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 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 AMICI CURIAE MOMS FOR LIBERTY AND INSTITUTE FOR FREE SPEECH IN SUPPORT OF DEFENDANT-APPELLANT KEN PAXTON AND REVERSAL

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March 7, 2022

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that—in addition to the persons and entities listed in the Appellees' Certificate of Interested Persons in APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO STAY PRELIMINARY INJUNCTION —the following listed persons and entities as described in the fourth sentence of 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.

Amici in Support of Defendant-Appellant:

MOMS FOR LIBERTY, AND ITS 176 CHAPTER AFFILIATES

INSTITUTE FOR FREE SPEECH

Counsel for Institute for Free Speech and Moms for Liberty

Endel Kolde

Alan Gura

INSTITUTE FOR FREE SPEECH

Moms for Liberty and Institute for Free Speech are nonprofit corporations, have no parent companies, and no publicly held company owns more than 10 percent of either of their stock.

s/Endel Kolde
Endel Kolde
Counsel for Amici

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INTEREST OF AMICI CURIAE[1]

Moms for Liberty is a nonprofit organization whose mission is to organize, educate and empower parents to defend their parental rights at all levels of government. Access to social media platforms is crucial to the Moms' efforts to attract new members, coordinate their activities, and communicate their messages to the broader public.

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Protecting individuals' ability to speak about politics on social media platforms is a part of the Institute's organizational mission in fostering free speech.

STATEMENT OF ISSUES

1. Whether 47 U.S.C. § 230(c)(1), which immunizes websites from liability based on their users' speech; or § 230(c)(2), which allows websites to restrict particular types of content "in good faith;" preempt Texas's requirements that social media platforms disclose and adhere to

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. All parties have provided written consent to the filing of this brief.

their content restriction policies and refrain from viewpoint discrimination;

2. Whether the First Amendment grants social media platforms blanket editorial control over their users' expression;

3. Whether social media platforms may be required to disclose their content-moderation policies and practices to consumers; and

4. Whether social media platforms may be prohibited from censoring their users' speech by engaging in viewpoint discrimination.

SUMMARY OF ARGUMENT

Social media platforms, a technology that could scarcely be imagined through the decades when First Amendment doctrine centered on traditional modes of expression, are now "the most important places . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal quotation marks omitted). "[F]or many," the platforms serve as "the principal sources for … speaking and listening in the modern public square." *Id.* at 1737.

But the modern public square is privately owned. And its handful of managers, potentially in concert with or under duress by officials, are quite willing to "prescribe what shall be orthodox in politics, nationalism, [arguably] religion, [and] other matters of opinion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), by stifling undesirable voices and excluding dissenters from the nation's social and

political discourse. Americans cast out of the polity for expressing their views are increasingly turning to their legislators for protection.

Our nation has a rich history of respecting private businesses' expressive rights, while acknowledging that sometimes their centrality to the operation of civic life requires that they be open to all on transparent terms. Texas's endeavor to protect consumers from arbitrary or politically motivated censorship in "the most important places . . . for the exchange of views," *Packingham*, 137 S. Ct. at 1735, is best understood in that light. Whether this early attempted solution proves optimal remains to be seen. But the Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (internal quotation marks omitted). Neither the First Amendment nor any act of Congress foreclose legislative efforts to address the growing challenge to our democracy posed by platform censorship.

NetChoice's position, reflecting the views of its constituent platforms, essentially boils down to this: "when we restrict users' speech we act and are protected under the First Amendment like newspaper editors or parade organizers, and 47 U.S.C. § 230 lets us do whatever we want on our own platforms without the liabilities of newspaper editors or parade organizers." Their view ignores both § 230's text and practical reality.

Section 230 protects social media platforms from being considered the publishers of content posted by their users, and allows them to make good-faith decisions to take down certain specifically-delineated forms of content. It does not give platforms blanket immunity for all content-moderation decisions, nor does it insulate platforms from liability for their own speech.

Texas's requirement that platforms publish their content-moderation rules, describe their algorithms, and give notice and an explanation of speech suppression does not offend the First Amendment, or even implicate Section 230. The Supreme Court has long recognized that states may impose factual disclosure requirements on commercial entities in the interest of consumer protection.

And while social media platforms enjoy the same First Amendment expressive rights as anyone else, those rights are not the subject of Texas's viewpoint discrimination concerns. The platforms' services are not analogous to traditional expressive forms. Unlike newspapers or parades, their primary function is not the offering of their own cohesive speech product. Rather, more like telephone companies, the platforms exist to distribute—to act as conduits for—the speech of others. And as with telephone companies, the platforms derive their value from the network effects inherent in their use. Allowing platforms to banish users to siloed, separate networks would provide no solution to the problem of a select few unaccountable actors excluding individuals from

civic life, arbitrarily or with the intent of controlling the national discourse.

Plaintiffs have failed to show the likelihood of success on the merits needed to sustain a preliminary injunction. The District Court's order should be reversed.

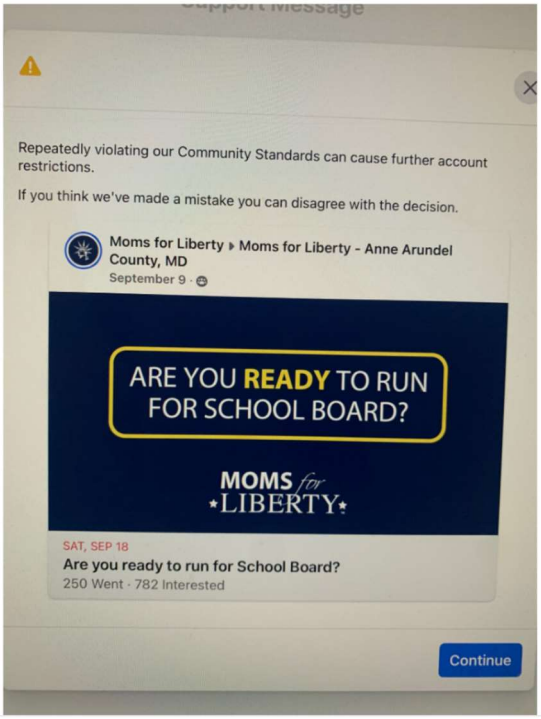
ARGUMENT

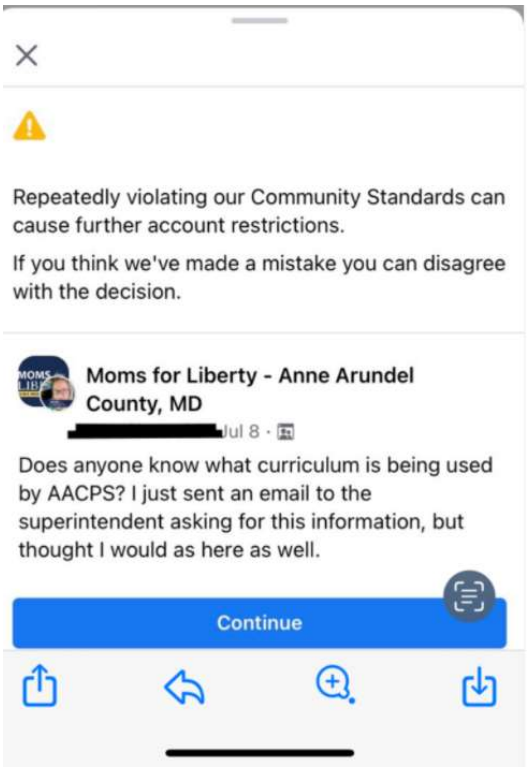
I. SOCIAL MEDIA PLATFORMS' OPAQUE ACCEPTABLE USE POLICIES, VIEWPOINT-BASED CENSORSHIP, AND ARBITRARY TREATMENT OF USERS CAUSE SIGNIFICANT HARM.

The platforms' content-moderation decisions often defy common sense; rules are unknown and haphazardly applied, and political bias often seems determinative. The problem's full exposition lies well-beyond the word limits, and this brief's scope, but has been widely noted, and recent history is replete with such events. *See, e.g.,* Jeffrey A. Tucker, *Kulldorff Deleted: Famed Epidemiologist and Early Opponent of Lockdowns Banned by LinkedIn,* BROWNSTONE INST. ARTICLES (Jan. 28, 2022), https://bit.ly/3s3e14p ("One of the world's important voices for traditional public health practice and the deployment of science in a pandemic has been deplatformed[.]"); Matt Taibbi, *Meet The Censored: Ivermectin Critic David Fuller,* TK NEWS (Sept. 2, 2021), https://bit.ly/3kJCkzk ("[YouTube's content] moderation system is secretive, random and very disrespectful to creators who have made large amounts of money for the company").

But some examples warrant discussion. Amicus Moms for Liberty had thrived by recruiting and organizing on Facebook when its ideological and political opponent, the National Education Association, began lobbying the platform to censor the Moms' content as "misinformation." Tiffany Justice & Tina Descovich, *Open Letter to Mark Zuckerberg* (Jan. 24, 2022), https://bit.ly/3K8egRB. Soon, Facebook issued 22 Moms chapter groups notifications of community standards' violations, and disabled the chapters "for posting basic information about local government operations such as school board meeting times, or questions about student textbooks." *Id.*

These are the sort of posts that triggered deplatforming:





Chrissy Clark, *Parent Group Alleges Facebook Censors Its Harmless Posts In Letter To Mark Zuckerberg,* DAILY CALLER (Jan. 24, 2022), https://bit.ly/3IwWbMV. Facebook restored the Moms' access following public outcry—this time.

Late last year, Heroes of Liberty, a publisher of children's biographies of conservative figures such as President Reagan and economist Thomas Sowell, was permanently banned from advertising from Facebook, only to be reinstated after a public outcry. Thomas Barrabi, *Facebook restores conservative book publisher's account after 'error.'* NEW YORK POST (Jan. 4, 2022), https://bit.ly/3puFHgK. At the time, Facebook did not explain why it had incorrectly labeled harmless childrens' book ads to be "Low Quality or Disruptive Content." *Id.*

Indeed, despite marketing themselves as open forums for all comers, the Facebook does not appear to equitably apply its own policies. The Wall Street Journal revealed that Facebook "shields millions of VIP users from the company's normal enforcement process," allowing favored people to violate the company's content rules with impunity. Jeff Horvitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt,* WALL STREET J. (Sept. 13, 2021), https://on.wsj.com/3tBbvBk. Online, the elite really do live by a different set of rules. And apparently, incumbent office holders are exempt from rules applied to challengers: "While the [privilege] program included most government officials, it didn't include all candidates for public

office, at times effectively granting incumbents in elections an advantage over challengers." *Id.*

At times, government actors appear to influence platforms to quietly censor content that they find disagreeable. As the White House Press Secretary admitted, "We are in regular touch with the social media platforms and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team." THE WHITE HOUSE, *Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy, July 15, 2021,* https://bit.ly/3pBe1Xr. Just last week, the Surgeon General requested platforms disclose details about their carriage of so-called "misinformation." Davey Alba, *The Surgeon General calls on Big Tech to turn over Covid-10 misinformation data*, NEW YORK TIMES (Mar. 3, 2021), https://www.nytimes.com/2022/03/03/technology/surgeon-general-covid-misinformation.html.

Texas's efforts here are animated by serious concerns. Having become the *de facto* public square, platforms are denying disfavored Americans the means of effective advocacy and association in the digital age, for ideological reasons or for no reason other than carelessness. The victims of such censorship have often invested significant time, effort, and money building their platform followings, only to see them unjustly unplugged with no recourse. Unsurprisingly, states are taking steps to protect platform consumers, and the people's neutral access to civic and political life.

II. NEITHER § 230 (C)(1) NOR (C)(2) PROVIDE ABSOLUTE IMMUNITY FOR "CENSORSHIP" AS DEFINED BY TEXAS LAW.

Social media platforms like to claim that § 230 gives them an unrestricted right to curate their users' expression.[2] It's hard to blame them—unfettered discretion and complete legal immunity make for an appealing combination. Some courts have contributed to this mindset by interpreting § 230 too broadly, and specifically by reading § 230(c)(2) out of the statute. This Court should recognize that § 230 has limits.

The plain text of 47 U.S.C. §§ 230 (c)(1) and (c)(2) provides platforms with limited legal protection, depending on their specific conduct or the nature of the plaintiff's legal claim. Section 230(c)(1) keeps platforms from being considered the publishers of content posted by their users: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." It treats them as conduits, like telephone or telegraph companies. Adam Candeub, *Reading Section 230 as Written,* 1 J. Free Speech L. 139, 146 (2021). This protects them from state-law defamation claims for content they did not generate themselves. It says nothing about the platforms' own speech

[2] The district court did not reach pre-emption issue, although it was raised below and might be evaluated as a potential alternate basis to uphold the district court by on appeal. ROA.21-51178.2581, n.1. This important predicate issue illustrates that Congress left room for states to legislate in this area.

independent of its users' speech, and it says nothing about editorial discretion.

Section 230(c)(2) provides only a limited immunity for content moderation. It immunizes not the removal of any and all expression as platforms see fit, but actions "*taken 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." 47 U.S.C. § 230(c)(2)(A) (emphasis added).

Thus: "Section 230(c)(1) said they were not liable for third party content—and Section 230(c)(2) said they would not become so even if they edited such content for certain, enumerated reasons." Adam Candeub, *supra.*

Neither provision immunizes platforms when publishing their *own* content and, however much social media giants might wish it, § 230 does *not* provide blanket immunity for all speech-curation decisions. This Court should resist any attempt to expand § 230's reach beyond its textual moorings, or ignore the provisions of § 230(c)(2); *see:*

Section	Legal Protection
Section 230(c)(1)	No liability for publishing third-party posts/speech that the platform hosts or controls
Section 230(c)(2)	No liability for content-moderating obscene, lewd, lascivious, filthy, excessively violent, and harassing content, and similar content
Not covered	Liability for content-moderating types of speech not mentioned in section 230(c)(2)

Candeub, *supra,* at 148 (table copied from article).

Section § 230 (c)(1) does protect platforms from being held liable for some editorial decisions—when those editorial decisions are made by third parties posting content, not by the platform. *Id.* Some circuits have read Section § 230(c)(1) more expansively, but a Ninth Circuit panel recently recognized that the provision is much narrower. *Compare Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) *with Lemmon v. Snap, Inc.,* 995 F.3d 1085, 1093 (9th Cir. 2021) ("internet companies remain on the hook when they create or develop their own internet content"). Section 230(c)(1)'s plain text does not support its expansive reading in *Zeran*.

Section 230(c)(2) requires "good faith" adherence to the limits of its text. Platforms cannot simply label any speech they dislike "obscene," "filthy," or "harassing." Nor may platforms file their political objections to consumers' speech under "otherwise objectionable." The context of § 230 (c)(2)'s specifically defined immunities supports a logical reading of the catch-all provision regarding "or otherwise objectionable" to link the phrase to the types of content otherwise enumerated in § 230(c)(2)(A). A "cardinal rule [holds] that statutory language must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (internal quotation marks omitted); *see* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2),* 1 J. FREE SPEECH L. 175, 176 (2021)

("Applying the *ejusdem generis* canon, 'otherwise objectionable' should be read as limited to material that is likewise covered by the CDA").

Congress did not create immunity for censoring six specific types of content—plus anything else under the sun. Properly interpreted, the "otherwise objectionable" language of § 230(c)(2) does not create an open-ended vessel for platforms to pour in new types of content restrictions, such as political or religious viewpoint-based restrictions. Candeub & Volokh, *supra,* at 189.[3]

Obscene sexual content is different from provocative political commentary or religious speech. And not everything that someone dislikes or finds uncomfortable is therefore "violent" (let alone "excessively" so) or "harassing." Cabining sexually explicit material or removing terroristic threats in good faith is covered by § 230(c)(2), but

[3] This Court should also view with skepticism any attempt to invent new legislative history favoring blanket immunity, years after § 230's enactment. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (citations omitted); *Texas Food Indus. Assoc. v. United States Dep't of Agric.*, 81 F.3d 578, 581 (5th Cir. 1996). Moreover, discerning a legislator's intent is "almost always an impossible task" because a legislator may have been motivated by any number of reasons, some stated, some not, including benefiting constituents, pleasing a donor, horse-trading, score settling, relationship building, or simple mistake. *Edwards v. Aguillard,* 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). And legislative history is highly manipulable. *Id.*

removing political speech, or mere opinion regarding social, cultural, or scientific matters, falls outside the statute Congress actually enacted.

That is not to deny that platforms may set content-based rules about political or other speech content in their terms of service, but Section 230 does not pre-empt laws that require disclosure, notice, and viewpoint-neutral application of such content-moderation rules.

Indeed, content removal and deplatforming decisions made without reference to known standards or haphazardly applied, may be bad faith decisions that are not immunized by § 230 (c)(2). *See, e.g., Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 267-68 (1977) (substantive and procedural departures from usual practices in zoning decisions may indicate improper purposes); *Echeverry v. Jazz Casino Co., L.L.C.*, 988 F.3d 221, 236 (5th Cir. 2021) (failure to follow internal policies can be relevant to negligence); *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 348 (5th Cir. 2019) (*ex post* addition of job requirements cast doubt on reasonableness and credibility of employer's decisions); *Gordon v. Southtrust Bank*, 108 F. App'x 837, 842 (5th Cir. 2004) (bank's failure to comport with internal policies could lead to jury finding the bank acted inappropriately); *Laxton v. Gap Inc.*, 333 F.3d 572, 581 n.3 (5th Cir. 2003) (employer's failure to follow internal policies, along with other evidence, is probative of pretext); *Bertrand v. Fischer*, No. 09-0076, 2011 U.S. Dist. LEXIS 144051, at *13 (W.D. La. Dec. 14, 2011) (plaintiff is

entitled to question witnesses at trial regarding internal policies on customer incidents and absence of photos or video).

Texas's common-carrier provisions, requiring the publication of any content-removal and deplatforming standards, and their viewpoint-neutral application, are not pre-empted by either § 230(c)(1) or (2). Consistent with § 230, Texas's law protects speakers by requiring platforms to disclose their rules and decisions, and to fairly enforce them. *See* Tex. Bus. & Com. Code §§ 120.051, 120.052. (disclosure requirements and acceptable use policy). These provisions do not hold platforms liable for the content of their users' posts, nor do they prevent platforms from removing speech that, regardless of any viewpoint it presents, falls within the Section 230(c)(2)'s content categories.

III. THE FIRST AMENDMENT LEAVES AMPLE ROOM FOR REGULATING SOCIAL MEDIA PLATFORMS AS COMMON CARRIERS

A. Social media platforms are primarily distributors of others' content. They are not editors of a cohesive speech product like a newspaper.

Social media platforms take the position that the First Amendment shields all of their content-moderation decisions, just as it shields a newspaper's editorial decisions under *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The analogy fails. The hard, practical reality is that newspapers and social media platforms differ more from each other than do the proverbial apples and oranges. No matter how

often they invoke *Tornillo*,[4] the fact remains that platforms do not function like 1970's era newspapers, magazines, or broadcast news.

The platforms-are-like-newspapers view grossly misperceives the platforms' role. Unlike newspapers, platforms exist to distribute the speech of others, not their own content. They do not present a cohesive speech product, akin to the edition of a newspaper or magazine. *See* Eugene Volokh, *Treating Social Media Like Common Carriers?* 1 J. FREE SPEECH L. 377, 423-428 (2021) (analyzing key Supreme Court cases on coherent speech products such as parades and periodicals and distinguishing social media).

That giant social media platforms exist to distribute the speech of others, not their own speech, is self-evident. It is precisely that feature which helps to draw in users and allow platforms to leverage network effects. *Miami Herald* readers safely presume that the newspapers' editors made a conscious choice to present them with the papers' contents. But nobody mistakes the Moms for Liberty Dallas chapter's Facebook page for Meta's corporate speech. And very few, if any Facebook users spend any time on the platform interacting with Meta Corp. or seeking its opinions on various matters. Indeed, YouTube

[4] A search of the ROA using the "find" function in Adobe Acrobat, reveals 179 references to *Tornillo,* mostly in NetChoice's briefing and that of its *amici.* A similar search of the Supp. ROA reveals that during the oral argument hearing before the district court, counsel for NetChoice mentioned *Tornillo* 11 times.

explicitly calls itself a "distribution platform" for others' content. YOUTUBE, *Terms of Service: Our service* (Jan. 5, 2022), https://www.youtube.com/static?template=terms ("The Service allows you to discover, watch and share videos and other content, provides a forum for people to connect …and *acts as a distribution platform* for original content creators[.]") (emphasis added).

Similarly, the platforms take pains to disclaim responsibility for their users' speech. *See, e.g.,* TWITTER, *Terms of Service: 3. Content on the Services*, https://twitter.com/en/tos#update (last visited Feb. 17. 2022) ("All Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content"); YOUTUBE, *Terms of Service: Content on the Service*, https://www.youtube.com/static?template=terms (last visited Feb. 17, 2022) ("Content is the responsibility of the person or entity that provides it to the Service"). One cannot on the one hand claim to be an editor of a cohesive speech product, and on the other hand disclaim all responsibility for the content.

Outside the courtroom, in the marketplace for users' attention, platforms don't claim to be editors of a cohesive speech product. In attracting consumers, the platforms generally hold themselves out as viewpoint-neutral forums for their users' self-expression, and as places to connect and exchange information. For example:

- "Defending and respecting the user's voice is one of our core values at Twitter. This value is a two-part commitment to freedom of expression and privacy." TWITTER, *Rules and Policies: Defending and respecting the rights of people using our service,* https://help.twitter.com/en/rules-and-policies/defending-and-respecting-our-users-voice (last visited Feb. 24, 2022);
- "We empower people to understand different sides of an issue and encourage dissenting opinions and viewpoints to be discussed openly. This approach allows many forms of speech to exist on our platform…and…promotes counterspeech[,]" *id., Rules and Policies: Our approach to policy development and enforcement philosophy,* https://help.twitter.com/en/rules-and-policies/enforcement-philosophy (last visited Feb. 24, 2022);
- "Our mission is to give people the power to build community and bring the world closer together…[and] [e]mpower you to express yourself and communicate about what matters to you," FACEBOOK (AKA META), *Terms of Service: 1. The services we provide,* https://www.facebook.com/legal/terms (last visited Feb. 24, 2022)
- "The goal of our Community Standards is to create a place for expression and give people a voice. Meta wants people to be able to talk openly about the issues that matter to them, even if some may disagree or find them objectionable," *id., Facebook*

Community Standards: Our commitment to voice, https://bit.ly/34Zfb8o (last visited Feb. 24, 2022);

- "Our services are designed to promote economic opportunity for our members by enabling you and millions of other professionals to meet, exchange ideas, learn, and find opportunities…" LINKEDIN, *User Agreement,* https://www.linkedin.com/legal/user-agreement (last visited Feb. 24, 2022);
- "LinkedIn generally does not review content provided by our Members or others," *id., 3.3 Other Content, Sites and Apps;*
- "We enforce these Community Guidelines using a combination of human reviewers and machine learning, and *apply them to everyone equally*—regardless of the subject or the creator's background, political viewpoint, position, or affiliation," YOUTUBE, *Community Guidelines: Overview*, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Feb. 24, 2022) (emphasis added).

Texas can take steps to ensure that these statements are not fraudulent and misleading. It is not too much to ask that platforms give consumers fair warning of their content-moderation rules (Tex. Bus. & Com. Code § 120.051, .052), apply them in a viewpoint-neutral manner (Tex. Bus. & Com. Code § 143A.001, .002), provide notice (Tex. Bus. & Com. Code § 120.103(1)), and explain their moderation decisions. These

are ordinary content-neutral transparency requirements that promote consumer choice and protect individual autonomy. Had Texas regulated the platforms' own expression—the content that the platforms might wish to publish on their own behalf, be it Google's press releases or design elements such as Twitter's blue bird logo—this would be a different case. But because the speech at issue here is not the platforms' speech, but the speech of its users which the platforms are only distributing, their First Amendment rights are not implicated.

Unlike the district court in this case (ROA.21-51178.2584), the recent Florida district court opinion recognized that social media platforms do *not* act like newspaper editors, because "newspapers, unlike social-media providers, create or select all their content." *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at *24 (N.D. Fla. June 30, 2021). Most of the speech carried by social media platforms is functionally invisible to them, even if algorithms screen some content. *Id.* at *24-25.

This limited screening of content cuts in favor of distinguishing platforms from newspaper editors. "[This] is an important holding because it recognizes, in ways that legal and political discourse around online content moderation generally has not, that social media platforms cannot easily be shoehorned into traditional First Amendment rules based on a simplistic model of platform 'rights.'" Alan

Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment,* 1 J. FREE SPEECH L. 337, 366 (2021).

Platforms trim on the edges. They leave most content untouched, but they do decide to suppress a small fraction of content and that problem has generated Texas's response.

The relatively new technologies, and the power of network effects, prevents Texas's law from falling neatly into traditional First Amendment categories, including *Tornillo*. A user who is booted off a platform, or who routinely has her content suppressed for ideological reasons, often cannot just switch platforms without losing valuable connections, reach, and content. She is unlike a reader who may select a different publication at a newsstand.

Deplatformed users are effectively excluded from vast information networks, and that exclusion directly impacts their ability to speak, consume the speech of others, and participate in civic life. When "everyone" is on a platform, that platform is where speakers are likely to find those who are not yet won over to their views or are even aware of their issues. In other contexts, the law has long recognized that the impermissible denial of a single choice among other potential options is unacceptable. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). And while in theory, restaurants and motels have substitutes, there is no substitute

for access to that large portion of the population that is only to be found on a particular network.[5]

Moreover, in the case of political campaigns and speech, timing is often crucial. Banning or suppressing the political speech of users during election season, even if only for a limited time period, might sway the outcome of an election. Similarly, preventing someone from raising campaign contributions on Facebook, or another platform, can hobble candidates and may sometimes protect incumbents.[6] Social media platforms should not act as *sotto voce* king-makers, by determining access to their vast networks.

Unlike Florida's social media law, Texas's law does not restrict the platforms from engaging in their own speech, such as posting fact checks or warnings. The district court's reading of the phrase "or otherwise discriminate" in the definition of "censor" as reaching such

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[5] To be sure, the history, nature, and impact of invidious discrimination is worse than, and quite different from, deplatforming. But telling wrongly deplatformed speakers to "find another Facebook" is no better answer than that which the law properly rejects in the discrimination context. We don't expect people to start their own motel chains or bus companies in response to bias, and governments appropriately regulate access in those areas.

[6] *See* Merideth McGraw and Sam Stein, *'It really f--ks the other '24 wannabes': How Facebook could give Trump a huge boost,* POLITICO (May 4, 2021), https://www.politico.com/news/2021/05/04/trump-facebook-social-media-return-485379 ("Online fundraising has become an increasingly bigger component of politics in recent cycles. And few politicians have taken more advantage of it than Trump...").

conduct is simply incorrect. *See* ROA.21-51178.2588; Tex. Bus. & Com. Code § 143A.001(1). The same *ejusdem generis* canon to Tex. Bus. & Com. Code § 143A.001(1) as should be applied to § 230, would define censorship as only reaching conduct that is closely similar to removing, banning, or hiding content; not engaging in counter-speech.

Likewise, the transparency and disclosure provisions neither prevent the platforms from creating their own speech, nor prevent them from customizing or enforcing their own content-moderation rules.[7] They simply require that the platforms tell users what the rules are, follow those rules in a viewpoint-neutral manner, and explain their application. To be sure, such transparency provisions may cause the platforms to exercise more care in trimming content, but, as they say, that is a feature, not a bug.

[7] These provisions are thus conceptually different from the speech restrictions at issue in cases such as *Citizens United v. FEC,* 558 U.S. 310 (2010) (upholding the right of corporations to make independent expenditures in political campaigns); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995) (upholding the right of parade organizers to determine the content of their own speech); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980) (upholding the right of public utility to include messages on current affairs in its billing statements); *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978) (striking down state law limiting political contributions by corporations).

B. Viewpoint-neutral and factual disclosure provisions are permissible consumer-protection measures.

Requiring commercial actors to disclose information that they don't want to disclose does implicate free speech rights, but when such disclosures are factual, consumer-protection measures, most courts have traditionally applied a low level of scrutiny. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) ("an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"); *see also, e.g., AHA v. Azar*, 983 F.3d 528, 540-41 (D.C. Cir. 2020) (upholding disclosure requirements for hospitals' negotiated rates with insurers); *ECM Biofilms, Inc. v. FTC*, 851 F.3d 599, 617 (6th Cir. 2017) (upholding biodegradability disclosure requirements); *Disc. Tobacco City & Lottery, Inc. v. United States,* 674 F.3d 509, 558 (6th Cir. 2012) (upholding graphic tobacco disclosure provision); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309-10 (1st Cir. 2005) (upholding disclosure provisions for pharmacy benefit managers).

Under NetChoice's theory, the First Amendment would eviscerate many disclosure-based consumer-protection regimes. Governments could not, for example, require newspapers to disclose their subscription cancellation policies or allow individuals to correct credit reports. There is no reason to categorically exempt social media platforms from

requirements that are routinely applied to financial institutions, pharmacy benefit managers, auto dealers, credit agencies, or tobacco companies. Considering the critical role these platforms play in today's society and their profound impact on every facet of the modern American economy, Texas does not ask too much in requiring them to make the same essential consumer disclosures required of other high-impact industries.

Requiring social media platforms to disclose their content-moderation rules and provide notice and an explanation of their decisions are fairly run-of-the-mill consumer-protection measures.[8] Although the topic of content moderation may itself engender some controversy, the contents of an acceptable use policy is a factual matter, and the platforms presumably know what their own rules provide.

Similarly, this is not a situation where the state is compelling the platforms to mouth government slogans – they are simply being asked to disclose their own rules and notify users when and how they are applied. Apparently, like other commercial actors subject to disclosure

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[8] *See* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?* 1 J. FREE SPEECH L. 97, 126 (2021) ("At a minimum, legislation requiring platforms to follow specific and consistent procedures in making deplatforming decisions, and perhaps granting an internal appeals process…probably should survive First Amendment scrutiny… the state interest in protecting *all* users from inconsistent or discriminatory treatment by platforms seems obvious[.]").

requirements, the platforms would prefer not to disclose their own rules or explain themselves, but that is precisely why mandatory disclosure regimes exist in all sorts of settings. There is a distinction between a corporation being required to disclose more than it wants to about its own products, and being forced to utter an opinion about a contested political issue or other controversial social matters.

Texas's law promotes consumers' rights by giving them insight into what the rules are and how they are applied. Importantly, the transparency report provision provides an important check against government jawboning or a heckler's veto by political opponents. Platforms are required to disclose how speech was flagged for suppression, including whether speech was suppressed because of a state actor's complaint. This provision is of obvious value in protecting the First Amendment rights of platform users. Platforms are vulnerable to political coercion seeking the repression of government-disfavored speech, as some state actors may seek to have the platforms do indirectly what the state actors cannot do directly. Setting out the rules ahead of time can be a valuable tool in preventing government from outsourcing censorship to the platforms.

The problems of opaque and arbitrary "content moderation"—including vague guidance on permissible content, unreliable algorithms, and a failure to explain a reason for removed content—are real. The disclosure and transparency provisions of Texas's law are legitimate

attempts to ameliorate these problems. Requiring that elite-posting policies such as Facebook's be disclosed by the platforms, rather than through investigative journalism, is not unconstitutional.

C. Requiring transparent and viewpoint-neutral curation rules for subscribed content feeds promotes free expression and individual autonomy.

Proponents of unfettered platform censorship often argue that consumers wouldn't want to use a platform with anything less than total platform speech-control lest they be flooded with porn, spam, and other unwanted content. This is a false dichotomy. The concern for filtering is weighty and one that should be taken seriously, but it leaves room for states to require platforms to apply their rules neutrally and allow users to self-curate their feeds.

Texas's law does not ban content curation; it merely requires that it be done according to known rules, in a view-point neutral manner, and with notice. Thus, enforcing HB 20 will not open the floodgates to unwanted content. Under Texas's law, the platforms can moderate content, but they can't do it in a black box.

Treating big platforms as common carriers is analogizable to existing jurisprudence on limited public forums, where content-based restrictions are allowed so long as they are reasonably related to the purposes of the forum, but viewpoint discrimination is not allowed. *See Pleasant Grove City v. Summum,* 555 U.S. 460, 470 (2009); *Good News*

Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001) (state may reserve limited public forum for certain groups and topics but may not discriminate on basis of viewpoint); *see also* Eugene Volokh, *Video: Whether Social Media Platforms Should Be Treated Like Common Carriers,* CATH. LAW: INAUGURAL SEIGENTHALER DEBATE (Feb. 16, 2022), https://youtu.be/7fnLvXWno5I, timestamp 1:12:43-1:14:36 (suggesting analogy of social media platforms to limited public fora).

To be sure, big platforms are not state actors (unless they censor at the behest of the government), but the point here is that there already exists a workable jurisprudential framework enabling forum operators to impose reasonable limits on content while remaining viewpoint neutral within those categories. That there may be some line drawing involved, doesn't prevent that framework from allowing courts (and lawyers) to effectively evaluate the public comment periods of city council meetings or school board meetings. Like many limited public fora, social media platforms generally cast a wide net for speakers (users) and only exclude some nonconforming content. Indeed, the value of their networks depends largely on the length and breadth of the nets they cast.

Second, many platforms include a self-curation function, which allows users to select the content they want to view. *See* TWITTER, https://help.twitter.com/en/using-twitter/following-faqs (last visited Feb. 22, 2022) ("Following someone on Twitter means: [1] You are

subscribing to their Tweets as a follower [2] Their updates will appear in your Home timeline"); *id., About your Home timeline on Twitter* https://help.twitter.com/en/using-twitter/twitter-timeline (last visited Feb. 22, 2022) (explaining content-curation on users' timelines and feature to switch to primarily chronological display of content); Volokh, *supra,* at 440 (noting the significance of the subscription function). Other platforms, such as Facebook, have a "friending" feature. FACEBOOK, *Friending,* https://bit.ly/3DVEtAH (last visited Feb. 22, 2022). These subscription functions promote individual autonomy without the need for direct content-curation by the platform, because users can filter their own feeds. If someone begins posting content that offends a given user, or just proves tiresome, that user can simply "un-follow" or "un-friend" the speaker.

And platforms enable like-minded users to find each other and associate for social and political purposes in other ways. Nobody is forced to join or read the Moms for Liberty or NEA pages on Facebook, but laws such as Texas's will only help these groups pursue their opposing ideologies. It is the absence of protection from viewpoint discrimination that threatens their expressive and associational activity. And the wider public also benefits from a freer marketplace of idea and the opportunity to hear more viewpoints.

Some platforms also have a "mute" function which provides a comparable benefit.[9] HB 20 specifically protects individual users' option to use such features to self-curate their feeds. Tex. Bus. & Com. Code § 143A.006(b) (law may not be construed to restrict "a user's ability to censor specific expression… at the request of the user").

It is also true that platforms enhance the user experience by promoting certain content ahead of other content—for example, trending content—in a user's timeline. *See* Volokh, *supra,* at 443. Doing so can prevent content overload, particularly for users that follow hundreds of accounts. If done based on an objective metric, such as user engagement,[10] doing so would not present an issue under HB 20. After all, the vast amount of speech on social media platforms must be organized in some fashion, and platforms have an interest in making these organizational choices.

Nor is post-prioritization constitutionally immune from all regulation. If done correctly, states (or Congress) can require platforms

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[9] LINKEDIN, https://www.linkedin.com/help/linkedin/answer/72150 (last visited Feb. 22, 2022) ("If you no longer wish to see the content of someone in your feed, you can always unfollow or mute this person"). Indeed, on at least one platform, a user can even mute certain words, emojis, hashtags, or phrases. TWITTER, *How to use advanced muting options*, https://bit.ly/3levd26 (last visited Feb. 22, 2022).

[10] "User engagement" in this context could mean a quantifiable metric such as the number of other users viewing, commenting on, replying to, or re-posting content.

to apply their post-prioritization rules in a viewpoint-neutral manner. *See* Volokh, *supra,* at 440, 443.

One can analogize this situation to that faced by military recruiters in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60-62 (2006). There the Supreme Court required law schools to not only host military recruiters, but to provide email and other notice to students on the same terms as to other recruiters, even though the law school faculties disagreed with the then-existing military rules regarding gay and lesbian servicemembers. *Id.* at 62; *see also* Volokh, *supra,* at 440-45. And to be sure, Texas only bars the platforms from engaging in viewpoint discrimination; it does not stop the platforms from serving users the viewpoints that *they* select, including through user-selected curation preferences.

Similarly, through various anti-discrimination laws, both Congress and state legislatures have for decades constrained the hiring decisions of employers in requiring that decisions to hire, fire, and promote not be based on race or other protected characteristics. These same principles can be applied in the social media context.

Texas's requirements that platforms disclose how they place, rank, and promote content (Tex. Bus. & Com. Code § 120.051(a)(1)-(4)) and refrain from de-boosting content in a view-point discriminatory manner (Tex. Bus. & Com. Code § 143A.001(1), § 143A.002(a)) are in accord with this non-discrimination principle.

CONCLUSION

This Court should vacate the district court's order.

Dated: March 7, 2022

Respectfully submitted,

s/Endel Kolde

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CERTIFICATE OF COMPLIANCE

In accordance with FED.R.APP.P. 32, I certify that this brief was generated using Microsoft Word and is set in 14-point Century Schoolbook, a proportionately spaced font; and as calculated by Microsoft Word, the relevant parts contain 6489 words, less than half the number of words permitted for the parties' briefs. The brief contains no personal identifiers.

Dated: March 7, 2022

s/Endel Kolde

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I hereby certify that today I electronically filed this brief using the appellate CM/ECF system and that all participants are registered CM/ECF users and will be served via that platform.

Dated: March 7, 2022

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