (2) subjecting YouTube's community to harm by allowing violative content to remain on the site." (YouTube Decl., Dkt. 12-3, at 22).

HB 20's prohibitions on "censorship" and constraints on how social media platforms disseminate content violate the First Amendment. The platforms have policies against content that express a viewpoint and disallowing them from applying their policies requires platforms to "alter the expressive content of their [message]." *Hurley*, 515 U.S. at 572–73, 115 S.Ct. 2338. HB 20's restrictions on actions that "de-boost" and "deny equal access or visibility to or otherwise discriminate against expression" impede platforms' ability to place "post[s] in the proper feeds." Tex. Civ. Prac. & Rem. Code § 143A.001(1); *NetChoice*, —— F.Supp.3d at ——, 2021 WL 2690876, at *3. Social media platforms "must determine how and where users see those different viewpoints, and some posts will necessarily have places of prominence. *See NetChoice*, —— F.Supp.3d at ——, 2021 WL 2690876, at *3. HB 20 compels social media platforms to significantly alter and distort their products. Moreover, "the targets of the statutes at issue are the editorial judgments themselves" and the "announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo, Hurley*, and *PG&E*." *Id.* HB 20 also impermissibly burdens social media platforms' own speech. *Id.* at ——, 2021 WL 2690876, at *9 ("[T]he statutes compel the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites."). For example, if a platform appends its own speech to label a post as ***1110** misinformation, the platform may be discriminating against that user's viewpoint by adding its own disclaimer. HB 20 restricts social media platforms' First Amendment right to engage in expression when they disagree with or object to content.[4]

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

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

[Discussion of Section 2 has been omitted]

3. HB 20 Discriminates Based on Content and Speaker

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

Rem. Code § 143A.006(a)(2)–(3). When considering a city ordinance that applied to "'fighting words' that . . . provoke violence[ ] 'on the basis of race, color, creed, religion[,] or gender,'" the Supreme Court noted that those "who wish to use 'fighting words' in connection with other ideas —to express hostility, for example, on the basis of political affiliation, union membership, or [ ]sexuality—are not covered." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). As Plaintiffs argue, the State has "no legitimate reason to allow the platforms to enforce their policies over threats based only on . . . favored criteria but not" other criteria like sexual orientation, military service, or union membership. (Prelim. Inj. Mot., Dkt. 12, at 35–36); *see id.*

***1113** HB 20 applies only to social media platforms of a certain size: platforms with 50 million monthly active users in the United States. Tex. Bus. & Com. Code § 120.002(b). HB 20 excludes social media platforms such as Parler and sports and news websites. (*See* Prelim. Inj. Mot., Dkt. 12, at 17). During the regular legislative session, a state senator unsuccessfully proposed lowering the threshold to 25 million monthly users in an effort to include sites like "Parler and Gab, which are popular among conservatives." Shawn Mulcahy, *Texas Senate approves bill to stop social media companies from banning Texans for political views*, TEX. TRIBUNE (Mar. 30, 2021), https://www.texastribune.org/2021/03/30/texas-social-media-censorship/. "[D]iscrimination between speakers is often a tell for content discrimination." *NetChoice*, —— F.Supp.3d at ——, 2021 WL 2690876, at *10. The discrimination between speakers has special significance in the context of media because "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The record in this case confirms that the Legislature intended to target large social media platforms perceived as being biased against conservative views and the State's disagreement with the social media platforms' editorial discretion over their platforms. The evidence thus suggests that the State discriminated between social media platforms (or speakers) for reasons that do not stand up to scrutiny.

4. HB 20 Is Unconstitutionally Vague

[Discussion of vagueness has been omitted]

5. HB 20 Fails Strict Scrutiny and Intermediate Scrutiny

HB 20 imposes content-based, viewpoint-based, and speaker-based restrictions that trigger strict scrutiny. Strict scrutiny is satisfied only if a state has adopted "'the least restrictive means of achieving a compelling state interest.'" *Americans for Prosperity Found. v. Bonta*, —— U.S. ——, 141 S. Ct. 2373, 2383, 210 L. Ed. 2d 716 (2021) (quoting ***1115** *McCullen v. Coakley*, 573 U.S. 464, 478, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014)). Even under the less rigorous intermediate scrutiny, the State must prove that HB 20 is "'narrowly tailored to serve a significant government interest.'" *Packingham v. North Carolina*, —— U.S. ——, 137 S. Ct. 1730, 1736, 198 L.Ed.2d 273 (2017) (quoting *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518). The proclaimed government interests here fall short under both standards.

The State offers two interests served by HB 20: (1) the "free and unobstructed use of public forums and of the information conduits provided by common carriers" and (2) "providing individual citizens effective protection against discriminatory practices, including discriminatory practices by common carriers." (Resp. Prelim. Inj. Mot., Dkt. 39, at 33–34) (internal quotation marks and brackets omitted). The State's

first interest fails on several accounts. First, social media platforms are privately owned platforms, not public forums. Second, this Court has found that the covered social media platforms are not common carriers. Even if they were, the State provides no convincing support for recognizing a governmental interest in the free and unobstructed use of common carriers' information conduits.[5] Third, the Supreme Court rejected an identical government interest in *Tornillo.* In *Tornillo*, Florida argued that "government has an obligation to ensure that a wide variety of views reach the public." *Tornillo*, 418 U.S. at 247–48, 94 S.Ct. 2831. After detailing the "problems related to government-enforced access," the Court held that the state could not commandeer private companies to facilitate that access, even in the name of reducing the "abuses of bias and manipulative reportage [that] are . . . said to be the result of the vast accumulations of unreviewable power in the modern media empires." *Id.* at 250, 254, 94 S.Ct. 2831. The State's second interest—preventing "discrimination" by social media platforms—has been rejected by the Supreme Court. Even given a state's general interest in anti-discrimination laws, "forbidding acts of discrimination" is "a decidedly fatal objective" for the First Amendment's "free speech commands." *Hurley*, 515 U.S. at 578–79, 115 S.Ct. 2338.

Even if the State's purported interests were compelling and significant, HB 20 is not narrowly tailored. Sections 2 and 7 contain broad provisions with far-reaching, serious consequences. When reviewing the similar statute passed in Florida, the Northern District of Florida found that that statute was not narrowly tailored "like prior First Amendment restrictions." *NetChoice*, —— F.Supp.3d at ——, 2021 WL 2690876, at *11 (citing *Reno*, 521 U.S. at 882, 117 S.Ct. 2329; ***1116** *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 131, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)). Rather, the court colorfully described it as "an instance of burning the house to roast a pig." *Id.* This Court could not do better in describing HB 20.

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

IV. CONCLUSION

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

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

Footnotes

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

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

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

4 The Court notes that two other Supreme Court cases address this topic, but neither applies here. *PruneYard Shopping Center v. Robins* is distinguishable from the facts of this case. 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). In *PruneYard*, the Supreme Court upheld a California law that required a shopping mall to host people collecting petition signatures, concluding there was no "intrusion into the function of editors" since the shopping mall's operation of its business lacked an editorial function. *Id.* at 88, 100 S.Ct. 2035. Critically, the shopping mall did not engage in expression and "the [mall] owner did not even allege that he objected to the content of the [speech]; nor was the access right content based." *PG&E*, 475 U.S. at 12, 106 S.Ct. 903. Similarly, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* has no bearing on this Court's holding because it did not involve government restrictions on editorial functions. 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). The challenged law required schools that allowed employment recruiters on campus to also allow military employment recruiters on campus—a restriction on "conduct, not speech." *Id.* at 62, 65, 126 S.Ct. 1297. As the Supreme Court explained, "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when the host interviews and recruiting receptions." *Id.* at 64, 126 S.Ct. 1297.

5 In *PG&E*, the Supreme Court did not recognize such a governmental interest; rather, it held that a private utility company retained editorial discretion and could not be compelled to disseminate a third-party's speech. 475 U.S. at 16–18, 106 S.Ct. 903. The Supreme Court's narrow reasoning in *Turner* does not alter this Court's analysis. There, the Court applied "heightened First Amendment scrutiny" because the law at issue "impose[d] special obligations upon cable operators and special burdens upon cable programmers." *Turner Broad. Sys., Inc.*, 512 U.S. at 641, 114 S.Ct. 2445. The law, on its face, imposed burdens without reference to the content of speech, yet "interfere[d] with cable operators' editorial discretion" by requiring them to carry some broadcast stations. *Id.* at 643–44, 662, 114 S.Ct. 2445. When it held that cable operators must abide by the law and carry some broadcast channels, the Court's rationale turned on preventing "40 percent of Americans without cable" from losing "access to free television programming." *Id.* at 646, 114 S.Ct. 2445. The analysis applied to the regulation of broadcast television has no bearing on the analysis of Internet First Amendment protections. *See Reno*, 521 U.S. at 870, 117 S.Ct. 2329.