Nos. 22-277, 22-555

In The Supreme Court of the United States

ASHLEY MOODY,
Attorney General of Florida, et al.,

Petitioners,

v.

NETCHOICE, LLC, dba
NETCHOICE, et al.,

Respondents.

NETCHOICE, LLC, dba
NETCHOICE, et al.,

Petitioners,

v.

KEN PAXTON,
Attorney General of Texas,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth And Eleventh Circuits

AMICUS CURIAE BRIEF OF THE HEARTLAND INSTITUTE IN SUPPORT OF PETITIONERS IN 22-277 AND RESPONDENT IN 22-555

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INTEREST OF *AMICUS CURIAE*[1]

The Heartland Institute is one of the world's leading free-market think tanks. It is a national nonprofit research and education organization based in Arlington Heights, Illinois. Its mission since its founding in 1984 is to discover, develop, and promote free-market solutions to social and economic problems.

The Heartland Institute plays an essential role in the national (and increasingly in the international) movement for personal liberty and limited government. The Heartland Institute's interest in this case is protecting free speech rights Americans have long enjoyed on today's internet.

SUMMARY OF ARGUMENT

The Declaration of Independence makes it clear that individuals have unalienable rights that precede the existence of the government. These include the right to free speech. This right must be protected against unchecked government but also, on occasion, from non-government entities as well. That is why the Founders included in the Declaration the text, "That to

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution.

secure these rights, Governments are instituted among men. . . ."

The dominant social media platforms' censorship is precisely the kind of infringement on our unalienable rights that the Founding Fathers feared and desired to prevent. Free speech is one of Americans' most vital and sacred rights. Social media is the primary means by which Americans today engage in free speech and share political, cultural, and religious views with one another. Social media has replaced the physical town square, neighborhood pubs, and even the telephone for this purpose.

Over the past decade, a few large entities have gained essentially monopoly control over social media platforms. As of December 2023, Facebook/Meta and its popular subsidiary Instagram control nearly 60% of social media traffic in the United States. *See* StatCounter, Social Media Stats United States Of America Dec 2022-Dec 2023, http://tinyurl.com/s6edyk6p. The top three social media companies control more than 90% of social media traffic in the United States. *See* StatCounter, Social Media Stats United States Of America Dec 2022-Dec 2023, http://tinyurl.com/ac3stjjt.

Being a large and market-dominant entity does not necessarily equate to being a bad actor, of course. A very serious problem emerges, however, when a market-dominant company, or cartel of companies, wields power in a manner and with the purpose and impact of suppressing Americans' unalienable rights. As this

Court has recognized, "[s]ocial media . . . are [among] the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

It is undisputed that the dominant social media firms are wielding their power with the purpose of suppressing Americans' sharing of political, cultural, and religious views. The social media platforms have censored and blocked scientists from presenting evidence that COVID-19 originated in a Chinese laboratory, journalists from reporting on the risks and benefits of the COVID-19 vaccines, medical doctors from discussing the medical benefits of hydroxychloroquine, pastors from presenting online church services, climate scientists from making the scientific case against an asserted climate crisis, media outlets from sharing their reporting about well-documented scandals involving Hunter and Joe Biden, and everyday Americans from sharing their own views or forwarding the views of others to their friends, family, and acquaintances. These are just a few examples.

Texas House Bill 20 ("HB 20") reflects a reasonable response by "We the People" to this threat from social media censorship. Texas' response is consistent with First Amendment precedent and proceeds from common carrier law, which has been part of our law from before the time of the founding of the Republic. Further, given the threats to First Amendment

principles from foreign nations and international bodies, the States have a right to protect their citizens' free speech rights. Increasingly, the question is not whether social media will be regulated, but rather by whom—the American people governing themselves through their elected representatives in the States, or distant, unelected bureaucrats insulated from political accountability.

ARGUMENT

I. HB 20 Protects the People's Right to Free Speech from Private and Public Actors.

NetChoice argues that there is a great "history and tradition" of protecting "editorial discretion." NetChoice Pet. Br. 18. To the contrary, as the Fifth Circuit held below, "the Supreme Court's cases do not carve out 'editorial discretion' as a special category of First-Amendment-protected expression." *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 463 (5th Cir. 2022). Rather, the "First Amendment protection of editorial discretion' . . . has a short history at the Supreme Court . . . [and] [t]he Court has only given editorial decision-making limited First Amendment protection." Adam Candeub, *Editorial Decision-Making and the First Amendment*, 2 J. FREE SPEECH L. 157, 159 (2022). More broadly, "[t]he Supreme Court has never endorsed the position that every aspect of operating a communications network is protected speech, and the consequences of such a view would be untenable." Ex parte

letter from Tim Wu, Assoc. Professor, Univ. of Va. Sch. of Law & Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Sec'y, FCC, at 9 (Aug. 22, 2003), http://www.timwu.org/wu_lessig_fcc.pdf.

The primary historical support of NetChoice and their amici for their claim that there is a long history of First Amendment protection of "editorial discretion" is a quote from Benjamin Franklin comparing his newspaper to a stagecoach. But, Franklin was referring to his refusal to publish libel or unlawful material. The quotation is off-point. The quote demonstrates nothing about a tradition of protecting editorial discretion, but rather Franklin's unwillingness to publish libel in his newspaper—something which HB20 does not require. The full quotation is below:

> In the conduct of my newspaper, I carefully excluded all libeling and personal abuse. . . . Whenever I was solicited to insert anything of that kind, and the writers pleaded, as they generally did, the liberty of the press, and that a newspaper was like a stage-coach, in which anyone who would pay had a right to a place, my answer was, that I would print the piece separately if desired, and the author might have as many copies as he pleased to distribute himself. . . .

BENJAMIN FRANKLIN, AUTOBIOGRAPH 169 (Henry Holt & Co. 1916).

Contrary to NetChoice's claims, NetChoice Pet. Br. 18, Franklin believed that printers-postmasters, the analog of today's social media, had a duty to

disseminate information without discrimination. During colonial times, printers in addition to printing newspapers also often served as postmasters. Joseph M. Adelman, *"A Constitutional Conveyance of Intelligence, Public and Private": The Post Office, the Business of Printing, and the American Revolution*, 11 ENTERPRISE & SOC'Y 711 (Dec. 2010). Many postmasters refused to "disseminate" newspapers from competing printers. Franklin, who valued the flow of information, was a great critic of this practice, believing that printers and newspapers had a public duty to disseminate information. WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 115-16 (2004). Given the value he placed on the free flow of ideas, Franklin would have likely supported HB 20.

NetChoice also points to an essay by William Livingston and a minority Virginia state resolution supporting the infamous, anti-free speech Alien and Sedition Act. NetChoice Pet. Br. 23. Neither have much to do with HB 20's viewpoint discrimination prohibition nor NetChoice's concept of absolute First Amendment protection of "editorial discretion." The Livingston essay simply says editors should publish worthy material—a true statement and perhaps applicable if NetChoice's members were editors, not distributors, of users' content. Similarly, the minority state resolution primarily deals with libel and unlawful content.

What NetChoice forgets is that Section 7 of HB 20 prohibits large social media platforms from "censor[ing]" a user based on the user's "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002. The large platforms are free to eliminate *content* of which they

disapprove, such as nudity or violence. Further, Section 230 of the federal Communications Decency Act, which preempts state laws, explicitly allows social media platforms to censor sexual obscenity, excessive violence, and other objectionable material. *See* 47 U.S.C. § 230(c)(2).

II. Since the Republic's Beginning, Common Carrier Law has Balanced Private Rights of Expression with Private Property.

From its earliest decisions, this Court has upheld the "peculiar law respecting . . . common carriers" *Hodgson v. Dexter*, 5 U.S. 345, 361 (1803). Justice Thomas has set forth the tests this Court has used to classify common carriers: (1) whether the entity regulated is part of the transportation or communications industry, (2) whether an industry is "affected with the public interest," (3) whether a firm exercises market power, (4) whether the industry receives countervailing benefits from the government, such as liability protection or rights to eminent domain or (5) whether the firm holds itself out as providing service to all. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring). Social media firms can be classified as common carriers under these tests. First, they are a communications firm.

Second, this Court in *Nebbia v. New York*, 291 U.S. 502, 523-24 (1934), abandoned the term "affected with the public interest" as a general category including non-common carriers such as grain elevators, *Munn v.*

Illinois, 94 U.S. 113, 126-30 (1876), or insurance companies, *German All. Ins. v. Lewis*, 233 U.S. 389, 417 (1914). But this Court still recognizes that common carriers, as a specific industry, further the public interest. *See Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 55 (2007) (noting that because "the underlying regulated activity at issue here resembles activity that both transportation and communications agencies have long regulated," activity may be treated as "common carrier" and subject to certain "public interest" standards).

Third, the large, dominant firms that HB 20 covers have market power. HB 20 itself has explicit findings concerning market power, stating "social media platforms and interactive computer services with the largest number of users are common carriers by virtue of their market dominance." Act of September 2, 2021, 87th Leg., 2d C.S., ch. 3, § 1(4).

Federal Communications Commission Commissioners Brendan Carr and Nathan Simington have recently written that "[t]here is market power" in social media markets. They explain the phenomenon in the following way:

> Dominant platforms can represent the outcome of a "winner-take-all" dynamic that is characterized by network effects, switching costs, the self-reinforcing advantages of unique data sets, and increasing returns to scale. The barriers to competitive entry are significant, and dominant platforms lock in their users from viable alternatives, who in

> turn often have no realistic substitute to access content outside the walled garden.

Brendan Carr & Nathan Simington, *Social Media Platforms Exercise Market Power and Are Central to Modern Public Discourse*, NOTICE & COMMENT BLOG, YALE J. ON REGUL. (Jan. 11, 2024), http://tinyurl.com/my9sduud.

Common sense reinforces this finding. The large social media platforms frequently argue that people who object to censorship of their online speech can find some other platform that does not censor speech. That argument ignores the fact that only three social media entities control the lion's share of social media traffic and coordinate with each other to censor free speech. Telling Americans they can simply join some other social media platform with only a very small number of users is like the government telling people they can exercise free speech only in a few, small designated places that a fraction of the population frequents. Excessively burdening free speech to the point that speech is being largely suppressed violates unalienable free-speech rights and is morally indefensible, whether perpetrated by government or private actors. That is particularly the case here, where the platforms represent themselves as "open to everyone." *Paxton*, 49 F.4th at 445.

Fourth, the social media platforms enjoy many countervailing benefits. The Internet Tax Freedom Act ("ITFA") prohibits state and local entities from taxing internet access services—which include social media.

See 47 U.S.C.A. § 151 note. In addition, social media platforms hold special liability protections under Section 230 of the Communications Decency Act. *See* 47 U.S.C. § 230(c)(1).

Fifth, social media firms hold themselves out to all users, i.e., they make a general offering to all customers. This test can be found in the work of early 20th century legal scholar, Charles Burdick. Holding out is probably the most widely accepted common law definition of common carriage that courts apply. Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 515 (1911).

NetChoice attempts to rewrite this test claiming that common carriers "hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering." NetChoice Pet. Br. 25. Under NetChoice's new rule, any firm that "require[s] users, as preconditions of access, to accept their terms of service and abide by their community standards," thereby exercising "editorial discretion" over their users, cannot be a common carrier. *Id.*

But, NetChoice cites no Supreme Court precedent for this novel test. And, it makes no sense. Any entity regulated as a common carrier, or for that matter, a public accommodation could decide that they were going to impose an "editorial filter" and select customers according to their standards—and thereby evade common carrier or public accommodation law. A common carrier bus line could start claiming it was expressive "editorially filtering" by only allowing short people on

their buses. A public accommodation, such as a lunch counter, could refuse to serve people of a certain race or religion—and claim it was expressing a message—and therefore exempt from antidiscrimination laws.

A better approach can be found in the work of Professor Adam Candeub. *See* Adam Candeub, *Common Carrier Law in the 21st Century*, 90 TENN. L. REV. 813, 838-45 (2024). He examines how this Court did not impose common carrier obligations in the 19th century to "express services" firms that pre-booked passenger or cargo space and offered express delivery anywhere in the world. This Court did so because railroads lacked the capacity and physical ability to make a public offering of express services. *Memphis & Little Rock R.R. v. S. Express Co.*, 117 U.S. 1, 20 (1886) (the "Express Cases"). Similarly, courts refused common carrier service for circus trains and Pullman cars.

In contrast, where firms had the capacity to make a public offering, they could be regulated as a common carrier, as telegraphs were in the provision of exclusive telegraph lines for businesses. Candeub, *supra*, at 840-45. As Candeub shows, the limits this Court has recognized in the "holding out" test do not involve the decision of the firm to impose an "editorial filter," but the firm's capacity and industrial investment that would allow it to make a generalized, non-discriminatory offering. *Id.*

III. HB 20 Falls Within a State's Power to Protect its Citizens' Rights to Free Expression.

The major internet platforms covered by HB 20 are global. The European Union regulates their activities in foreign countries, and last year its Digital Service Act ("DSA") went into effect. It is an offensively anti-free speech regulation that requires platforms covered under HB 20 to censor "harmful" speech. This category includes "disinformation" as EU bureaucrats might define it as well as any content considered unlawful by any of the EU's member states. The DSA also requires the practice—unquestionably violative of the First Amendment if imposed by the United States government—of having government "flaggers" identify unlawful content and requires the platforms to remove such content under EU country-specific laws. *See* Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 CHI. J. INT'L L. 115, 116-123 (2023).

To give a recent example of the DSA's breathtaking scope consider the current German prosecution of American playwright and satirist, C.J. Hopkins. The DSA requires censorship of speech unlawful under national law. This would include the German Network Enforcement Act which outlaws Nazi symbols as well as a broad swath of other "offensive" speech. C.J. Hopkins is an American playwright and author living in Berlin, who wrote a book critical of the German COVID-19 response, THE RISE OF THE NEW NORMAL REICH: CONSENT FACTORY ESSAYS, Vol. III (2020-2021). Berlin prosecutors charged Hopkins under the

criminal provisions of the German Network Enforcement Act for tweeting an image of the cover of his book, which had a barely perceptible swastika, and a critical tweet "insulting" a government bureaucrat. To be clear, for comparing the authorities to Nazis, the authorities prosecuted Hopkins. *See* Matt Taibbi, *First Roger Waters, Now This: Germany Places American C.J. Hopkins Under Investigation*, SCHEERPOST (June 15, 2023), http://tinyurl.com/5a3fse58.

EU officials have already used the DSA to initiate an investigation of Elon Musk's X. David Meyer, *Elon Musk's content moderation decisions make X the first target of the EU's new Digital Services Act*, FORTUNE (Dec. 18, 2023), http://tinyurl.com/3zpfu79r. Threatening fines of 10% of global revenue, the EU alleges that X failed to take adequate measures to curb what it termed "disinformation." *Id.*

"This extensive regulatory regime [of the DSA] will incentivize platforms to skew their global content moderation policies toward the EU's instead of the U.S.'s balance of speech harms and benefits." Nunziato, *supra*, at 117. The EU is in effect giving platforms a choice: conform to our standards that disregard American First Amendment standards or go to the expense of running two separate platforms.

The DSA is but one example of the "Brussels Effect" whereby the EU leverages its regulation over internet transactions in the EU to become a de facto global standard. *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD

(2020). The EU's regulations have already become de facto global standards in areas as varied as data privacy, consumer health and safety, and antitrust. *Id.* at 4-34.

The question then is not whether the social media platforms will be governed, but by whom. As EU bureaucracies exercise state power to censor disfavored speech, NetChoice asks this Court to consign the American people to permanent bystander status as others get to shape the regulatory environment for "the modern public square." *Packingham*, 582 U.S. at 107. The First Amendment does not require this.

The States have an interest, if not a duty, to protect their citizens' right to exercise their right to free speech. HB 20, would render the EU's censorship regime—which discriminates on the basis of speech disliked by bureaucrats—unlawful to apply in Texas.

CONCLUSION

The Heartland Institute urges this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit, and reverse the decision of the

United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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