CASE NO. 21-51178

IN THE UNITED STATES COURT OF APPEALS
FOR THE 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 THE ATTORNEY GENERAL OF TEXAS

Defendant-Appellant

Appeal from an Order of the United States District Court for the Western District of Texas, The Hon. Robert Pitman (Dist. Ct. No. 1:21-CV-840-RP)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

CASE NO. 21-51178

NetChoice, L.L.C. v. Ken Paxton

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Thomas Berry	Counsel to *Amicus*
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Nicole Saad Bembridge	Counsel to *Amicus*
Cato Institute	*Amicus curiae*

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/s/ Thomas Berry

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*. This case interests Cato because it concerns the application of basic First Amendment principles to social media, a critically important issue in the digital age.

SUMMARY OF THE ARGUMENT

Texas's social media regulations purport to "protect First Amendment rights" and to stop "Silicon Valley censorship" of conservative views. By doing so, the state has adopted a progressive legal theory to impose its own form of internet censorship.

Texas's law declares that social media platforms are common carriers, subject to onerous regulations over who and what they can host. The law prohibits them from removing any user or any content on the basis of "viewpoint." Like the progressive legal theory it draws from, Texas makes arguments fundamentally at

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

odds with the core First Amendment values of a free speech marketplace. The Texas law violates platforms' First Amendment rights and their property rights by forcing them to publish content and host users they would otherwise exclude.

Social media platforms are not common carriers, and they have a First Amendment editorial right to choose the content they host. This right is not contingent on the amount of speech they can host or on whether they produce a unified speech product. Rather, the First Amendment protects platforms' editorial discretion over any speech product they choose to present. Texas cannot unilaterally deprive platforms of this right simply by calling them common carriers.

Texas's account of platforms' discrimination against conservative users reveals a misunderstanding of how content moderation at scale works. The platforms that the Texas law targets receive a staggering amount of content each day, which is processed through inevitably imperfect artificial intelligence and subjective human moderators. "Incorrect" removals of content happen millions of times per day to users representing every conceivable ideology. Rather than proof of a targeted campaign against conservatives, the anecdotes Texas offers as evidence of anti-conservative discrimination are mostly casualties of the margin of error inherent in content moderation at scale.

Forcing "viewpoint neutrality"—or exercising little or no content moderation at all—is not the solution to the problems with content moderation at scale. Prior attempts at lightly moderated "free speech" alternatives to Facebook and Twitter became so overrun with offensive content that they became unenjoyable for the average user. Finding the right balance is a difficult problem, but the market is the mechanism with which to solve that problem.

The First Amendment protects private platforms' rights to moderate content. Interfering with this right based on a flawed and historically discredited right-to-access interpretation of the First Amendment will chill speech, undermine property rights, and deprive the public of the beneficial use of these platforms.

ARGUMENT

I. HB20 Recycles the Outdated Progressive Theory of Communications Collectivism

Texas ostensibly passed HB20 "to protect First Amendment rights" from the "dangerous movement by social media companies to silence conservative viewpoints and ideas." Press Release, Office of the Texas Governor, Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship (Sept. 9, 2021).[2] Yet in its efforts to protect conservative speech from "Silicon Valley censorship," HB20 adopts the theory and tactics of the progressive communications

[2] Available at https://bit.ly/3tWoHTp.

collectivist movement of the 1960s, which argued that the government should control the media in order to promote equality of access to it. By forcing platforms to include speakers and speech they would otherwise exclude, Texas, like the communications collectivists that preceded it, violates platforms' First Amendment rights and property rights at the same time.

Providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press," the First Amendment naturally prohibits the government from censoring private speech and press. U.S. Const. amend. I. Turning that guarantee on its head, communications collectivists convert the First Amendment from a shield to protect private actors from government abuse into a sword for the government to wield against privately-owned media platforms. In his seminal 1967 article, "Access to the Press: A New First Amendment Right," Jerome Barron attacked the "banality" of a First Amendment jurisprudence that only limits the government's interference with speech. Barron emphasized the need for the First Amendment to address "nongovernmental obstructions to the spread of political truth" in a capitalist system, where the private media's pecuniary interests would invariably obstruct that "truth." Jerome Barron, *Access to the Press: A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1643 (1967) (arguing that a new First Amendment right should be created for the public to access private, for-profit mass media on terms set by the government). To this end, Barron argued that "the interests

of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view." *Id.* at 1656; *see generally,* Owen Fiss, The Irony of Free Speech, (1998) (arguing the state must adopt a "democratic," rather than "libertarian," conception of the First Amendment so it can police the private speech arena for the public interest).

Then as now, communications collectivists advocated for "neutrality" requirements, right-of-reply mandates, and expansive applications of common carriage doctrine (using "public forum" or "public square" rhetoric). *See generally,* Adam Thierer, *The Surprising Ideological Origins of Trump's Communications Collectivism*, The Technology Liberation Front Blog (May 20, 2020)[3]; *see also* Jerome A. Barron, *Access Reconsidered,* 76 Geo. Wash. L. Rev. 826 (2007) (describing the history of collectivist efforts to impose media access mandates since the 1960s). Borrowing directly, if unconsciously, from the communications collectivists' playbook, HB20 applies common carriage doctrine to social media platforms. The law dictates that 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 or a user's content "based on the viewpoint of the user or another person." Tex. Civ. Prac. & Rem. Code §§ 143A.001; 143A.002(a)(1)-(3). Texas specifically endeavors to prevent the platforms from

[3] Available at https://bit.ly/36KwWsD.

"silencing conservative views," including content discussing "the practice of prescribing drugs 'off-label'" to treat Covid-19. Governor Greg Abbott (@GregAbbott_Tx), Twitter (Mar. 5, 2021, 9:35 PM)[4]; Appellant's Br. 9. Adopting the collectivists' position that the government should control the content shared over the mass media, HB20 forces social media platforms to host the ideological viewpoints Texas prefers. Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1)-(3).

Until Texas resurrected it, communications collectivism had fallen sharply out of favor with courts and self-identified conservatives alike, and for good reasons. First, these efforts violate platforms' First Amendment right to choose what content they host. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (holding that a must-carry mandate for social media was content based and subject to strict scrutiny); *Columbia Broad. System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (finding that there is no constitutional right of access to broadcast outlets for political advertising); *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241 (1974) (rejecting a right-of-reply for print media).

Second, in an effort to advance the "fundamental interest in protecting the free exchange of ideas and information values," communications collectivism chills speech. Appellant's Br. 11; *NetChoice, LLC v. Paxton*, __ F. Supp. 3d __, No. 21-51178 (W.D. Tex. 2021) (must-carry mandate for social media platforms chill the

[4] Available at https://bit.ly/3K45kxf.

social media platforms' speech and editorial rights); *Tornillo,* 418 U.S. at 256-58 (finding that newspaper editors were avoiding printing controversial stories under the "right of reply" mandate, thereby chilling speech). The Federal Communications Commission recognized this when it unanimously voted to repeal the Fairness Doctrine. *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 659 (D.C. Cir. 1989) ("In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.").

Likewise, HB20 will encourage platforms to ban entire subjects (say, terrorism) to avoid facing the unappetizing choice to either host certain objectionable content (like pro-terrorism material) or to face liability for removing each piece of content. Tex. Civ. Prac. & Rem. Code § 143A.007(a); Complaint for Declaratory and Injunctive Relief at 3, *NetChoice v. Paxton*, No. 1:21-cv-00840, (W.D. TX. 2021) ("Texas legislators rejected amendments that would explicitly allow platforms to exclude . . . terrorist content.").

Third, and critically, media access mandates violate property rights by forcing private platforms to host users and publish speech they would otherwise exclude. *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979) (holding that the right to

exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); 2 William Blackstone, Commentaries *2 (describing property as "that sole and despotic dominion which one man claims and exercises . . . in total exclusion of the right of any other individual in the universe.").

Texas conceives of its impingement on property rights as a victory for free speech, reasoning that HB20 advances free speech values in the face of a "discriminatory dystopia where large corporations punish speakers with idiosyncratic views." Appellant's Br. 4, 11. But co-opting private property to amplify certain viewpoints is not authorized by the First Amendment, and "the concept that government may restrict the speech of some elements of our society," here, the social media platforms, "in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley v. Valeo,* 424 U.S. 1, 49 (1976). *See also Moody,* 546 F. Supp. 3d at 1096 (noting that "balancing the exchange of ideas among private speakers is not a legitimate governmental interest"). Property rights are thus collateral damage in Texas's effort to retaliate against Silicon Valley's allegedly left-wing bias.

Texas relies on *PruneYard Shopping Center v. Robins* to argue that it may seize the platforms by fiat. 447 U.S. 74 (1980); Appellant's Br. 18. First, as Appellees explain, *PruneYard* is inapposite here because the shopping center at issue was not a speech publisher. Further, this case is distinguishable from *PruneYard* in

that social media platforms exercise their editorial discretion to exclude certain content specifically because they *object* to the content. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S 557, 580 (1995) (explaining that *PruneYard* "did not involve any concern that access to this area might affect the shopping center owner's exercise of his own right to speak" and that the owner in *PruneYard* "did not even allege that he objected to the content of the pamphlets") (internal citations omitted).

Texas's arguments would amount to an unprecedent extension of *PruneYard*, applying it not only to compelled hosting on physical property but also compelled publishing of speech. When a case is itself on shaky constitutional footing, lower courts should refrain from dramatically expanding its reach. And *PruneYard* is on such shaky footing. In fact, *PruneYard* was wrong when it was decided.

PruneYard's theory that the compelled physical hosting of speech raises no First Amendment concerns was impossible to reconcile with *Wooley v. Maynard*, which held that a state may not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. 705, 713 (1977). And its suggestion that the First Amendment harm from the compelled support of speech can be cured by a non-endorsement disclaimer has been subsequently undermined by the Supreme Court many times over. *See Janus*

v. Am. Fed'n of State, Cty., & Mun. Employees, 138 S. Ct. 2448 (2018) (forced subsidy of union speech violates the free speech rights of nonmembers, even though no one would assume funding constitutes endorsement); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (law requiring crisis pregnancy centers to notify patients of the availability of publicly funded abortion was compelled speech and violated the First Amendment, regardless of appearance of endorsement); *United States v. United Foods, Inc*., 533 U.S. 405 (2001) (compelled assessment for mushroom promotion violated the First Amendment); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (right-of-access to privately operated cable television channel violated the First Amendment). This Court should therefore decline to rely on *PruneYard* in the novel and inapposite context of social media.

By adopting the tactics of communications collectivists, Texas contravenes historically held conservative political values of limited government, constitutional fidelity, and strong property rights. *See generally*, Robert McChesney & John Nichols, Our Media, Not Theirs: The Democratic Struggle Against Corporate Media, Open Media Series (2002) (arguing that collectivist efforts to reform the media must begin with "the need to promote an understanding of the urgency to assert public control over the media"). HB20 also severely undermines rights of free speech and free press, arguably our most cherished civil liberties. To ensure these

protections stay intact, this court should permanently enjoin Texas's effort to resurrect communications collectivism.

II. Platforms Are Not Common Carriers by Texas's Own Account

To be a common carrier, a company must "serve the public indiscriminately and not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" *Am. Orient Exp. Ry. v. STB*, 484 F.3d 554, 557 (D.C. Cir. 2007). In other words, it must provide "indifferent service" that accommodates all comers and "confers common carrier status." *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). A company "will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve." *Id.* at 608–09. Under those long-settled principles, social media platforms are not common carriers because they make user access contingent on ongoing compliance with community standards and, by Texas's own account, "arbitrar[ily] and inconsistently" apply their rules to individual cases. *See, e.g.*, Facebook Community Standards[5]; Appellant's Br. 43.

Texas may not assume control over what content platforms host simply by calling them "common carriers." As editors and publishers of unique speech products such as their "feeds," social media platforms have a First Amendment right to choose the content they publish. *Halleck*, 139 S. Ct. at 1932 (recognizing that

[5] Available at https://bit.ly/373iImB

"certain private entities . . . have rights to exercise editorial control over speech and speakers on their properties or platforms"). The Supreme Court has long recognized that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258.

And this editorial freedom extends far beyond newspapers and other print media. *See, e.g.*, *Moody,* 546 F. Supp. 3d at 1093 (finding strict scrutiny applies to law restricting social media platforms' editorial decisions); *Hurley,* 515 U.S. at 567–70 (finding that editorial privilege extends to parade organizers); *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) (noting that the First Amendment protects an online bulletin board's decision "to publish, withdraw, postpone or alter content"); *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 790 (2011) (noting that First Amendment protections "do not vary when a new and different medium for communication appears"). *See also La'Tiejira v. Facebook, Inc.,* 272 F. Supp. 3d 981 (S.D. Tex. 2017) (finding that the First Amendment extends to social media networks); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2013) (same regarding internet search engines); *Langdon v. Google, Inc.,* 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (same).

Accordingly, courts have consistently rejected efforts to impinge on social media platforms' editorial judgments. *See, e.g.*, *Paxton,* __ F. Supp. 3d __, No. 21-51178 (preliminarily enjoining HB20 because plaintiffs would otherwise suffer irreparable injury to their protected editorial judgment); *Moody,* 546 F. Supp. 3d 1082 (preliminarily enjoining Florida's "Stop Media Censorship Act" because plaintiffs would otherwise suffer irreparable injury to their protected editorial judgment); *Illoominate Media, Inc. v. Cair Fla., Inc.*, 841 Fed. Appx. 132 (11th Cir. 2020) (upholding the dismissal of a lawsuit by a political personality over her Twitter ban); *Domen v. Vimeo, Inc.,* 991 F.3d 66 (2d Cir. 2021) (upholding the dismissal of a Vimeo account termination); *Fyk v. Facebook, Inc.,* 808 Fed. Appx. 597 (9th Cir. 2020) (finding dismissal of a user's suit against Facebook for removing his content was proper).

To sidestep platforms' well-established editorial rights by designating them common carriers, Texas has invented prerequisites for First Amendment protection and claimed that the platforms do not meet them. Appellant's Br. 21–23. According to Texas, common carriage doctrine may be applied to social media platforms "because they differ from newspapers in . . . dispositive respects." *Id.* at 21. Unlike traditional printed media, which had a limited amount of page space to feature articles in each week, "space constraints on digital platforms are practically nonexistent." *Id.* at 23 (quoting *Biden v. Knight*, 141 S. Ct. 1220, 1224 (2021)

(Thomas, J., concurring)). Texas argues that because platforms have greater capacity to host content, they do not need to edit content the way print media does. And because their need is less urgent, the argument continues, they do not deserve robust editorial rights.

This argument has received recent attention from other scholars exploring whether platforms may be regulated as common carriers consistent with the First Amendment. *See* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377 (2021) (arguing that online platforms may be considered common carriers because their virtually unlimited hosting space makes infringements on their editorial rights less grave than infringements on newspapers' rights). But the notion that constitutional protections apply only with strength proportionate to an individual's need for them is incorrect: the First Amendment forbids abridging speech generally, not abridging speech for those who have persuaded the court of the urgency of their message. First Amendment protections "do not vary when a new and different medium for communication appears," and social media platforms do not forfeit their constitutional rights by buying more servers. *Brown,* 564 U.S. at 790; *see also Reno v. ACLU,* 521 U.S. 844, 849 (1997) (finding the First Amendment applies with full force to internet media). A contrary constitutional rule would encourage online services to host less speech, not more.

Platforms would be incentivized to avoid the size threshold where, according to Texas, they lose control of their own platforms.

In a similar vein, others have argued that platforms' editorial rights are contingent on their published content producing a "unified" or "coherent" speech product. *See, e.g.*, Reply Br. for the Attorney General at 14, *NetChoice, LLC v. Attorney General,* (11th Cir.) (No. 21-12355)[6]; Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. Free Speech L. 143 (2021); Volokh, *supra*, at 405. Proponents of the coherence-as-prerequisite theory argue that the Supreme Court has upheld infringements on the First Amendment rights of editors when their "message" lacked unity or coherence. And they argue that the lack of a unified message made these infringements on editorial rights less grave.

But the Supreme Court's own explanation of the rights of editors is incompatible with that view. "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." *Hurley*, 515 U.S. at 569–70; *see also Malik v. Brown*, 16 F.3d 330, 332 (9th Cir. 1994) (explaining that a person does not forfeit their First Amendment rights by not exercising them in a certain timeframe because "a 'use it or lose it' approach does not square with the Constitution"). The fact that an online platform chooses to host a wide range of views and topics is no basis for curtailing

[6] Available at https://bit.ly/3DMsqpX.

its First Amendment rights. That choice itself embodies a protected editorial judgment. The coherence-as-prerequisite theory rule would encourage online services to host less and moderate more to establish that they do present a coherent speech product.

Furthermore, First Amendment rights are not contingent on the closeness of a medium's similarity to a newspaper, and "we don't need to compare [platforms] to . . . grocery stores, malls, parade organizers, law school career fairs, doctors, or anything else to conclude that the publication and withdrawal of third-party content" is protected editorial activity. Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question),* Santa Clara Digital Commons (2018).[7] And though "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 how much speech the platform hosts or the coherence of its message "is a distraction." *NetChoice v. Paxton ,* __ F. Supp. 3d __, No. 21-51178. "The core question," for determining whether content moderation is protected by the First Amendment "is still whether a private company exercises editorial discretion over the dissemination of content." *Id.*

[7] Available at https://bit.ly/3J1qw5E.

III. HB20 is Based on a Fundamental Misunderstanding of Content Moderation at Scale

Texas's account of the platforms' "abusive" content moderation is based on a fundamental misunderstanding of how content moderation at scale works. Appellant's Br. 10. Texas and amicus Institute for Free Speech offer anecdotes to support their claim of anti-conservative bias. These include an instance suggesting Twitter inconsistently applied its private information policy and an instance where Facebook incorrectly removed an advertisement for conservative children's books on account that it was "Low Quality or Disruptive Content," before reinstating the advertisement on appeal. Appellant's Br. 8; Brief by the Institute for Free Speech for Atty. General Paxton as Amicus Curiae, p. 7, *NetChoice v. Paxton*, No. 21-51178 (2022). While Texas characterizes these removals as "abusive" and deliberate, their account of the "abuse" instead showcases that "content moderation at scale is impossible to do well." Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, Techdirt (Nov. 20 2019).[8]

HB20 applies to any "social media platform that functionally has more than 50 million active users in the United States in a calendar month." Tex. Bus. & Com. Code § 324.055(2)(b). Those qualifying platforms host staggering amounts of content. Facebook, for one, has 2.91 billion monthly active users worldwide, and

[8] Available at https://bit.ly/373dMhw.

receives 350 million photos per day. Cooper Smith, *Facebook Users Are Uploading 350 Million New Photos Each Day*, Insider Magazine, Sept. 18, 2013.[9] Likewise, YouTube receives 500 hours of new video every minute, and, in the first half of 2020, Twitter processed user complaints against 12.4 million accounts. Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability,* 121 Colum. L. Rev. 759, 791 (2021) [hereinafter "Douek, *Governing Online Speech*"].

Platforms of this size moderate content at scale, meaning they process a sum of content "no amount of people," alone, can deal with, using processes that "can be replicated in different contexts." TED, How Twitter Needs to Change, TED (Apr. 2019)[10]; Tarleton Gillespie, *Content Moderation, AI, and the Question of Scale*, 7 Big Data and Soc'y 2 (2020) (explaining that moderation at scale entails applying the same rule to countless pieces of content that often have context-specific meanings).[11] Twenty years ago, online communities could get by relying on user reporting, with few if any moderators. *Id.* But "the quantity, velocity, and variety of content today is stratospheric," and "the consequences of online harms now extend beyond the platform on which they occur," like "Gamergate, Myanmar, revenge porn, the [Cambridge Analytica scandal] . . . and Christchurch." *Id.*

[9] Available at https://bit.ly/3x6stv4.
[10] Available at https://bit.ly/3j1QxqZ.
[11] Available at https://bit.ly/3K1TNOX.

As a result, "Artificial intelligence (AI) tools have become indispensable for dealing with the unfathomable firehose of online speech," and are the "only scalable way to identify and root out most of this harmful content." Douek, *Governing Online Speech* at 791; Drew Harwell, *AI Will Solve Facebook's Most Vexing Problems, Mark Zuckerberg Says. Just Don't Ask When or How*, Wash. Post (Apr. 11, 2018).[12] AI moderation tools are used by virtually all large platforms today, including Donald Trump's "free speech" alternative to Twitter, TRUTH Social. Tom Porter, *Trump's free speech social-media site plans to use AI to automatically censor some posts,* Business Insider (Jan. 25, 2022).[13]

Commercial content moderation tools frequently use matching systems, which compare new posts against a database of pre-classified content. Douek, *Governing Online Speech* at 795. Matching systems involve both false positives (as when terrorist footage used in news reporting is mistakenly flagged as pro-terrorist speech) and false negatives (as when graphic footage of the Christchurch Massacre is mistaken by the AI as a car wash and is not flagged). *Id.*

The technology that dominant social media platforms use is state of the art. Kurt Wagner, *Facebook says it has spent $13 billion on safety and security efforts since 2016*, Fortune (Sept. 21, 2021)[14]; Adam Satariano & Mike Isaac, *The Silent*

[12] Available at https://wapo.st/3NCfRBV.
[13] Available at https://bit.ly/3wQ75dC.
[14] Available at https://bit.ly/3r0ULn1.

Partner Cleaning Up Facebook for $500 Million a Year, N.Y.T., (Oct. 28, 2021).[15] But this technology is still in its relatively nascent stages, and it sometimes produces incorrect and even offensive results. Deepa Seetharaman, Jeff Horwitz & Justin Scheck, *Facebook Says AI Will Clean Up the Platform. Its Own Engineers Have Doubts*, Wall St. J. (Oct. 17, 2021) (describing how still-crude Facebook AI mistook Cockfights for a car crash and mistook videos livestreamed by perpetrators of mass shootings as paintball games or a trip through a carwash).[16] Technology companies and commentators today accept that the volume of speech online can never be perfectly governable, at least in the first instance: "it is unrealistic to expect rules to be applied correctly in every case." Douek, *Governing Online Speech* at 765.

Content that passes the initial AI screening can be reported by users after it is posted. When this happens, the content may be sent to human moderators for review. But like AI screening, this also produces inconsistent decisions because content moderation is an inherently subjective task. For example, in an exercise at the 2018 Content Moderation at Scale Conference, a room of content moderation specialists all evaluated the same eight case studies. *COMO Summit 5 – You Make the Call: Audience Interactive*, YouTube (May 16, 2018).[17] Participants disagreed on what action should be taken in all eight cases. *Id.* Unsurprisingly, Mark Zuckerberg

[15] Available at https://nyti.ms/3770Gjm.
[16] Available at https://on.wsj.com/36P58Ds.
[17] Available at https://bit.ly/3LGoFFb.

admitted in a white paper that human moderators "make the wrong call in more than one out of every 10 cases." John Koetsier, *Report: Facebook Makes 300,000 Content Moderation Mistakes Every Day,* Forbes (Jun. 9, 2020).[18] "But even if Facebook's content moderation systems got 99.9% of content moderation decisions 'right,' whatever that means, out of its roughly 350 million posts per day, it's still going to make 'mistakes' 350,000 times a day." Masnick, *supra*.[19] At least with the technology available now, content moderation at scale is impossible to do perfectly. More specifically, "it will always end up frustrating very large segments of the population and will always fail to accurately represent the 'proper' level of moderation of anyone." *Id.*

These "incorrect" removals affect posts representing every conceivable ideological slant, not just "conservative viewpoints and ideas." *See, e.g.,* Kevin Reed, *World Socialist Website's Fight Against Facebook Censorship Draws International Support*, World Socialist Website (Jan. 27, 2021)[20]; Megan McCluskey, *These TikTok Creators Say They're Still Being Suppressed for Posting Black Lives Matter Content*, Time Magazine (July 22, 2020).[21] And everyone, not just conservatives, who is subject to a suspension or takedown experiences a sense

[18] Available at https://bit.ly/3uMaqHQ.
[19] Available at https://bit.ly/373dMhw.
[20] Available at https://bit.ly/3qIll4d.
[21] Available at https://bit.ly/3NpPKOy.

of injustice. *See e.g.,* Angel Díaz & Laura Hecht-Felella, *Double Standards in Social Media Content Moderation,* Brennan Center for Justice, N.Y.U. School of Law (Aug. 4, 2021) (arguing Facebook, YouTube, and Twitter disproportionately censors communities of color, women, LGBTQ+ communities, and religious minorities)[22]; Vera Eidelman, Adeline Lee & Fikayo Walter-Johnson, *Time and Again, Social Media Giants Get Content Moderation Wrong: Silencing Speech about Al-Aqsa Mosque is Just the Latest Example,* ACLU (May 7, 2021) (describing how Facebook deleted 52 accounts belonging to Palestinian journalists and activists for violating their policy on terrorism)[23]; Jessica Guynn, *Facebook while black: Users call it getting 'Zucked,' say talking about racism is censored as hate speech*, USA Today (July 9, 2020), (describing widespread complaint among Black activists that Facebook removes and suspends them for talking about racism).[24]

Further, it is not at all clear from Texas's and amici's anecdotes or otherwise that conservatives are "silenced" more often on the platforms than other groups, or that the platforms are "abusive" towards conservatives. "No credible large-scale studies have determined that conservative content is being removed for ideological reasons or that searches are being manipulated to favor liberal interests." Paul M. Barrett & J. Grant Sims, *False Accusation: The Unfounded Claim that Social Media*

[22] Available at https://bit.ly/3uqTG8Q.
[23] Available at https://bit.ly/3DfZyG4.
[24] Available at https://bit.ly/386nMap.

Companies Censor Conservatives, The NYU Stern Center for Business and Human Rights 1 (2021) (arguing that "the claim of anti-conservative animus is itself a form of disinformation: a falsehood with no reliable evidence to support it")[25]; Matthew Feeney, *Conservative Big Tech Campaign Based on Myths and Misunderstanding,* Cato Institute (May 28, 2020) (describing how claims of anti-conservative bias, to date, have been either purely anecdotal or the products of poor methodology).[26] Even the National Telecommunications and Information Administration's petition to the FCC to reinterpret Section 230 to require "political neutrality" contained only "self-reported complaints collected by the White House, claims in the Trump Executive Order, and statements by another FCC Commissioner, Brendan Carr" as evidence for anti-conservative bias. Adam Thierer & Neil Alan Chilson, *FCC's O'Rielly on First Amendment & Fairness Doctrine Dangers*, The Federalist Society, FedSoc Blog (Aug. 6, 2020).[27] Though Texas calls social media platforms a "discriminatory dystopia where large corporations punish speakers with idiosyncratic views," many aggrieved conservatives have probably just fallen victim to the margin of error inherent in content moderation at scale.

Though it may seem intuitive, exercising no content moderation—or very light moderation—is not clearly preferable to the status quo. Lightly moderated "free

[25] Available at https://bit.ly/3Det7Ih.
[26] Available at https://bit.ly/3K5w8x8.
[27] Available at https://bit.ly/3JRfa5r.

speech" alternatives to Twitter and Facebook, like TRUTH Social, Parler, and Gettr, moderate extensively today, after initially becoming so overrun with offensive content that they became off-putting for the average user. *See, e.g.*, Mark Scott & Tina Nguyen, *Jihadists flood pro-Trump social network with propaganda*, Politico (Aug. 2, 2021)[28]; Kevin Randall, *Social app Parler is cracking down on hate speech—but only on iPhones*, Wash. Post, (May 17, 2021) ("Parler is using a new artificial intelligence moderation system with more stringent standards" against "hate speech," which includes racial slurs).[29] Texas Attorney General Paxton's own website acknowledges the necessity of content moderation, providing that "[m]embers of the public should not post or share information on an OAG social media page if that information is personal, sensitive, obscene, threatening, harassing, discriminatory, or would otherwise compromise public safety or incite violence or illegal activities." Texas Attorney General, Site Policies.[30]

CONCLUSION

The First Amendment protects private platforms' rights to moderate content. Interfering with this right based on a communications collectivist interpretation of

[28] Available at https://politi.co/3K6apVB.
[29] Available at https://bit.ly/3uqTG8Q.
[30] Available at https://bit.ly/3nHBwxX.

the First Amendment will chill speech, undermine property rights, and deprive the public from beneficial use of the platforms.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,336 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Thomas Berry*
April 8, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Thomas Berry*
April 8, 2022