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,

vs.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF APPELLEES AND AFFIRMANCE

On Appeal from the United States District Court for the Western District of Texas, No. 1:21-cv-840

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiffs-Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Circuit 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.

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TechFreedom has no parent corporation. No publicly held company has any ownership interest in TechFreedom.

/s/ Corbin K. Barthold

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has closely studied recent state laws that attempt to regulate social media. Its experts have written and spoken extensively on those laws' constitutional infirmities, as well as on why those infirmities cannot be fixed by a "common carriage" theory. See, e.g., Corbin K. Barthold, *Social Media and Common Carriage: Lessons From the Litigation Over Florida's SB 7072*, WLF Legal Backgrounder, https://bit.ly/3FmvYzl (Sept. 24, 2021); UCLA School of Law, *A Space for Everyone? Debating Online Platforms and Common Carriage Rules*, YouTube, https://bit.ly/3Dfa3Ir (June 4, 2021) (debate between TechFreedom President Berin Szóka and Professor Eugene Volokh); Berin Szóka & Corbin K. Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, Lawfare, https://bit.ly/2YxGxPo

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

(Apr. 14, 2021); Corbin K. Barthold & Berin Szóka, *Florida's History of Challenging the First Amendment Shows DeSantis' 'Tech Transparency' Bill is Doomed*, Miami Herald, http://hrld.us/2ZPzqCf (Mar. 25, 2021).

TechFreedom submits this brief to assist the Court in understanding the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment.

SUMMARY OF ARGUMENT

Announcing his support for the social media speech code that would become HB20, Texas Governor Greg Abbott tweeted: "Too many social media sites silence conservative speech and ideas and trample free speech. It's un-American, Un-Texan, & soon to be illegal." Greg Abbott (@GreggAbbott_TX), Twitter (Mar. 4, 2021), 11:52 PM, https://bit.ly/3jqSwWP. A few months later, in an order blocking enforcement of a similar law passed by Florida, District Judge Hinkle offered the perfect response: "[L]eveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest." *NetChoice LLC v. Moody*, 546 F. Supp. 3d 1082, 1095 (N.D. Fla. 2021).

Under the First Amendment, "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This is a right to "editorial control and judgment" over the speech one publishes and disseminates. *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). See Appellees' Response Brief (ARB) 17-19 (discussing *Hurley* and *Miami Herald* in greater detail). With its onerous reporting and process requirements, and its unprecedented (and impossible) demand for viewpoint neutrality, HB20 roundly violates this right.

Under a conventional First Amendment analysis, HB20 is doomed. Hence the Texas legislature's attempt to insulate its new law from such analysis under the guise of "common carriage." HB20 §§ 1(3), (4). But slapping the label "common carrier" on something doesn't make it so. And even if it did, common carriers retain their First Amendment rights, and they have much broader discretion to refuse service than HB20 allows for.

We address Texas's "common carrier" theory as follows:

I. Social media websites—even large ones—are nothing like common carriers. Common carriage is about (1) *carriage*, i.e., pure transportation or transmission, (2) of uniform *things*, i.e., people, commodities, or parcels of private information, (3) in a manner that is

common, i.e., indiscriminate. When determining which communications services are telecommunications common carriers, the Federal Communications Commission (FCC) has adhered to these points. Social media, meanwhile, depart from them in all pertinent respects. Social media are (1) a diverse array of data-*processing* products (microblogs, videochats, photo streams, and so on), (2) typically shared as a public-facing *expressive* activity, (3) that are offered *subject to the condition* of a user's compliance with extensive terms of service.

II. Contrary to HB20's naked assertions—and to arguments made on appeal by Texas and its *amici*—large social media websites display none of the indicia of traditional common carriage:

- Even if the sites were "affected with a public interest" (whatever that might mean), see § 1(3), the Supreme Court—and at least one of the common carrier theory's most notable proponents—don't think a "public interest" test is useful for determining who can be treated as a common carrier.
- Social media websites have not "enjoyed governmental support," see § 1(3), in any special or unique sense. They certainly have not received anything akin to the exclusive public easements that governments granted to railroads and telegraph companies.

- Social media websites do not possess "bottleneck" control over speech. In fact, social media markets remain highly fluid and competitive. In any event, the concept of "market dominance," see § 1(4), is not useful. Even an entity with substantial market power retains its First Amendment rights.
- Such sites do not "hold" themselves "out" as willing to serve the public indiscriminately. Rather, they serve the public *subject* to various rules of conduct—rules that reflect the sites' normative judgments about what expression they wish to foster or are willing to tolerate.

III. Texas and its *amici*'s main authorities—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)—show, at most, that an entity can sometimes be required to host another's speech if doing so does not "interfer[e]" with the host speaker's "desired message," *Rumsfeld*, 547 U.S. at 64. The whole point of HB20, by contrast, *is* to "interfere" with social media websites' "desired message." What's more, unlike the entities regulated in *PruneYard*, *Rumsfeld*, and *Turner*, social media websites function as editors, constantly making decisions about whether and how to allow, block, promote, demote, remove, label, or otherwise respond to content.

Curation and editing of expression are antithetical to the concept of common carriage.

IV. Even if social media websites *were* similar to common carriers, most, if not all, of HB20 would remain unconstitutional. In addition to the fact that common carriers are not stripped of their First Amendment rights (see ARB 36-37), no common carrier has ever had to serve customers without regard to their behavior. Common carriers have always been entitled to refuse service to anyone who misbehaves, disrupts the service, harasses other patrons, and so on. Because HB20 tries to force websites to serve *even* such people, it is not itself a proper common carriage regulation.

ARGUMENT

I. Social Media and Common Carriage Are Irreconcilable Concepts

"A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." *McCoy v. Pac. Spruce Corp.*, 1 F.2d 853, 855 (9th Cir. 1924). As its name suggests, in other words, "common carriage" is about offering, to the *public at large* and on

indiscriminate terms, to carry generic *stuff* from point A to point B. Social media websites fulfill none of these elements.

A. Social Media Are Not "Carriage": They Are Diverse and Evolving Data-Processing Products

Lumber is lumber. Once it has arrived at a construction site, one two-by-four is generally as good as another. How the wood got to the site is, for purposes of the construction itself, irrelevant. Putting common carriage in its proper historical context begins with this fundamental point. The "business of common carriers" is, at its core, "the transportation of property." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406 (1914); see Interstate Commerce Act, 24 Stat. 379, 379-80 (1887) (prohibiting a "common carrier" in "the *transportation* of *passengers or property*" from discriminating, by price, among its similarly situated customers) (emphasis added).

True, the "transmission of intelligence" has sometimes been treated as "of cognate character" to traditional common carriage. *German Alliance*, 233 U.S. at 406-07. But that "cognate character" arose in fields, such as telegraphy and telephony, where information was treated as a commodity product to be purveyed through some sort of (typically scarce) public thoroughfare. See *id.* at 426-27 (Lamar, J., dissenting). The key is that, like traditional common carriage, "they all ha[d] direct relation to

the business or facilities of *transportation*" itself. *Id.* at 426 (emphasis added). Although it doubtless contains a message, a telegram is best thought of as a widget of private information conveyed along "public ways," *id.*, by a commodity carrier, see Mann-Elkins Act, 36 Stat. 539, 544-45 (1910) (applying the Interstate Commerce Act to telegraph and telephone companies).

Social media websites are nothing like this. They are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not *transportation* at all. The FCC has long distinguished between "basic" services, which simply *carry* data along, and "enhanced" services, which *process* data in some way. See, e.g., *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 FCC 2d 384, 420, ¶ 97 (1980). Any service that offers more than "pure transmission capability" is an "enhanced" service. *Id.* Social media websites clearly offer "enhanced" services, extensively manipulating data to enable, structure, and shape microblogs, photo-sharing, video-streaming, group chats, newsfeeds, and more. "Enhanced services" are, by definition, not common carriers. See *Verizon v. FCC*, 740 F.3d 623, 629-30, 650 (D.C. Cir. 2014).

It is not true, as Texas and its *amici* claim, that social media services are simply "conduits" of information, akin to the telegraph or the

telephone. See, e.g., Appellant's Opening Brief (AOB) 22, Claremont Brief 11, 14, 17-18, Hamburger Brief 4, 7, 10, 11-13, 17, 20. Again, a service that offers *anything* more than "basic transmission" is an "enhanced" service, and, thus, not a common carrier. Indeed, because the bar for qualifying as "more than a basic transmission service" is low, even some services that, unlike social media, involve an element of pure information "transport" are, nonetheless, not common carriers. Although telephony, which connects users without any intervention by the carrier, is common carriage, even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not. See *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd. 12075 (2018).

Social media websites constantly process information in new ways. What they do *not* do is passively act as "carriers" of information.

B. Social Media Are Not "Carriage": They Are Fundamentally Expressive

Common carriage, to repeat, involves the transportation of people and commodities. Telegraphy and telephony press the boundaries of that core, transportational conception of common carriage. One message, after all, is not interchangeable with another. There is, however, a key sense in which a telegram or a telephone call is indeed just a widget of

information: such communications are usually private. And being private, they are usually treated as strictly between the individual sender and recipient. Cf. 18 U.S.C. § 2511 (criminal penalties for intercepting a wire or secretly recording a call). This means that a carrier may transmit a telegram or a call while remaining indifferent to its content.

Once a "telephone company becomes a medium for public rather than private communication," however, "the fit of traditional common carrier law becomes much less snug." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987). While transmitting a private call or message can be thought of as carrying an information widget, transmitting a public-facing call or message is clearly about *broadcasting* ideas and viewpoints. *Id*. It is a mode of expression, not only by the direct speaker, but also by the purveyor of the speech. "Mass-media speech," in short, "implicates a broader range of free speech values" than does "person-to-person" speech. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010).

This is not to say that all private communications are common carriage. As we saw above, text messaging is not. Nor would an Internet-based messaging service such as WhatsApp be. What is true, though, is

that *public* communication is, virtually by definition, not common carriage. Indeed, Congress considered, and rejected, proposals to make broadcasting common carriage in the Radio Act of 1927, and it explicitly declared that broadcasting is *not* common carriage in the Communications Act of 1934. *Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 105 (1973); see 47 U.S.C. § 153(h).

As the appellees explain (ARB 17-19), two of the key precedents governing this case are *Miami Herald*, 418 U.S. 241, and *Hurley*, 515 U.S. 557. *Miami Herald* strikes down a Florida law that required a newspaper to print a political candidate's reply to the newspaper's unfavorable coverage. *Hurley* holds that a private parade may exclude some groups from participating. Like a newspaper (*Miami Herald*) or a parade (*Hurley*), a social media website presents a collection of messages to a wide audience. This public-facing expression is incompatible with—indeed, contradictory to—the concept of common carriage. Calling the websites "common carriers" anyway doesn't make it so. The Texas legislature could not overturn *Miami Herald* or *Hurley* simply by declaring that newspapers or parades are "common carriers." The same holds true here.

Forcing upon a speaker "the dissemination of a view contrary to one's own" curtails the speaker's "right to autonomy over [its] message,"

in violation of the First Amendment. *Hurley*, 515 U.S. at 576. That is the overriding principle that HB20 flouts. "Common carriage" is not a magic label that can make this First Amendment violation go away.

C. Social Media Are Not "Common": They Are Not Offered Indiscriminately

An edited product is, inherently, not common carriage. Although the FCC has waffled over whether most Internet service providers are common carriers, for instance, what's clear is that if an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing *en banc*); contra Hamburger Brief 15 (questioning this standard, yet offering no reason why a common-carriage test that applies to ISPs should not also apply, *a fortiori*, to social media). So long as it's up front about what it's doing, a provider that wants to engage in "editorial intervention"—and, thus, not common carriage—is free to do so. 855 F.3d at 389.

All prominent social media websites engage in such intervention. Twitter, for example, has rules that seek to "ensure all people can participate in the public conversation freely and safely." Twitter, *The Twitter Rules*, https://bit.ly/3cpc75S (last accessed Apr. 4, 2022).

"Violence, harassment and other similar types of behavior discourage" such conversation, and are therefore barred by Twitter's rules. *Id*. Not surprisingly, bans on things like harassment and hate speech are common among online platforms. See ARB 5 (citing ROA.359, ROA.383, ROA.1664-1721).

What's more, such bans have always been common. "You agree not to use the Web site," Facebook's terms of service said in 2005, to post "any content that we deem to be harmful, threatening, abusive, harassing, vulgar, obscene, hateful, or racially, ethnically or otherwise objectionable." Wayback Machine, *Facebook Terms of Use*, https://bit.ly/3w1gYC5 (Nov. 26, 2005). Indeed, one can go back much farther than that. As early as 1990, Prodigy, one of the first social networks, made its curation function a central part of its marketing appeals. "'We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve,'" it declared. *Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995). "'Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.'" *Id*.

That social media websites engage in curation and editing should come as no surprise, given that curation and editing are a fundamental

aspect of the service those websites exist to provide. Without intermediaries, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries enable users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day." Yoo, *supra*, 78 Geo. Wash. L. Rev. at 701. Indeed, "social media" could not exist if intermediaries did not play this role. It is only because a website engages in curation and editing that a mass of "social" media becomes navigable by the average user. More than that, such curation and editing is necessary to make social media a pleasant experience worth navigating. "[T]he editorial discretion that intermediaries exercise" enables users to avoid "unwanted speech" and "identify and access desired content." *Id*.

Texas and its *amici* contend that, to enjoy a First Amendment right to editorial discretion, social media services must "pre-screen" posts. AOB 23, Claremont Brief 17, Hamburger Brief 13-14. Such a rule would be perverse, rewarding websites for engaging in more of the so-called "censorship" that Texas claims to oppose. In any case, there is no reason why, under the First Amendment, the time at which editorial control is exercised should matter. Consider talk radio, in which a station lightly "screens" calls in advance, yet retains the (much needed) right to cut off callers at will.

Not only do social media refuse to publish content indiscriminately; they are widely expected not to do so. No matter how many times Texas and its *amici* assert otherwise (see, e.g., AOB 23, States' Brief 10-11, Claremont Brief 13, 22-23), everyone from advertisers to civil rights groups to the media holds online platforms responsible for the content they spread. See, e.g., Tom Maxwell, *Twitch Streamers Demand the Platform 'Do Better' at Moderating Hate Speech*, Input, https://bit.ly/37wIbSo (Aug. 10, 2021); Analis Bailey, *Premier League, English Soccer Announce Social Media Boycott in Response to Racist Abuse*, USA Today, https://bit.ly/3xIpfdT (Apr. 24, 2021). An underlying assumption in the recent furor over the *Wall Street Journal*'s "Facebook Files" coverage was that Facebook can, and should, intervene, extensively, in its own products to ensure that they are free, so far as possible, of toxic content. See *The Facebook Files*, Wall St. J., https://on.wsj.com/3GPgzYX (last accessed Apr. 4, 2022).

II. Social Media Bear None of the Indicia of Common Carriage

HB20, Texas, and Texas's *amici* declare that large social media websites meet some of the criteria exhibited by common carriers of the past, such as railroad and telegraph companies. Even if these criteria had

more than limited relevance to the rights of expressive entities (they don't), social media websites meet none of the criteria at hand.

A. "Affected With a Public Interest"

HB20 claims that social media websites are "affected with a public interest." § 1(3). Texas and some of its *amici* mention this claim (AOB 26, Claremont Brief 28, Hamburger Brief 8), but, not surprisingly, they don't press the point. As the Supreme Court has said, whether a business serves a "public interest" is "an unsatisfactory test of the constitutionality of legislation directed at [the business's] practices or prices." *Nebbia v. New York*, 291 U.S. 502, 536 (1934). Even Justice Thomas—perhaps the most prominent champion of the idea that social media are common carriers—concedes that a "public interest" test for common carriage "is hardly helpful," given that "most things can be described as 'of public interest.'" *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

B. "Have Enjoyed Governmental Support"

HB20 says that social media websites have "enjoyed governmental support in the United States." § 1(3); see also Hamburger Brief 8-9. This presumably refers to Section 230 of the Telecommunications Act of 1996. 47 U.S.C. § 230; see ARB 32-34 (discussing Section 230).

True enough, businesses that employ property acquired through eminent domain have sometimes had to operate as common carriers. It does not follow that Section 230, which broadly protects *all* websites for publishing speech that originates with others, creates a similar *quid pro quo* obligation. There are several problems with the comparison:

- Section 230 was not a gift to a few large social media websites (none of which existed when Section 230 was passed). It applies to every Internet website and service. See 47 U.S.C. §§ 230(c)(1), (c)(2), (f)(2), (f)(3); contra Hamburger Brief 18-19 (wrongly stating that Section 230 "privileges social media"). If Section 230 doesn't turn a blog, or Yelp, or a newspaper's comments sections, or an individual social media account, into a common carrier, it's unclear why it should turn Facebook, YouTube, or TikTok into one.

- Section 230 simply ensures that the *initial speaker* is the one liable for speech that causes legally actionable harm. See *id.* §§ 230(c)(1), (f)(3). It is not a "privilege" akin to the government handing real property to one firm, to the exclusion of potential competitors, for use as a railroad or a telegraph line.

- Far from being a sign that the government wants social media websites to act as "conduits" or common carriers, Section 230 is

> a sign that it recognizes they are editors, and wants them to act as discerning ones. Section 230 ensures that a website can "exercise" a "publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content"—without (in most cases) worrying that doing so will trigger liability. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997); contra Hamburger Brief 6-7 (wrongly stating that Section 230 "recognizes" social media services as common carriers). Section 230 does not curtail websites' First Amendment rights; it *endorses* them.

And if the *federally* enacted Section 230 is the *quid*, why should a *state* government get to impose the *quo*? The history of common carriage in the United States, going back to the Interstate Commerce Act of 1887, is one of aiding *interstate* commerce by setting and enforcing *national* standards. Precisely because they were regulated federally as common carriers, telegraph companies were not subject to state regulation. *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919). Even if Section 230 could serve as the basis for common carriage rules, it couldn't serve as the basis for common carriage rules imposed *by Texas*.

C. "Market Dominance"

HB20 claims that large social media websites "are common carriers by virtue of their market dominance." § 1(4); but see generally AOB (appearing to abandon this argument). The first problem on this front is the brute legal fact that an entity does not forfeit its constitutional rights by succeeding in the market. The Supreme Court accepted that the *Miami Herald* enjoyed near-monopoly control over local news; yet the newspaper retained its First Amendment right to exercise editorial control and judgment as it saw fit. 418 U.S. at 250-52, 256-58.

This is not to say that media firms, social or otherwise, are above the antitrust laws. A newspaper that uses its market power to inflict *economic* pain on a rival—one that, say, strongarms advertisers into boycotting, and thereby bankrupting, a local radio station—is inviting antitrust liability for its business practices. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). It *is* to say, however, that the right to reject speech for *expressive* reasons travels with a company, like a shell on a turtle, wherever the company goes—even if the company, like Yertle, is king of the pond. Cf. Dr. Seuss, *Yertle the Turtle and Other Stories* (1958).

In any event, the social media market is as lively as ever. It continues to offer many avenues of expression and communication. If you're convinced (as Gov. Abbott and HB20's other supporters explicitly

are) that "Big Tech" is "out to get" Republicans, you can blog on Substack, post on Parler, Gettr, or Gab, message on Signal or Discord, and watch and share videos on Rumble. And anyone who claims that network effects will ultimately thwart this competition must grapple with the rapid rise of TikTok.

Contrary to Texas's claim, the "old telegraph and telephone companies" are not the "technological ancestors" of social media services. AOB 3. The Internet is not "a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Even the largest social media websites are just a piece of that "relatively unlimited" world of "communication." As one (conservative) commentator has put it, social media websites are "equivalent not to the telegraph line," but to a few "of the telegraph line's many customers." Charles C.W. Cooke, *No, Big Tech Firms Are Not Common Carriers*, National Review Online, https://bit.ly/3hQMYDQ (Aug. 2, 2021). They are just a handful of "website[s] among billions." *Id*.

D. "Holding" Oneself "Out" as "Willing to Deal"

Common carriers, Texas correctly notes, "hold" themselves "out" as "willing to deal with all comers." AOB 27. Texas is mistaken, however, in

assuming that social media services meet this definition. Although it might indeed be said that the websites welcome "all the world" to *join*, whether one gets to *stay* is contingent on one's complying with the sites' terms of service. Social media websites are not "willing to deal" with users who promote violence, engage in harassment, or spew hate speech. See Sec. I.C., *supra*.

Even if the websites did hold themselves out as serving the public indiscriminately (they don't), the "holding out" theory of common carriage is "conspicuously empty." Thomas B. Nachbar, *The Public Network*, 17 CommLaw Conspectus 67, 93 (2008). A "holding out" standard is easy to evade. See Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. of Free Speech Law 463, 475 (2021). Suppose HB20 went into effect, and the websites responded by tightening their terms of service further, thereby making even clearer that they do not serve the public at large. What then? Rather than admit how badly its attempt to force the websites to publish unwanted speech had backfired, Texas would probably declare that the websites are common carriers because the state has *ordered* them to serve the public at large. Such a declaration would confirm that the "holding out" theory is empty at best, and circular at worst.

Texas agrees that the "holding out" rule is "circular" if a company can *avoid* common carrier status by *not* "holding" itself "out" to the public. AOB 27. It then tries to save the test, however, by claiming that a state can *impose* common carrier status simply by baldly declaring that a company *should* "hold" itself "out" to the public. *Id*. That won't do. The test remains circular under Texas's formulation; it's just that the location of the circularity has moved. (At least Texas does not confidently announce that the "holding out" rule applies to any business that "offer[s] [its] services to the public, even if not all the public"—a standard that would make virtually every business, from an airline to a local bakery, a "common carrier." Hamburger Brief 15-16. But cf. *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018).)

III. Supreme Court Case Law Does Not Save HB20's Common Carrier Theory

Texas and its *amici* cite three Supreme Court cases—*PruneYard*, *FAIR*, and *Turner*—as support for the notion that social media websites are analogous to common carriers. See, e.g., AOB 18-19 (*PruneYard*), 19-20, 23 (*FAIR*), 28-29 (*Turner*); States' Brief 5 (*PruneYard*), 6-8 (*FAIR*); Claremont Brief 19 (*PruneYard*), 12-16, 19-20 (*FAIR*), 11-12, 18-19, 24-27 (*Turner*); Hamburger Brief 12 (*Turner*). None of the three helps their cause.

A. *PruneYard Shopping Center v. Robins*

At issue in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), was whether a shopping mall could be forced, under the California Constitution, to let students protest on its private property. Yes, *PruneYard* says, it could. In so saying, however, *PruneYard* distinguishes *Miami Herald*. That case involved "an intrusion into the function of editors," *PruneYard* notes—a "concern" that "obviously" was "not present" for the mall. *Id*. at 88. Here, by contrast, that concern obviously *is* present, as explained above. "Intru[ding]" into social media websites' "function" as "editors" is what HB20 is all about.

What's more, *PruneYard* announces that "the views expressed by members of the public" on the mall's property would "not likely be identified with that of the owner." *Id*. at 87. Even if that evidence-free declaration was true, at the time, of the mall (we have our doubts), it is certainly not true today of social media websites. As we've discussed—and Texas and its *amici*'s repeated claims to the contrary notwithstanding—those sites *are* "identified" with the speech they spread. A social media service that publishes a certain speaker is widely considered to have deemed that speaker "worthy of presentation," and "quite possibly of support as well." *Hurley*, 515 U.S. at 575.

The mall also challenged the speech-hosting obligation under the Takings Clause. On its way to rejecting that challenge, *PruneYard* makes further findings pertinent to this case. The students, *PruneYard* notes, "were orderly," and the mall remained free to impose "time, place, and manner regulations" on others' speech that would "minimize any interference with its commercial functions." 447 U.S. at 83-84. This makes *PruneYard* nothing like the case here, in which Texas seeks to make websites publish hostile, abusive, highly disruptive speech. In effect, HB20 requires the websites to allow *disorderly* conduct, and it *bars* them from imposing reasonable time, place, and manner regulations.

B. *Rumsfeld v. FAIR*

In protest of the military's "Don't ask, don't tell" policy, various law schools stopped allowing military recruiters on their campuses. Let the recruiters in, Congress responded, in a law known as the Solomon Amendment, or lose government funding. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), rejects an association's contention that the Solomon Amendment violates the First Amendment.

Distinguishing *Miami Herald* and *Hurley*, *FAIR* concludes that "accommodating the military's message d[id] not affect the law schools' speech." *Id*. at 63-64. Unlike "a parade, a newsletter, or the editorial page

of a newspaper," *FAIR* explains, "a law school's decision to allow recruiters on campus is not inherently expressive." *Id*. at 64. The pertinent distinction between job-recruitment meetings, on the one hand, and parades, newsletters, and newspapers, on the other, is not hard to divine. One-on-one recruitment meetings are akin to telegraphic or telephonic communication—the passage of private information widgets—and not at all like the public-facing expression of views undertaken by a parade, a publication, or a website.

HB20 requires social media to platform various speakers, and to spread and amplify, far and wide, almost anything those speakers wish to say. It thus looks nothing like the law at issue in *FAIR*, a case about direct communication between a recruiter willing to talk and a law student willing to listen. For *FAIR* to resemble this case, Congress would have had to pass a law altogether different from the Solomon Amendment. Picture a law requiring law schools to let neo-Nazis maraud their halls toting signs and bullhorns. *That* is the equivalent of what HB20 requires of select social media websites.

C. *Turner Broadcasting System v. FCC*

In the 1992 Cable Act, Congress imposed "so-called must-carry provisions" that "require[d] cable operators to carry the signals of a

specified number of local broadcast television stations." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 630 (1994). While concluding that cable operators engage in speech protected by the First Amendment, *id*. at 636, *Turner* subjects the must-carry provisions merely to intermediate, rather than to strict, scrutiny. *Turner* is brimming, however, with distinctions that render it inapplicable to social media websites.

First, like traditional common carriers, see *German Alliance*, 233 U.S. at 426-27 (Lamar, J., dissenting), cable systems use "physical infrastructure"—"cable or optical fibers"—that require "public rights-of-way and easements," 512 U.S. at 627-28. This setup "gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id*. at 656. This means that "a cable operator, *unlike speakers in other media*," can "silence the voice of competing speakers with a mere flick of the switch." *Id*. at 656-57 (emphasis added). On precisely this ground, *Turner* distinguishes *Miami Herald*, notwithstanding the fact that a "daily newspaper" may "enjoy monopoly status in a given locale." *Id*. at 656. "A daily newspaper," after all, "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications." *Id*. Just the same can be said of social media websites. Whatever the level of their market control—it's not much, in

our view, as we have explained—they do not, when "assert[ing] exclusive control over [their] own … copy," thereby "prevent other[s]" from "distribut[ing]" competing products "to willing recipients." *Id*.

Second, "cable personnel" generally "do not review any of the material provided by cable networks," and "cable systems have no conscious control over program services provided by others." *Id.* at 629 (quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988)). Cable operators are thus, "in essence," simply "conduit[s] for the speech of others." *Id*. They generally transmit speech "on a continuous and unedited basis to subscribers." *Id*. This makes sense, given that most broadcast television content is comparatively sanitized and, certainly when compared to the worst online speech, uncontroversial. *Turner* concludes, therefore—again while distinguishing *Miami Herald*—that "no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that 'the safe course is to avoid controversy,' and by so doing diminish the free flow of information and ideas." *Id*. at 656 (quoting *Miami Herald*, 418 U.S. at 257). This is the precise opposite of the situation with social media websites. The websites, to repeat, are not simply "conduits"; they are provided on a curated and edited basis, and they do sometimes take "the safe course" and "avoid controversy." Witness, for instance, Twitter's

decision to stop publishing political advertisements. See *Wash. Post v. McManus*, 944 F.3d 506, 517 n.4 (4th Cir. 2019).

Third, and relatedly, *Turner* declares—again while distinguishing *Miami Herald* (and it could have added *Hurley* to boot)—that there was "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655. This, again, because of the cable operators' "long history of serving" merely "as a conduit for broadcast signals." *Id.* The cable operators did not even contest this point; they did "not suggest" that "must-carry" would "force" them "to alter their own messages to respond to the broadcast programming they [we]re required to carry." *Id.* As we've explained, the "long history" behind social media could not be more different. Naturally, given that history, social media services vigorously contend that they would have to "respond" to certain messages they might be required "to carry."

Fourth, the central issue in *Turner* was whether the must-carry provisions were content-neutral. "Broadcasters, which transmit over the airwaves, are favored," *Turner* acknowledges, "while cable programmers, which do not, are disfavored." *Id.* at 645. But this distinction, *Turner* concludes, did not make the must-carry provisions a content-based law subject to strict scrutiny. According to *Turner*, "Congress' overriding

objective … was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free [broadcast] television programming." *Id*. at 646. In other words, the law was purely about "economic incentive[s]." *Id*. The cable operators, for their part, did little to argue otherwise, raising only "speculati[ve]" "hypothes[es]" about "a content-based purpose" for the law. *Id*. at 652. Here, by contrast, HB20 compels the carrying of speech based on its viewpoint. § 6; see *Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015) (viewpoint discrimination is simply "a more blatant and egregious form of content discrimination").

IV. The Burdens Imposed by HB20 Go Far Beyond Common Carriage

Texas's law effectively compels large social media services to deal with all users, however obnoxious their behavior. This is not what common carriage meant at common law. "An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons[.]" *Lombard v. Louisiana*, 373 U.S. 267, 280 (1963) (Douglas, J., concurring) (citing Bruce Wyman, *Public Service Corporations* (1911), available at https://bit.ly/3xekNXI). "If [a] guest … misconducts himself so as to annoy other guests, he may for that cause be ejected from the inn." Wyman, *supra*, § 630. "Telegraph companies

likewise need not accept obscene, blasphemous, profane or indecent messages." *Id.* § 633.

In short, common carriers enjoyed broad discretion to "restrain" and "prevent" "profaneness, indecency, [and] other breaches of decorum in speech or behavior." *Id.* § 644. They were not even "bound to wait until some act of violence, profaneness or other misconduct had been committed" before expelling those whom they suspected to be "evil-disposed persons." *Id.*

True, there were limits. A telegraph company that refused to carry an "equivocal message"—one whose offensiveness was debatable—did so "at its peril." *Id.* § 632. Although a telephone service could "cut off" a "habitually profane" subscriber, it had to show some tolerance to someone who "desisted from objectionable language upon complaint being made to him." *Id.* And regulators could (and in some areas still can) assess whether certain of a common carrier's rules and prohibitions are "just and reasonable." See, e.g., 47 U.S.C. §§ 201(b), 202(a). But in general, the "principle of nondiscrimination does not preclude distinctions based on reasonable business classifications." *Carlin*, 827 F.2d at 1293. Thus, a telephone company could refuse to carry all price advertising in its yellow pages directory (a common carrier service) even though this was an "explicit content-based restriction." *Id.*

Texas's attempt (see AOB 26) simply to "label" HB20 a "common carrier scheme" has "no real First Amendment consequences." ARB 36-37 (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part)). But although a common carrier's First Amendment rights exist apart from its common-law powers over patrons' behavior, it still bears noting that, under those common-law rules, HB20 cannot qualify as a proper common-carriage law. Above all, a valid common-carriage regulation would not bar social media from setting reasonable rules governing "indecent messages" or "disorderly guests." Wyman, *supra*, §§ 630, 633.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,422 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

On April 8, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

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