No. 22-555

In the Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA, PETITIONERS

v.

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

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

For nearly 50 years, this Court has stated that "statutory or common law may ... extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("*Turner I*"). Recognizing that a small number of modern communications platforms effectively control access to vast swaths of our nation's public discourse, Texas recently barred those platforms from discriminating against their customers on the basis of geography, association, or viewpoint. Notwithstanding their own oft-repeated promises to provide just such neutrality, the covered platforms have mounted a wide-ranging facial attack on this new statute. In granting certiorari, however, the Court has limited its review to two questions:

1. Whether Texas House Bill 20's content-moderation restrictions comply with the First Amendment.

2. Whether Texas House Bill 20's individualized-explanation requirements comply with the First Amendment.

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INTRODUCTION

The telegraph marked the most revolutionary advancement in communication since the Gutenberg press. Transactions were "effected between New York, London and other financial centres in minutes, which formerly occupied weeks, and even months, to accomplish." JOHN MURRAY, A STORY OF THE TELEGRAPH i (John Lovell & Son, ltd., 1905). And "[t]he daily Press [was] enabled to record" the world's events "a few hours or even minutes after their occurrence." *Id.*

This revolution, however, had a dark side. "[T]he private entities that controlled this amazing new technology" could—and *did*—"use that power to manipulate the flow of information to the public." Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2321 (2021). Western Union "refused to carry telegraph messages from newspapers that … competed" with its ally, the Associated Press, and discriminated against certain political speech, like "strike-related telegraphs." *Id.* at 2321-22. To safeguard the free exchange of ideas, the States and later the federal government required telegraph operators to transmit speech "with impartiality and good faith." *Id.* at 2320 n.104.

History is repeating itself. People the world over use Facebook, YouTube, and X (the social-media platform formerly known as Twitter) to communicate with friends, family, politicians, reporters, and the broader public. And like the telegraph companies of yore, the social-media giants of today use their control over the mechanics of this "modern public square," *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), to direct—and often stifle—public discourse.

Like the States that stepped in to prevent

discrimination in the last great communication revolution, Texas enacted an anti-discrimination law to address discrimination by social-media platforms: the Act of September 2, 2021, 87th Leg., 2d C.S., ch. 3 (commonly known as "HB20"). HB20 bars such discrimination in two ways. *First*, it prevents the world's largest social-media platforms from discriminating against their customers based on characteristics having nothing to do with speech on their platforms. Facebook, for example, cannot discriminate against someone because she lives in Texas, is a member of a teachers' union, or said something decades ago in a college newspaper that Facebook now deems objectionable. *Second*, HB20 prevents these companies from discriminating among user-generated content based on the viewpoints that users express on the platforms themselves.

At the same time, however, HB20 does *not* bar these companies from saying anything they want—even about specific posts. And it specifically allows platforms to facilitate user choice as to what they want to hear and from whom, thus ensuring that no one is forced to hear anything they would rather not.

HB20 further requires covered platforms to publicly disclose their acceptable-use policies and to inform users why they are denied service. This consumer-protection measure is consonant with the rule that States may require commercial entities to disclose "purely factual and uncontroversial information" about their services. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

Nonetheless, the district court facially enjoined all applications of HB20, reasoning that because the platforms' algorithms help determine the sequence in

which user-generated content is displayed, that content becomes the platforms' own speech. The Fifth Circuit correctly held, however, that HB20 regulates the platforms' conduct, not their expression. To the extent speech is even implicated, HB20 just enables communication between willing speakers and willing listeners like earlier regulations on telegraphs and telephones. And holding that businesses are not required to comply with their own acceptable-use policies would upend consumer-protection laws across the country. By any measure, the Court should affirm the Fifth Circuit's judgment and allow Texas to enforce its law.

STATEMENT

I. The Digital Public Square

A. The Platforms

Social-media platforms are the gatekeepers of the "modern public square." Pet.App.2a (quoting *Packingham*, 582 U.S. at 107). "[B]illons of people" venture onto them to engage in "interactions that once took place via mail, on the phone, or in public areas." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 502-03 (2023); *accord* J.A.15a. Because they lack the capacity constraints of traditional communication channels, "[t]oday's digital platforms provide avenues for historically unprecedented amounts of speech." *Biden v. Knight First Am. Inst. at Columbia Univ.*, 141 S.Ct. 1220, 1221 (2021) (Thomas, J., concurring); *see also* Pet.App.70a & n.28.[1]

Petitioners are two trade associations representing those platforms—including, most prominently in this litigation, Google (which owns YouTube), Meta (which

[1] All references to *Knight* are to Justice Thomas's concurrence.

owns Facebook), and X (collectively, "the Platforms").[2] The Platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," *Packingham*, 582 U.S. at 107, and wield "enormous influence over the distribution of news," *Tah v. Global Witness Publ'g*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting).

As this Court explained in detail just last year, through just a few swipes on a phone or clicks of a mouse, "[p]eople from around the world can sign up for the [P]latforms and start posting content on them, free of charge." *Taamneh*, 598 U.S. at 480. And "[o]nce on the [P]latforms, users can upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share." *Id.* "Billions of people have done just that": "for *every minute* of the day, approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter." *Id.*; *see* J.A.67a, 138a. The Platforms "profit from" hosting this massive amount of user-generated "content largely by charging third parties" to place advertisements "on or near the billions of videos, posts, comments, and tweets uploaded by the[ir] users." *Taamneh,* 598 U.S. at 480; *see* J.A.67a.

"To organize and present" this content, the Platforms "have developed 'recommendation' algorithms that automatically match advertisements and content with each use; the algorithms generate those outputs based on a wide range of information about the user, the advertisement, and the content being viewed."

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[2] Although Petitioners now insist (at 1) that HB20 covers four additional entities, Respondent will focus on the only three entities which Petitioners' deponent was "certain" were covered by HB20. J.A.361a.

Taamneh, 598 U.S. at 480-81; J.A.68a-70a. "All the content" on the Platforms "is filtered through these algorithms," which "appear agnostic as to the nature of the content, matching any content … with any user who is more likely to view that content." *Taamneh,* 598 U.S. at 499; *see* J.A.138a-39a. User-generated content is thus "generally available to the internet-using public with little to no front-end screening." *Taamneh*, 598 U.S. at 498.

The Platforms do not meaningfully associate themselves with the deluge of user-generated content posted online. As Google explained just last year: "Watch the World Series of Poker on YouTube, and YouTube's algorithms might display Texas Hold 'em tutorials. That does not mean YouTube endorses gambling, any more than spellcheck endorses a suggested substitute word, Westlaw endorses higher-listed cases, or a chatroom endorses posts organized by topic." Br. for Respondent at *27, *Gonzalez v. Google, LLC*, No. 21-1333, 2022 WL 18358194 (U.S. Dec. 12, 2022). Instead, the Platforms have a "passive" and "highly attenuated" relationship to their "billion-plus" users. *Taamneh*, 598 U.S. at 500. Their functionalities resemble "cell phones, email, or the internet generally." *Id.* at 499.

B. The Platforms' Professed Neutrality

The Platforms have long assured the public that, in the words of Twitter's former CEO, their purpose is to provide a forum "to serve the public conversation." Pet.App.67a. According to Facebook, it doesn't "want to have editorial judgment over the content that's in [a user's] feed" and "tr[ies] to explicitly view [itself] as not [an] editor[]." Pet.App.36a. YouTube has similarly aimed to "just let the users upload whatever [videos] they wanted no matter how silly, or inane, or personal, or

whatever." BRIAN MCCULLOUGH, HOW THE INTERNET HAPPENED: FROM NETSCAPE TO THE IPHONE 253 (2018); *see* J.A.108a-09a.

Consistent with those assurances, the Platforms' terms of service represent that the Platforms "may not monitor," "do not endorse," and "cannot take responsibility for" the user-posted content on their websites. Pet.App.36a (quoting X's terms of service); *id.* (describing YouTube and Facebook's). Google's CEO also testified to Congress that his company's "goal is to offer a platform for all ideas." Pet.App.36a. The Platforms further routinely tell courts that they "serv[e] as conduits for other parties' speech." Pet.App.37a (collecting examples).

C. The Platforms' Actual Discrimination

The Platforms, which "derive much of their value from network size," exercise an "unprecedented" level of "concentrated control" of users' speech. *Knight*, 141 S.Ct. at 1221. Nor is their power diminishing. For example, Google "is valuable relative to other search engines because more people use it, creating data that Google's algorithm uses to refine and improve search results." *Id.* at 1224. Because the Platforms make billions of dollars from the highly targeted advertising that their algorithms enable, "[t]hese network effects entrench the[] companies" against nascent rivals. *Id.*

Having achieved market dominance, the Platforms have begun to retreat from their neutrality assurances. For example, X has argued for "an absolute First Amendment right to remove anybody from its platform, even if doing so would be discriminatory on the basis of religion, or gender, or physical disability, or mental disability." Tr. Hr'g at 23-24, *Taylor v. Twitter, Inc.*, No. CGC-18-564460 (Cal. Super. Ct. June 14, 2018)

(citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995)). And Google has commissioned an academic study that purports to excuse it from even antitrust law on similar grounds. *See* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 895 (2012).

Rather than "serving as conduits for other parties' speech," Pet.App.52a, the Platforms have also begun favoring certain viewpoints. Granted, the Platforms' deletion of user-generated content sometimes results from technical errors, which may be corrected after a user complains. But the Fifth Circuit noted, and the Platforms nowhere dispute, that they routinely bar transmission of "pure political speech" and have even barred a congressional hearing. Pet.App.18a.

II. HB20

Texas responded to this discrimination by enacting HB20, which holds the Platforms to their own long-time representations of neutrality. HB20 applies to "social media platform[s]" with at least 50 million monthly users in the United States, which are classified as common carriers. HB20 §1(3); Tex. Bus. & Com. Code ("TBCC") §120.002(b). A "'[s]ocial media platform' … allows a user to create an account[] and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." TBCC §120.001. HB20 does not cover internet-service providers ("ISPs"), email providers, or websites that do not "primarily" disseminate "user generated" content. *Id.* Section 7 and Section 2 of HB20 are at issue here.

A. Section 7

Section 7 contains HB20's antidiscrimination rules, which bar the Platforms from "censoring"—defined as "blocking, banning, removing, deplatforming, demonetizing, de-boosting, restricting, denying equal access or visibility to, or otherwise discriminating against"—a user with respect to a "user's expression, or a user's ability to receive the expression of another person" based on:

(1) "the viewpoint of the user or another person";
(2) "the viewpoint represented in the user's expression or another person's expression"; or
(3) "a user's geographic location in" Texas.

Tex. Civ. Prac. & Rem. Code ("TCPRC") §§143A.001(1), .002(a)(1)-(3) (cleaned up). These antidiscrimination rules "appl[y] regardless of whether the viewpoint is expressed on a social media platform or through any other medium." *Id.* §143A.002(b).

Section 7 thus targets at least two types of discrimination. *First*, it bars discrimination against a user based on whether the user resides in Texas, who a user associates with, or what a user thinks or does off-platform. A covered platform, for example, cannot discriminate based on the fact that a user holds certain viewpoints that the user does not express on the platform, is linked with someone else—such as an employer, associational group, or family member—that expresses a viewpoint either on or off the platform, or himself expresses a viewpoint off the platform. These provisions complement preexisting Texas laws forbidding discrimination based on race, color, disability, religion, sex, national origin, or age. *E.g.*, Tex. Prop. Code §301.027; Tex. Lab. Code §21.051. *Second*,

Section 7 bars discrimination based on a viewpoint that a user expresses on a platform.

The Platforms retain several tools to keep their spaces hospitable. For one, they can block *categories* of content, such as violence or pornography. Even if it would be viewpoint-based, the Platforms may also block speech that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as peace officer or judge." TCPRC §143A.006(a)(3). The Platforms can also censor speech they are "specifically authorized to censor by federal law," as well as speech that "is unlawful," or "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment." *Id.* §143A.006(a)(1), (a)(2), (a)(4).

Section 7 also permits the Platforms to "authoriz[e] or facilitat[e] a user's ability to censor specific expression on the user's platform or page at the request of that user." *Id.* §143A.006(b). The Platforms thus can create an opt-in framework. The default rule is that anyone who wishes to speak may do so, but so long as the user's decision is respected, a platform is free to limit the content that user receives. No one must hear speech that he or she finds distasteful.

B. Section 2

Apart from and in addition to Section 7's prohibition against discrimination, Section 2 requires the Platforms to apprise their users of why service is being denied or diminished. It requires any covered platform to "publicly disclose accurate information regarding its content management, data management, and business practices,"

including how it "targets" and "moderates content," which is "sufficient to enable users to make an informed choice regarding" whether to use the platform. TBCC §120.501(a)(1), (a)(3), (b). The platform also must "reasonably inform users about the types of content allowed" and how such an acceptable-use policy will be monitored and enforced. *Id.* §120.052(b)(1). The Fifth Circuit upheld these general disclosure requirements against a facial challenge, Pet.App.91a-99a, and this Court declined to revisit the question. *Netchoice, LLC v. Paxton*, No. 22-555, 2023 WL 6319650, at *1 (U.S. Sept. 29, 2023).

Currently before the Court are four specific duties that Section 2 imposes on the Platforms to ensure their compliance with the mandated acceptable-use policies: duties of notice, initial explanation, appeal, and appellate explanation. The first two duties require that "concurrently with the removal" of user expression, a covered platform must "notify the user who provided the content of the removal and explain the reason the content was removed." TBCC §120.103(a)(1). The third requires the platform to "allow the user to appeal the decision" through "an easily accessible complaint system." *Id.* §§120.101(2), .103(a)(2). Finally, the platform must also resolve the appeal—and notify the user of the resolution—within 14 business days and provide "the reason for the reversal" if the platform reverses itself. *Id.* §120.103(a)(2)-(3). These requirements do not apply if the platform cannot contact the user or "knows that the potentially policy-violating content relates to an ongoing law enforcement investigation." *Id.* §120.103(b)(2).

C. Enforcement and Severability Provisions

Any "user may bring an action" to enforce HB20, as may the Texas Attorney General. TCPRC §143A.007(d).

Regardless of who sues, HB20 is enforceable only through injunctive relief. *Id.* §§143A.007(a), .008. Damages are not available, and absent contempt of court, neither are monetary penalties. *Id.* §143A.007(c).

When adjudicating actions brought under HB20, courts are guided by legislative rules and findings regarding severability that span nearly three pages of HB20's enacted text. *See generally* HB20 §8. In brief, courts must consider severable not just "every provision, section, subsection, sentence, clause, phrase, or word in th[e] Act," but even "every application of the provisions in th[e] Act." *Id.* §8(a).

III. The Platforms' Facial Challenge to HB20

Just days after HB20's enactment, the Platforms sued the Texas Attorney General, alleging that HB20 facially violates the First Amendment. J.A.1a. They asked the court to enjoin HB20's enforcement in its entirety before the statute could go into effect. J.A.60a-61a. The district court agreed to do so. Pet.App.185a. Stay litigation followed first in the Fifth Circuit, Pet.App.480a, then here, *NetChoice, LLC v. Paxton*, 142 S.Ct. 1715 (2022). As a result, HB20 has never been enforced by Respondent or construed by the Texas Supreme Court.

A divided Fifth Circuit panel held that the Platforms failed to meet the demanding standard for "pre-enforcement facial relief against Section 7." Pet.App.9a. It explained that "[t]he Platforms do not even try to show that HB20 is 'unconstitutional in all of its applications.'" Pet.App.13a. "For example," the panel observed, no one suggests that HB20's antidiscrimination rule "based on geographic location" violates the First Amendment, Pet.App.13a n.4, and Petitioners cannot fill the gap merely by invoking the overbreadth doctrine, Pet.App.9a-14a. The panel further refused to adopt a view of "speech"

so capacious as to preclude "nondiscrimination requirements on … telephone companies or shipping services." Pet.App.25a. And even if Section 7 did implicate the First Amendment, the panel concluded that "facial pre-enforcement relief" was unjustified because Section 7 is "a content- and viewpoint-neutral law" that is appropriately tailored to Texas's legitimate interests. Pet.App.80a.

Each member of the panel wrote separately on Section 7. Judge Oldham would have upheld that provision under the common-carrier doctrine. Pet.App.66a. Concurring, Judge Jones found it "ludicrous" to say that user-generated content is the Platforms' own speech. Pet.App.114a. Dissenting, Judge Southwick concluded, with "hesitan[ce]," that the discrimination here is akin to newspapers deciding "what they do and do not print." Pet.App.119a.

The panel, however, unanimously rejected the Platforms' facial challenge to Section 2 because "disclosures that consist of 'purely factual and uncontroversial information' about the Platforms' services" is not constitutionally suspect. Pet.App.91a (quoting *Zauderer*, 471 U.S. at 651).

Although Petitioners sought broader review, the Court granted certiorari limited to whether Section 7's content-moderation restrictions and Section 2's individualized-explanation requirements comply with the First Amendment.

SUMMARY OF ARGUMENT

Because facial challenges "rest on speculation" about how a statute will be interpreted and what the facts will reveal, a plaintiff can ordinarily prevail only if the statute is "unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442,

449-50 (2008). Although this Court has shown somewhat greater solicitude to free-speech claims, *id.* at 449 n.6, a facial injunction against a state statute is "strong medicine," presenting significant separation-of-powers concerns. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Petitioners have not met their heavy burden to obtain such relief as to either Section 7 or Section 2.

I. Section 7 is not facially unconstitutional. It bars two types of discrimination: one targeting off-platform characteristics, the other on-platform speech. The Platforms do not argue that the former is unconstitutional, and the notion that companies have a First Amendment right to discriminate based on characteristics that have nothing to do with content is contrary to *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). By themselves, these constitutional applications would defeat a facial challenge under this Court's ordinary rules.

The Platforms cannot avoid that outcome by incanting "overbreadth" and focusing on the provisions of Section 7 that bar on-platform viewpoint discrimination. Section 7 does not regulate the Platforms' speech; it regulates their conduct, which consists of hosting users' speech. The Platforms' contrary theory has no limiting principle and runs headlong into *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47 (2006).

Section 7 is further supported by principles of public accommodation and common carriage. "The First Amendment's command that government not impede freedom of speech" allows the government "to ensure that private interests not restrict … the free flow of information and ideas." *Turner I*, 512 U.S. at 657. And government may "extend protection or provide redress

against a private corporation or person who seeks to abridge the free expression of others." *Hudgens*, 424 U.S. at 513. Section 7 is limited to platforms with market power, allows covered platforms to exclude any categories of content they wish, in no way restricts a platform's ability to convey its own message, and permits users to choose whether the platform may continue censoring content. In other words, Section 7 just enables voluntary communication on the world's largest telecommunications platforms between speakers who want to speak and listeners who want to listen, treating the Platforms like telegraph or telephone companies.

The Platforms advance a bevy of counterarguments, but they offer no theory of the First Amendment under which the Court could hold Section 7 unconstitutional without contravening other doctrines. The Platforms focus on an "editorial discretion" theory, relying on cases involving newspapers, parades, and other inherently expressive conduct. Yet nearly 20 years ago, in *FAIR*, the Court rejected the notion that "editorial discretion," standing alone, excused an entity from antidiscrimination rules.

II. Section 2 is also not facially unconstitutional. The duties of notice and initial explanation require straightforward statements of fact and can be met with an automated process. And the duties of appeal and appellate explanation essentially require the Platforms—some of the world's largest businesses—to have customer-service departments. Texas did this for a sound reason: The Platforms routinely reverse removal decisions, which can result from technical errors in their algorithms or black-and-white misapplications of their acceptable-use policies. The Court's decision in *Zauderer* thus plainly supports affirmance. The Platforms' insistence that the

sky will fall if they are forced to follow their own policies misstates HB20, hinges on questions excluded from the grant of certiorari, and is unsupported by the record. Their arguments underscore why a facial challenge is inappropriate and, if accepted, would gut ordinary consumer-protection laws across the country.

ARGUMENT

I. Section 7 Is Not Facially Unconstitutional.

A. States May Prohibit Discrimination Based on Status, Private Associations, or Off-Site Speech.

1. The Platforms repeatedly insist (*e.g.*, at 5) that this case is about "editorial discretion"—whether they can be forced to distribute user-generated content notwithstanding their own "value judgments about what expression is worthy of presentation" on their websites. Yet the Platforms ignore that countless applications of Section 7 have nothing to do with any on-platform expression. And they offer no evidence that the "law's unconstitutional applications" are "substantially disproportionate to [this] statute's lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023). Absent evidence of such a "lopsided ratio," "courts must handle unconstitutional applications as they usually do—case-by-case"—even in the First Amendment context. *Id.*

For example, as the court of appeals pointed out, although the Platforms are careful (at 35 n.7) to preserve their argument that *every* application of Section 7 is unconstitutional, they nowhere explain how "HB 20's provision restricting censorship based on 'a user's geographic location in [Texas]' could not be constitutionally applied to them." Pet.App.13a (quoting TCPRC §143A.002(a)(3)). The reason for that silence is

obvious: The Platforms, who make billions selling targeted advertising, know exactly where their users are located. *See, e.g.*, Megan Graham & Jennifer Elias, *How Google's $150 Billion Advertising Business Works*, CNBC (May 18, 2021), https://tinyurl.com/2n4ew4jj. Indeed, they or their parent companies have settled fraud claims worth hundreds of millions of dollars for lying about it. *See, e.g.*, Notice at 2, *Brown v. Google LLC*, No. 4:20-cv-03664-YGR (N.D. Cal. Dec. 26, 2023) (ECF No. 1089). But discrimination based on where someone lives can be just "as invidious [as] discriminations based upon factors such as race or economic status." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (citations omitted). This is particularly true because "place of residence is closely correlated with race" and can be used by algorithm designers "to sort implicitly on the basis of a protected characteristic." Pauline T. Kim, *Big Data and Artificial Intelligence: New Challenges for Workplace Equality*, 57 U. LOUISVILLE L. REV. 313, 320 (2019).

Other examples abound. Because Section 7 forbids discriminating against a user based on either his own viewpoint or that of someone else, Facebook cannot discriminate against a user whose on-platform speech is indistinguishable from other users' speech just because that user—or the user's family member, employer, neighbor, acquaintance, or co-religionist—is a member of, say, the American Civil Liberties Union or the National Rifle Association. TCPRC §143A.002(a)(1). And because Section 7 applies regardless of whether "the viewpoint is expressed on a social media platform or through any other medium," the same would be true if the user—or anyone the Platforms' algorithms suspect of being associated with the user—had previously donated money to a political campaign or had written a provocative op-ed decades ago.

Id. §143A.002(b). Discriminating against users based on such *off-platform* characteristics may allow the Platforms to generate greater revenues by treating people whom the Platforms perceive to be of higher value better than everyone else. But it has nothing to do with the First Amendment.

2. The Platforms have reason to shy away from the Fifth Circuit's question about how their supposed "editorial discretion" entitles them to discriminate based on status, associations, or speech that has nothing to do with their websites. The First Amendment has long been invoked as the refuge of last resort for discrimination, whether by restauranteurs, *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964); *accord Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam); hoteliers, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964); or those who "commercially operate" schools, *Runyon v. McCrary*, 427 U.S. 160, 168, 176 (1976). But the Court has firmly rejected such attempts to enshrine a right to discriminate—on at least one occasion calling the argument "patently frivolous." *Piggie Park Enters.*, 390 U.S. at 402 n.5.

For example, the Court has explained that even if persons or institutions have "a First Amendment right" to "promote the belief that racial segregation is desirable," it "does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Runyon*, 427 U.S. at 176 (emphasis added). And governments may "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel*, 379 U.S. at 250 (quotation marks omitted). Although the Platforms are not openly demanding the right to discriminate based on

race, gender, age, disability, or sexual orientation, X has candidly admitted that its view of the First Amendment would allow it to do so. *Cf.* Tr. Hr'g, *supra*, at 23-24.

Yet "refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment." *303 Creative*, 600 U.S. at 619 (Sotomayor, J., dissenting) (citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)). And preventing "invidious discrimination in the distribution of publicly available goods, services, and other advantages" has long been considered a "compelling state interest[] of the highest order." *Id.* at 608, 622 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628 (1984)). This is why, even in the Platforms' own authority, the Court stressed that the petitioner seeking to exclude a given message from its platform had "disclaim[ed] any intent to exclude" anyone for agreeing with that message so long as he or she did not vocalize that agreement during the event. *Hurley*, 515 U.S. at 572.

The Court, of course, found itself divided last Term on an as-applied challenge to a state law forbidding discrimination based on sexual orientation. But in that case the State stipulated that it sought to enforce its law against an individual whose "original, customized" websites "communicate[d]" the business owner's "ideas." *303 Creative*, 600 U.S. at 587. Relevant here, the whole Court agreed that "[o]ur Constitution contains no right to refuse service to a disfavored group" based on characteristics having nothing even arguably to do with the business's speech. *Id.* at 604 (Sotomayor, J., dissenting); *see also id.* at 589 (majority op.) (comparing the website creator to a writer, muralist, or movie director who works on commission). No one suggested that the First Amendment would allow a business to

refuse "to work with all people," *id.* at 582, just because the owner disliked individuals from certain places or disagreed with what a customer said elsewhere that had nothing to do with the commissioned art.

3. Because many of HB20's applications are plainly constitutional, the Platforms' facial challenge should have been rejected. *See Hansen*, 599 U.S. at 770. At minimum, the district court needed to examine severability before it enjoined HB20's enforcement in full. "Severability is of course a matter of state law," *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and Texas gives near-dispositive weight to a severability clause, *e.g.*, *Builder Recovery Servs., LLC v. Town of Westlake*, 650 S.W.3d 499, 507 (Tex. 2022). Accordingly, the Court should vacate the district court's injunction in its entirety—and certainly to the extent it bars Texas from enforcing the plainly constitutional applications of Section 7.

B. Prohibiting Discrimination Against on-Platform Viewpoints Is Also Not Facially Unconstitutional.

The district court also should not have enjoined the lone aspect of Section 7 that the Platforms *do* challenge: its bar against viewpoint discrimination for on-platform content.

1. The Platforms focus most of their brief on precedent. But precedent confirms that refusing to provide undifferentiated service constitutes "conduct, not speech." *FAIR*, 547 U.S. at 60; *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

So long as state law does not require a private property owner to convey a "specific message," a facility that is "open to the public to come and go as they please" can be required to open its doors on equal terms to all.

PruneYard, 447 U.S. at 87; *see FAIR*, 547 U.S. at 60. In *PruneYard*, the Court applied that principle to unanimously hold that a shopping mall has no "First Amendment right not to be forced by the State to use [its] property as a forum for the speech of others." 447 U.S. at 85. The Court made the same point in *FAIR*, holding that, notwithstanding their sincere objections to the military's "don't ask, don't tell" policy, law schools have no First Amendment right to deny the same access to military recruiters that they give to other recruiters. 547 U.S. at 55-58.

FAIR synthesized the Court's jurisprudence distinguishing between speech and conduct. *Id.* at 55. "[F]ew restrictions on action … could not be clothed by ingenious argument in the garb" of expression or an act ancillary to it. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). To avoid ripping a "gaping hole in the fabric" of (among other things) public-accommodations law, *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 431-32 (1990); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 602-03 (2011) (Breyer, J., dissenting), *FAIR* requires inquiry into whether regulated conduct is "inherently expressive," 547 U.S. at 66. Concluding that hosting recruiters is not inherently expressive, the Court held that requiring equal treatment "d[id] not sufficiently interfere with any message of [a] school" to trigger First Amendment scrutiny. *Id.* at 64.

That fundamental distinction between ordinary conduct and conduct that is "inherently expressive" also explains the limits of a government's ability to require websites to serve users. For example, a web-designer cannot be forced to create an "'original,' 'customized,' and 'tailored'" website with which she disagrees. *303 Creative*, 600 U.S. at 579. Neither can the government

force an "expressive association," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000), to convey a message contrary to the organization's "specific expressive purpose," *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). But HB20 applies only to platforms whose "dominant market shares" allow them to exercise "unprecedented" and "concentrated control" over the world's speech. *Knight*, 141 S.Ct. at 1221. In other words, the Platforms are like the mall in *PruneYard*, but 100,000 times larger.

2. The Platforms fare no better with their brief gesture (at 22-23) toward original public meaning. For good reason: Section 7's prohibition of on-platform discrimination fits comfortably among rules deemed "permissible at the time of the founding." *Knight*, 141 S.Ct. at 1223-24.

As Judge Oldham explained, the First Amendment's speech and press clauses were originally understood as barring prior restraints on the press, Pet.App.21a (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52), and prosecution for speaking in good faith on matters of public concern, Pet.App.20a-22a (citing, *inter alia*, Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 874-75 (2022)). And the Platforms' limited examples from the founding just confirm that newspapers addressed matters of public concern.

Whether a government can impose a licensing requirement to publish, however, is a separate question from whether the framers would have understood the First Amendment to protect a private party's right to exercise "unbridled control" over the means of voluntary communication between willing speakers and listeners. *Knight*, 141 S.Ct. at 1222. The framers understood that liberty "cannot long subsist if the *channels of*

information be stopped." 3 ANNALS OF CONG. 289 (1791) (emphasis added). That accurate understanding of communication's importance is irreconcilable with the Platforms' view that, because they are private, they have the constitutional right to prevent private individuals from voluntarily communicating with one another.

The common-carriage doctrine, which has existed since at least the 1300s, *see* Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 147 n.31 (1914), confirms that the State can, under appropriate circumstances, impose obligations on private enterprise. At the founding, those who "carried the mails" were subject to common-carriage rules and could not discriminate among customers. *United States v. Thomas*, 82 U.S. 337, 344 & n.22 (1872) (citing *Lane v. Cotton*, 1 Ld. Raym. 646 (K.B. 1701)). Courts have applied the same principle to hold that a private telephone company has no right to act as "a censor of public or private morals, or a judge of the good or bad faith of any party who may seek to send" a message. *W. Union Tel. Co. v. Ferguson*, 57 Ind. 495, 498 (1877). On the contrary, such entities, which "host[] or transport[] others or their belongings" or messages, *303 Creative*, 600 U.S. at 590 (distinguishing a steamship or telegraph from a customized website), can be required to transmit messages with "impartiality and good faith," *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896).

The Platforms are today's descendants of such common carriers. Although courts sometimes consider other factors, the centuries-old calling card of a common carrier is that it does not "make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). That describes the Platforms, which are "open to the

public." TBCC §120.001(1); TCPRC §143A.001(4). And when asked below whether they "treat all of [their] users equally in terms of applying" their "terms and conditions," the Platforms' answer was an unqualified "Yes." J.A.223a-24a. Anyone 13 or older "can create an account and post content." J.A.70a.

Courts and commentators have also, at times, looked at four additional factors to determine whether common-carriage treatment is warranted: whether the entity (1) is in the "communications" industry, *Cellco P'ship v. FCC*, 700 F.3d 534, 545 (D.C. Cir. 2012); (2) possesses market power, *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); (3) enjoys government support, Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 530-31 & n.83 (1911); or (4) is affected with a "public interest," *Tyson & Bro.-United Theatre Ticket Offs. v. Banton*, 273 U.S. 418, 430 (1927). It is unclear whether any of those factors states a requirement, *see Knight*, 141 S.Ct. at 1222-23, or even reflects good law, *Nebbia v. New York*, 291 U.S. 502, 536-37 (1934) (suggesting a public-interest requirement is not good law). In any event, the Platforms meet each.

First, HB20-covered platforms are communications providers akin to "cell phones, email, or the internet generally," *Taamneh*, 598 U.S. at 499. And on its face, Section 7 applies only to voluntary communications.

Second, the network effects that the Platforms have built up over decades—and that allow them to reap billions in profits—indicate that their market power is significant. *See supra* p. 6. Indeed, the Platforms may well have monopoly power in their respective markets; they certainly have "dominant market share." *Knight*,

141 S.Ct. at 1224. At the very least, if the Court deems market power relevant and the record inadequate, it should vacate the injunction and remand for fact-finding regarding market power—something that never happened in this accelerated, pre-enforcement facial challenge. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 187 (1997) ("*Turner II*") (reviewing "must-carry" rules for cable providers after remand for record development).

Third, the Platforms have received government support. Apart from outright monetary gifts, *see, e.g.*, David Jeans, *Data In The Dark: How Big Tech Secretly Secured $800 Million In Tax Breaks For Data Centers*, FORBES (Aug. 19, 2021), http://tinyurl.com/DarkData Forbes, §230 of the Communications Decency Act of 1996 has shielded the Platforms from billions in liability by instructing courts not to "treat[]" them as "publisher[s] or speaker[s]" of other people's speech for the purpose of defamation and similar torts. 47 U.S.C. §230(c)(1). That shield does not apply, however, if the platform is "responsible" even "in part" for the speech it transmits. *Id.* §230(f)(3). The distinction thus treats a web host "like a delivery service or phone company," rather than like a newspaper. *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003); *see also* RESTATEMENT (SECOND) OF TORTS §581 cmt. b (1977). So under traditional First Amendment principles, they can be required to transmit messages without discrimination. *See, e.g.*, 47 U.S.C. §202.[3]

[3] This analogy is further demonstrated by comparing HB20's and §230's protections for removing categories of low-value content, 47 U.S.C. §230(c)(2), with similar protections afforded telephone carriers, *see, e.g.*, 47 U.S.C. §559; *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987)

Fourth, to the extent that a common carrier must affect the public interest, Platforms do that too: The Platforms are the medium by which many private individuals communicate with each other and interact with their elected leaders. *See, e.g.*, *Lindke v. Freed*, No. 22-611 (U.S.); *O'Connor-Ratcliff v. Garnier*, No. 22-324 (U.S.). If the ability to communicate with a public official on these websites is so significant that blocking it can potentially constitute a violation of the First Amendment by a state official, it is hard to see how access is *not* affected with the public interest and therefore subject to state protection. *See Knight*, 141 S.Ct. at 1223.

Taken together, these factors show that the Platforms are today's most prominent telecommunications common carriers. And even if they were not, the same considerations would also allow legislatures "to treat digital platforms like places of public accommodation." *Id.* at 1225. Either way, forbidding the Platforms from discriminating on the basis of viewpoint regulates conduct, not speech. Section 7 thus no more transgresses the First Amendment than similar requirements imposed on telegraphs, telephones, and internet cafés.

3. Even if Section 7's antidiscrimination rules implicated speech, they would satisfy constitutional scrutiny for much the same reasons the court gave in *Turner I* and *Turner II*, which applied intermediate scrutiny to Congress's requirement that cable-television operators reserve over one-third of their channels for

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(allowing a state to bar transmission of pre-recorded pornographic messages); Allan L. Schwartz, *Right of Telephone or Telegraph Company to Refuse, or Discontinue, Service Because of Use of Improper Language*, 32 A.L.R.3d 1041 (1970).

local broadcasters. The physical constraints on cable television led the Court to conclude that these "must-carry" rules implicated cable-television operators' rights by "reduc[ing] the number of channels over which [they] exercise[d] unfettered control." *Turner I*, 512 U.S. at 637. Yet the requirement survived intermediate scrutiny because it advanced the government's interest in the "widest possible dissemination of information from diverse and antagonistic sources." *Turner II*, 520 U.S. at 189, 192. Even the *Turner I* dissent agreed that "if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies." 512 U.S. at 684 (O'Connor, J., dissenting in part).

Section 7 advances the same critical government interests, by ensuring the widest possible dissemination of information from diverse sources. If anything, the must-carry rules at issue in the *Turner* cases were *more* invasive than anything here. Unlike Section 7, those rules selected specific speakers to receive preferential treatment (the broadcasters) at the expense of others (the cable programmers). *Turner I*, 512 U.S. at 657. By contrast, Section 7 only requires viewpoint neutrality for voluntary communications between users and allows the Platforms to say anything they wish about any post or subject.

4. Finally, even if strict scrutiny applied, it would be satisfied. Although the Court ultimately applied intermediate scrutiny, *Turner I* concluded that ensuring "the widespread dissemination of information from a multiplicity of sources" is "a governmental purpose of the highest order." *Id.* at 662-63; *see also Associated Press v. United States*, 326 U.S. 1, 20 (1945) (describing such

diversity of viewpoints as "essential to the welfare of the public").

The only question relates to tailoring. This Court, however, has recognized that "[t]he First Amendment requires" that a provision like Section 7 "be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015). That inquiry examines factors such as whether the government's chosen mean that are neither "seriously underinclusive" nor "seriously overinclusive" when compared to the government's ends, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 805 (2011); and whether any proposed alternatives are likely to be as effective in serving those ends, *Ashcroft v. ACLU*, 542 U.S. 656, 657-58 (2004).

Here, the Platforms do not seriously contend that some lesser restriction on their websites could cure the discrimination that led to HB20's enactment. Section 7 applies only to voluntary communication between users, and it permits the Platforms to say anything they wish. They thus can "expressly disavow, distance themselves from, or say whatever they want about any expression they host," Pet.App.41a—just like the law schools in *FAIR*. Nor can the Platforms claim that Texas should have passed some less intrusive law regarding their algorithm; after all, "[a]ll the content" on the Platforms "is filtered through these algorithms." *Taamneh*, 598 U.S. at 499.

Indeed, the only "less restrictive alternative" the Platforms suggested in the trial court was that Texas should "create[] its own government-run social-media platform." Pet.App.89a. But such a site would suffer from the same "network effects" that already "entrench these companies" against potential competitors. *Knight*, 141 S.Ct. at 1224. That is, a government-sponsored site

would give users a different place to post their material, but it would not give them access to the audience of willing listeners present in the Platforms' modern public square.

C. The Platforms' Counterarguments Fail.

The Platforms offer a litany of reasons they should be excused from the rules that apply to other telecommunications companies. None is persuasive.

1. The Platforms' primary argument is that they exercise "editorial discretion" over billions of hours of user-generated content. That "editorial discretion" canard fails for at least three reasons.

First, the premise of the Platforms' argument is wrong because there is no free-standing "editorial discretion" right under the First Amendment. Otherwise, *FAIR* would have been decided differently. Like the Platforms here, the law schools there also asserted an "editorial" right to exclude speakers. *See* Br. for Respondents at *27-28, *Rumsfeld v. FAIR*, No. 04-1152, 2005 WL 2347175 (U.S. Sept. 21, 2005). The Court, however, refused to "stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR,* 547 U.S. at 70.

Instead, as the Fifth Circuit explained, "editorial discretion" is analyzed as part of a larger evaluation of whether a law alters an enterprise's own expression. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974). Other factors include whether the law forces the enterprise to "tak[e] up space" with the message of another "that could be devoted to other material the [publisher] may have preferred to print," *id.* at 256; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality op.) ("*PG&E*"); and

whether the undesired content would be incorrectly attributed to the publisher, *Hurley*, 515 U.S. at 577-78.

In *Turner I*, which marks the outer limit of platform-speech rights, the Court noted that a cable-television operator "exercis[es] editorial discretion over which stations or programs to include in its repertoire." 512 U.S. at 636 (quotation omitted). The Court deemed the risk of misattribution not particularly pertinent, "[g]iven cable's long history of serving as a conduit for broadcast signals." *Id.* at 655. Nonetheless, the cable operators' "repertoire" was expressive because a scarcity of channels compared to available programming meant that the must-carry rules "reduce[d] the number of channels over which cable operators exercise unfettered control." *Id.* at 637. Here, by contrast, forbidding the Platforms from discriminating based on viewpoint will not impose *any* space-constraints like *Turner I*.

If the Platforms were correct that editorial discretion is all that matters, not only would *Turner I* need to be revisited, but other laws would also be imperiled. For example, cable operators are still forbidden from "exercis[ing] any editorial control" over that content, 47 U.S.C. §532(c)(2), or discriminating against "unaffiliated programming" on their networks, *Tennis Channel, Inc. v. FCC*, 827 F.3d 137, 139 (D.C. Cir. 2016). The FCC has also recently announced that it intends to restore its net-neutrality rules, which prohibit ISPs from blocking "lawful content," 47 C.F.R. §8.5 (2016), and favoring internet traffic for either ideological or monetary reasons, *id.* §§8.7, 8.9 (2016). Suffice it to say, "there is no *principled* distinction" between ISPs and the Platforms. *U.S. Telecom*, 855 F.3d at 433 (Kavanaugh, J., dissenting from denial of reh'g en banc). If Section 7 falls, so does net neutrality. *Accord* Brendan Carr & Nathan

Simington, *The First Amendment Does Not Prohibit The Government From Addressing Big Tech Censorship*, YALE J. ON REG. BLOG (Jan. 11, 2024), http://tinyurl.com/CarrSimmington (opining why net neutrality is more problematic than HB20).

Second, the Platforms' conduct is not an exercise of "editorial discretion." As Judge Oldham summarized, the "role of 'editors and editorial employees' generally includes 'determin[ing] the news value of items received' and taking responsibility for the accuracy of the items transmitted." Pet.App.45a (alteration in original) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 127 (1937)). That is consistent with how "authorship" is treated in other contexts—namely, as "synonymous with human creation." *Thaler v. Perlmutter*, No. 22-CV-01564-BAH, 2023 WL 5333236, at *5 (D.D.C. Aug. 18, 2023) (mem. op.). Copyright law thus has "never stretched so far … as to protect works generated by new forms of technology operating absent any guiding human hand." *Id.* at *4.

The Platforms claim (at 26) that editors do not need to be "responsib[le] for the content." But the exercise of "editorial discretion" is the process by which an entity can take the speech of another person and make it its own. The result of the process is that the editor takes responsibility—both reputational, *cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (explaining principle of attribution), and legal, *e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (reiterating that there is no "absolute protection for the communications media")—for the content.

"There is not even reason to think that" the Platforms "carefully screen[] any content before allowing users to upload it onto their platform[s]." *Taamneh*, 598 U.S. at

498-99. And even after users post their own content, the Platforms use "algorithms that automatically match advertisements and content with [a] user" and "generate those outputs based on" information from and about the user. *Id.* at 480-81. Such a "passive" and "highly attenuated" relationship to users, *id.* at 500, is not editorializing in any relevant sense. Nor does the public view it as such. The Platforms routinely *disclaim* responsibility for objectionable content and insist that "objective observers would not conclude" that they "intended … to promote" such content. Pet.App.37a (quotation marks omitted).

The Platforms claim (at 26) that user or advertiser boycotts prove that they have "reputational responsibility" for objectionable user speech. According to the Platforms, however, objective observers do *not* hold them responsible for user-generated content. *See* Pet.App.37a. Leaving that aside, the Platforms' argument is circular. Failing to remove content can cause reputational damage only if third parties expect them to remove content. As a result, the Platforms are seeking to justify the discrimination that HB20 prohibits by noting that discrimination has occurred in the past. Respondent is unaware of any case in which this Court has accepted a request to excuse a place of public accommodation—let alone a common carrier—from antidiscrimination laws because some of its customers preferred the *ancien régime*. *See supra* p. 17. Regardless, that the Platforms sometimes suffer advertiser boycotts is not evidence that objective observers believe that user-generated content is the Platforms' speech. Rather, it confirms that advertisers know that the Platforms currently have the power to censor user speech that advertisers want silenced.

Third, Section 7's exceptions defeat the Platforms' asserted need to exercise "editorial discretion." It is not true that HB20 "compels publication of pro-terrorist speech." C*ontra* Pet.Br.36. HB20 permits the Platforms to remove unlawful speech and speech that incites violence, regardless of whether doing so would be viewpoint discrimination. TCPRC §143A.006(a)(3). Section 7 also allows the Platforms to enable users to screen out any content they wish. The Platforms' hypotheticals about "vile expression," Pet.App.19a, are thus precisely the type of "fanciful" applications of the law that are never sufficient to facially invalidate a law, *Hansen*, 599 U.S. at 770.

2. Driven by their view that the exercise of "editorial discretion" is sufficient to invoke the First Amendment, Petitioners' plea to precedent places outsized emphasis on a trio of cases—*Hurley*, *PG&E*, and *Miami Herald*. Petitioners ask this Court (*e.g.*, at 20) to analogize their telecommunications platforms to "parade[s]," "newspapers' op-ed pages," "bookstores," "book publishers," "[c]omedy clubs," "movie theaters," *etc.* None of these, however, is a commercial enterprise open to the public that is refusing to provide undifferentiated service to consumers, let alone a communications provider that billions of people use as a "modern public square" to voluntarily speak with one another. *Packingham*, 582 U.S. at 107. As a result, the application of the First Amendment is different in at least two critical ways.

First, as *Hurley* and *PG&E* themselves make clear, First Amendment concerns are heightened when a law creates a risk that an audience will "*mis*attribut[e]" speech on a curator's platform to the curator itself, *Hurley*, 515 U.S. at 577 (emphasis added); *PG&E*, 475

U.S. at 15-16 & n.11—such as when a "university select[s] a commencement speaker," *Forbes*, 523 U.S. at 674; *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S.Ct. 2082, 2088 (2020) (describing *Hurley* as a "speech misattribution" case). If a law forced a university to host unwanted speakers or a law review to publish unwanted articles, the audience would likely (and reasonably) presume that the university green-lit the speaker's appearance. After all, when someone reads an article in the Washington Post, it is customary to say: "Look what the Washington Post said about X yesterday." Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1528 (2013). By contrast, "no one says, 'It was interesting what Google had to say about *X*'"—any more than he or she would about AT&T or Western Union. *Id.*

Second, because the Platforms *do* open themselves to the public, requiring them to allow communication between third parties "does not sufficiently interfere with any message of the" Platforms themselves to implicate the Platforms' First Amendment rights, *FAIR*, 547 U.S. at 64, no matter how much the Platforms "object" to the content of that third-party speech, *id.* at 52.[4]

"Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2077 (2021); *see also*

[4] *Wooley v. Maynard*, 430 U.S. 705 (1977), is inapposite because it addressed the compelled dissemination of a "[g]overnment-mandated pledge or motto." *FAIR*, 547 U.S. at 62 (discussing *Wooley*). Section 7 does not compel the Platforms to say anything—only not to discriminate against their own users based on what they say.

PruneYard, 447 U.S. at 87. The newspaper in *Miami Herald*, 418 U.S. at 256, and the company newsletter in *PG&E*, 475 U.S. at 9, each used their finite amount of space to carry exclusively either the entity's own speech or speech deliberately selected by that entity's owner. The same is true of the parade organizer in *Hurley* who, although more "lenient" about who could march, nevertheless "select[ed] the expressive units of the parade from potential participants." 515 U.S. at 569, 574.

None of those concerns applies here. As discussed above, *see supra* pp. 5-6, the Platforms have become some of the predominant companies of the age by holding themselves out as "platform[s] for all ideas." Pet.App.36a. The Platforms also possess essentially infinite space for hosting speech. *See Knight*, 141 S.Ct. at 1224-25. To be sure, "there is no basis for qualifying the level of First Amendment scrutiny that should be applied" to the internet. *Reno v. ACLU,* 521 U.S. 844, 870 (1997); Pet.Br.13. But the fact that "technology" does not change the First Amendment's "basic principles," *Brown*, 564 U.S. at 790, cuts in favor of Section 7. Because the Platforms more closely resemble the mall in *PruneYard* and the law schools in *FAIR*, the "basic principles" from those cases apply here, too.

3. The Platforms' remaining cases are even further afield. Most discuss whether the First Amendment itself compels certain private parties to permit third-party access. *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921 (2019); *Forbes*, 523 U.S. 666. Yet "the degree to which the First Amendment *protects* private entities … from government legislation or regulation"—like Section 7—"requiring those private entities to open their property for speech by others" is a "distinct question." *Halleck*, 139 S.Ct. at 1931 n.2; *see also*

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 825 (1996) (Thomas, J., dissenting in part). The Court answered *that* question not in *Halleck* but in *FAIR* and *PruneYard*.

The question in *303 Creative* was also distinct: The law at issue "compel[led] an individual to create speech she does not believe." 600 U.S. at 578-79. And the question was whether it could be applied to a website designer who "vet[ted]" customer projects to determine if they warranted use of "her own" "unique" words and artwork—*i.e.*, "her" speech. *Id.* at 588. The former is not what Section 7 requires; the latter is not what the Platforms do.

4. At the same time they insist that the exercise of "editorial discretion" makes them the speakers of all user-generated content on their websites, the Platforms paradoxically insist (at 30-31) that §230 is irrelevant to the First Amendment inquiry because it only orders courts not to "treat[]" them as "speaker[s]." But if, as the Platforms say, they are "combining multifarious voices," Pet.Br.20 (quoting *303 Creative*, 600 U.S. at 588), as part of their own expression, then they are "responsible" at least "*in part* … for the creation or development" of the final expression. 47 U.S.C. §230(f)(3) (emphasis added). That would mean no immunity under §230's plain terms. And if, as the Platforms suppose, §230 offers them a shield even when they *are* responsible for the speech on their websites, then §230 would be unconstitutional. Providing the Platforms with a shield that other similarly situated online speakers do not enjoy would privilege "certain preferred speakers." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Either path—holding that the Platforms have no immunity to begin with or that such immunity is unconstitutional—would destabilize the law. The Court

should instead read §230 for what it is: An effort by Congress to recognize that entities like the Platforms are not speakers but conduits for their users' speech. *Supra* p. 24.

5. The Platforms' three objections (at 31-32) to Texas's decision to regulate them as common carriers also lack merit.

First, the Platforms' reliance on *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), is misplaced. Texas did not just snap its fingers and "transform [the Platforms] into common carriers." *Id.* at 379. Looking at (among other things) the "arm's length, passive, and largely indifferent" relationship the Platforms have with their users, *Taamneh*, 598 U.S. at 500, the Texas Legislature found that they already meet the requirements that would allow a government to regulate them as such, *see supra* p. 7.

Second, the Platforms insist (at 31) that they *do* make "individualized" decisions—albeit discriminatory ones—that distinguish them from telephone or telegraph companies. But the Platforms' logic is "upside down." Pet.App.68a. They claim immunity from common-carriage regulation by virtue of their ongoing violations of the cardinal rule of such regulation: no discrimination. Yet "[t]he common carrier's duty to serve all indifferently cannot be lessened by a violation of that duty." *Semon v. Royal Indem. Co.*, 279 F.2d 737, 740 (5th Cir. 1960).

Moreover, to be individualized for common-carriage purposes, a service must be provided pursuant to "special contract[s]" that "vary necessarily in their details, according to the varying circumstances of each particular case." *Memphis & L.R.R. Co. v. S. Express Co.*, 117 U.S. 1, 21 (1886). For example, a car-rental company makes an individualized decision outside of its common-

carriage obligations when it "accommodate[s] [one] *particular* customer's needs" by offering one of its employees to drive that customer. *Harper v. Agency Rent-A-Car, Inc.*, 905 F.2d 71, 73 (5th Cir. 1990) (emphasis added). Apart from discriminating based on viewpoint, however, the Platforms do nothing to "vary" the "details" of what they offer to reflect the "circumstances" of each user. *Memphis*, 117 U.S. at 21; *see also* Pet.App.68a.

The happenstance that Texas enacted HB20 after the Platforms began discriminating is also irrelevant. Indeed, that is what happened a century ago when telegraph companies discriminated based on viewpoint and offered many of the same excuses the Platforms offer now. *See, e.g.*, Pet.App.59a-60a. The States responded by forbidding viewpoint discrimination. *See id.* (citing Lakier, *supra*, at 2320-24). That is how government usually works—legislators identify an existing problem and fix it.

Third, the Platforms suggest (at 32) that they cannot be common carriers absent a "government-franchised monopol[y]." But they cite no authority imposing such a requirement, which is flatly inconsistent with the recent experience of telephone companies—perhaps the archetypal common carrier. It also is not historically grounded; common carriers have often acted without a government franchise. *See, e.g.*, *Munn v. Illinois*, 94 U.S. 113 (1876); Hebert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801, 812-13 (1999) (explaining that the entity in *Munn* was *not* operating pursuant to a monopoly license). Indeed, it is not even clear that there is a market-power requirement, let alone one tied to a government franchise. *See supra* p. 23.

The Platforms protest (at 8, 15, 42-43) that competitors exist, and no technological barriers prevent new entrants. Leaving aside that the same could have been said about telegraphs and telephones, the Platforms' argument ignores network effects. The Platforms are not "popular," Pet.Br.43, because of their programming acumen. Rather, as with the Bell Telephone Company a century ago, their size is itself what creates much of the value to their users. *See, e.g.*, *Knight*, 141 S.Ct. at 1223-24. HB20 extends the same nondiscrimination rules applicable to telephone companies to the Platforms. But at a minimum, this issue also cannot be resolved in the Platforms' favor in a facial, pre-enforcement posture without fact-finding.

6. Finally, to the extent the issue is even within the scope of the Court's grant of certiorari, the Platforms are wrong (at 36) that because Section 7's on-platform antidiscrimination rule is "content-based," it fails strict scrutiny. As already discussed, because Section 7 regulates conduct, it is not subject to First Amendment scrutiny, *see supra* pp. 19-21, and even if it were, it would survive that scrutiny, *see supra* pp. 25-28.

But the Platforms are wrong even on their own terms. The "principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Section 7's antidiscrimination rule does no such thing—it just tells the Platforms that they must not discriminate against any user's viewpoint expressed on the platform. "It is … hard to imagine" a more "neutral" rule than that. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez*, 561 U.S. 661, 694 (2010); *cf. Barr*

v. Ass'n of Pol. Consultants, Inc., 140 S.Ct. 2335, 2354 (2020) (describing the First Amendment as "a kind of Equal Protection Clause for ideas"). That is, HB20 is not content-based because it does not regulate according to the specific "message" that any speech conveys. *Ward*, 491 U.S. at 791. None of the Platforms' four arguments changes this.

First, the Platforms insist (at 36) that Section 7 is content-based because it "require[s] a website to include speech it does not want to include." That argument conflates multiple doctrines. For example, compelled speech can raise concerns about misattribution. *See supra* pp. 32-33. But a law compelling such speech is content-based only when the "extent of the interference … depend[s] upon the content of the" Platforms' service. *Turner I*, 512 U.S. at 643-44; *see FAIR*, 547 U.S. at 60. Section 7 does not interfere based on content at all. Otherwise, a rule requiring AT&T or Verizon to transmit speech they find objectionable would be content-based and subject to strict scrutiny.

Second, the Platforms claim (at 36-37) that Section 7 is content-based because it *allows* them to remove certain forms of content. TCPRC §143A.006(a). Most (if not all) of this content, however, is *illegal* or within a category of speech that falls outside the scope of First Amendment protection in the first instance. *Compare, e.g.*, *id.* §143A.006(a)(3) (allowing the Platforms to remove content inciting violence), *with Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (reaffirming that the First Amendment does not protect statements "directed [at] producing imminent lawless action" (alteration in original)). Moreover, courts have blessed the same structure with respect to cable companies, *see Turner II*, 520 U.S. at 216, and telephones, *see supra* pp. 24-25 &n.3.

And in any event, if the Court views these carveouts as problematic, then it should sever them. *See supra* p.19.

Third, the Platforms contend (at 37-40) that the antidiscrimination rule discriminates between speakers—applying only to "a subset of websites." In particular, they complain (at 37) that the definition of "social media platform" improperly excludes "news, sports, and entertainment" websites as well as smaller platforms. But almost every law applies only to a certain subset of individuals; that alone is no reason to apply strict scrutiny. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979). Even "the fact that [the] law singles out a certain medium … 'is insufficient by itself to raise First Amendment concerns'" where the treatment is "justified by [a] special characteristic" of the covered platforms. *Turner I*, 512 U.S. at 660-61 (quoting *Leathers v. Medlock*, 499 U.S. 439, 452 (1991)).

Here, HB20 differentiates the Platforms, whose content is almost entirely user-created, from an entity that "primarily" presents content "preselected *by the provider.*" TBCC §120.001(1)(C)(i) (emphasis added). The Platforms' argument is akin to complaining that governments do not treat movies the same as telephones. And applying Section 7 to smaller platforms (which do not have market power) would raise—not reduce—constitutional concerns. *See, e.g.*, *PruneYard*, 447 U.S. at 96 (Powell, J., concurring).

The Platforms' related complaint (at 45 n.9) that they consider the 50-million-user threshold arbitrary is both wrong and irrelevant. It is wrong because serving 50 million monthly users means a platform has considerable market power. And it is irrelevant because it ignores the special value that this Court's jurisprudence places on clarity. *Reno*, 521 U.S. at 871-72. Adopting a rule to

provide that clarity will inevitably produce marginal cases. But that does not make lines facially unconstitutional.

In arguing otherwise, the Platforms rely (at 38) on cases concluding that various taxation schemes raised a First Amendment problem by singling out the press. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936). But the problem in those cases was that the "differential taxation" was evidence of the government's effort to "suppress the expression of particular ideas or viewpoints." *Leathers*, 49 U.S. at 447.

HB20 is different in kind, as it seeks to ensure undifferentiated access to all ideas and viewpoints for voluntary communications. The Platforms disagree with that assessment and complain (at 43-44) that allowing them to remove categories of content will result in less speech, not more. But under their view, they already have the unqualified right to remove categories of speech. *See supra* p. 6. HB20 doesn't change that. And given the need to tailor any (nonexistent) restriction on the Platforms' speech, that HB20 does not impose *additional* restrictions on their putative right to "editorial discretion" is surely a constitutional virtue, not a vice.

Fourth, ignoring the Court's denial of certiorari on the issue, *Netchoice*, 2023 WL 6319650, at *1, the Platforms rehash (at 40) their argument from legislative history that HB20 was designed to target them based on their viewpoint. Even if this question were before the Court, because the text of HB20 is viewpoint agnostic, the isolated statements of individuals about their subjective motivations are irrelevant. *See, e.g.*, *Brnovich*

v. Democratic Nat'l Comm., 141 S.Ct. 2321, 2350 (2021); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Those who wanted to regulate telegraphs as common carriers were unhappy because Western Union favored some political groups over others. *See* Lakier, *supra*, at 2321-22. Yet for more than a century, Western Union has been lawfully required to observe viewpoint neutrality. So too with its modern-day equivalents.

II. Section 2 Is Not Facially Unconstitutional.

Whatever the Court decides with respect to Section 7, Section 2 is not facially unconstitutional. It requires the Platforms to (1) notify a user when content is removed, (2) "explain the reason" for the removal, (3) maintain a complaint system for appeals, and (4) sometimes offer an explanation following an appeal. These consumer-protection duties do not transgress the First Amendment—and certainly not facially.

A. Each of Section 2's Duties Is Appropriate.

1. In *Zauderer*, the Court established the test for permissible compelled commercial disclosures when it rejected a First Amendment challenge to a rule requiring attorneys to disclose certain fee information in advertising. 471 U.S. at 629. The Court agreed that the rule compelled the attorney "to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650. But that did not violate the First Amendment because the rule compelled the disclosure of "purely factual and uncontroversial information about the terms under which his services will be available" and the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising [wa]s minimal." *Id.* at 651. The Court emphasized that the "right of a commercial speaker not

to divulge accurate information regarding his services is not such a fundamental right" as to warrant strict scrutiny, *id.* at 651 n.14, but instead need only be "reasonably related to the State's interest in preventing deception of consumers," *id.* at 651.

Since *Zauderer*, the Court has repeatedly reaffirmed this basic principle of consumer protection. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, the Court affirmed that the government may require a law firm to identify itself as a debt-relief agency. 559 U.S. 229, 249-53 (2010). The Court has since indicated that *Zauderer* applies not just to advertising, but to "commercial products" more broadly. *See, e.g.*, *NIFLA v. Becerra*, 138 S.Ct. 2361, 2376 (2018) (health-and-safety warnings); *PG&E*, 475 U.S. at 15 n.12 ("disclosure requirements for business corporations"). Other courts have followed that lead, upholding disclosures of "calorie content," *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009); radiation levels, *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 850-52 (9th Cir. 2019); and a product's country of origin, *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014). More fundamentally, when a company offers an ongoing service, terms of service necessarily inform the consumer's choice whether to continue using the service in a way materially indistinguishable from the representations in *Milavetz*.

2. Section 2's notice and initial-explanation duties fit comfortably within long-accepted disclosure principles, which require the Court to evaluate whether these duties are "unjustified" with an eye toward Texas's interests in enacting them. *Zauderer*, 471 U.S. at 651. Here, the Platforms need only disclose that removal occurred and, in almost all cases, simply identify what specific term of

service the user supposedly violated—assuming they craft their acceptable-use policies with sufficient clarity and specificity. TBCC §§120.052(a), .103(a)(1).

These duties protect multiple interests. Most prominently, they "protect[] consumers and regulat[e] commercial transactions," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), between individual consumers and the multi-billion-dollar corporations that can "stifle[] speech" through "unbridled control of the [individual's] account," *Knight*, 141 S.Ct. at 1222. As users will not always know that (let alone why) their content has been removed—often without any warning, and regularly by mistake—Section 2's notice and explanation duties also promote "the free flow of commercial information," which "is indispensable" to the "formation of intelligent opinions" about our economic system and, ultimately, to "public decisionmaking in a democracy." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

On the other side of the ledger, the burdens that the notice and initial explanation duties impose are quite modest. It is not difficult to tell a user that the platform has removed the user's content or why. As the algorithm presumptively knows both when and why it removes content, both the notice and initial-explanation duties can be automated. At minimum, the Platforms offered no evidence below, and still cite none at this stage, explaining why they could not provide an automated notice to users when content is flagged for removal. Because the Platforms bore the burden of showing a constitutional infirmity, that dearth of evidence is fatal to their facial challenge.

Even if *Zauderer* did not apply to Section 2's notice and initial explanation requirements, those

requirements would survive even more stringent review. As with any consumer-protection statute, Texas has a compelling interest in ensuring that the Platforms comply with their own policies. No means other than providing the user with notice that content has been removed, followed by some minimal explanation for why it was removed, suffices to protect consumers in a commercial relationship.

A contrary conclusion would have catastrophic consequences for a host of reporting obligations and consumer-protection laws. "Numerous examples could be cited of communications that are regulated" through such regimes "without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements," and the like. *Ohralik*, 436 U.S. at 456 (citation omitted). Indeed, some consumer-protection laws with similar disclosure requirements have been on the books for decades and have never been thought to violate the First Amendment. *See, e.g.*, 15 U.S.C. §1681m (Fair Credit Reporting Act).

3. In addition to providing notice and an initial explanation, the Platforms must also maintain an appeal system and sometimes provide additional explanation as part of an appeal's resolution. TBCC §§120.101-.104. But that is essentially just a requirement to have a functional customer-service department. Granted, customer-service representatives speak when they interact with customers. But HB20 does not control the words they say, and the First Amendment "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567. Even Twitter's former CEO told Congress that "all companies should be required to provide a

straightforward process to appeal decisions made by humans or algorithms." Pet.App.96a.

B. The Platforms' Counterarguments Fail.

None of the Platforms' objections undermine the Fifth Circuit's decision. Notably, the Platforms offer no argument at all with respect to either Section 2's notice duty or the requirement to create a complaint-tracking system. And their four arguments with respect to Second 2's initial and appellate explanation duties fail.

First, the Platforms rehash (at 46) their theory that removing content is an "exercise of editorial discretion." But far from targeting "editorial discretion," Section 2 just mandates compliance with the Platforms' own acceptable-use policies. The Platforms protest (at 46) that requiring an explanation is "akin to requiring the New York Times or Wall Street Journal to explain why it rejected each letter to the editor and placed particular articles on specific pages." Not so. Even if the Platforms could be analogized to newspapers (and they cannot), it would not be to the OpEd section. Instead, it would be to a newspaper that sells a classified ad, pockets the money, doesn't run the ad, and refuses to explain itself. Maybe it's a glitch—as is all too often the case with the Platforms. Maybe it is a deliberate decision. Either way, a State can require a company to provide a working product or explain why its product doesn't work.

Regardless, the Platforms grossly overstate what an explanation requires. Although no Texas court has yet interpreted Section 2, Texas courts would, "if possible, interpret the statute in a manner that avoids constitutional infirmity." *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998). Respondent submits that, in the mine-run of cases—which is all that is relevant in a facial, pre-enforcement challenge—a Platform need only

identify which provision of its acceptable-use policy has supposedly been violated.

Second, the Platforms insist (at 46) that Section 2's explanation requirement compels them to disclose when they take anything they amorphously define as "content-moderation actions." That is not so. HB20's requirement to describe "actions" relates to the *biannual transparency report*, *see* TBCC §120.053(a)(2), (a)(7)—which this Court did not grant certiorari to consider. Moreover, HB20's requirement to describe "action[s]" focuses on describing platform-wide decisions, rather than specific implementations of those decisions. *See id.*

Third, the Platforms complain (at 47) about the alleged chilling effect from "penalties that might accrue" for violations of Section 2's explanation requirement. But as they elsewhere concede (at 11-12), Section 2 does not have a penalty provision at all; instead, the Attorney General (but not users) can recover only costs if his office prevails in a state-court enforcement action. TBCC §120.151(b). The Platforms do not explain how such limited remedies could chill their speech.

Fourth, the Platforms object (at 50-51) to what they view as the unfair administrative burdens of compliance. Those objections are exaggerated; it is not difficult to identify the term of service that has allegedly been violated, which almost always should be sufficient. Regardless, *Zauderer*'s focus on "unduly burdensome" compelled disclosures is concerned only with "burden[s] *on speech*," not the "financial burdens" of compliance. *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020). Under *Zauderer*, a challenger must show that the requirement burdens a plaintiff's speech, such as by "drown[ing] out" the plaintiff's own message. *NIFLA*, 138 S.Ct. at 2378.

Here, the Platforms' alleged burdens (at 50-52) are strictly administrative and operational, ROA.227, and largely flow from the companies' size, *Azar*, 983 F.3d at 541; *e.g.*, J.A.149a (declarant's testimony that Section 2 will impose "an enormous burden" on Facebook). Yet as the Platforms trumpet elsewhere (at 43), their size does not itself change the First Amendment analysis. There is no such thing as being constitutionally "too big to regulate." Every day, companies of all sizes explain what happened when a product failed to work. The First Amendment does not exempt the Platforms from that same basic requirement, especially because content is often removed due to technical errors. And in any case, the meager evidence they now cite—one declarant's speculation about the difficulty for YouTube to provide an appeals process—falls far short of showing that the number of unconstitutional applications is "*substantial* ... relative to" Section 2's "plainly legitimate sweep." *Hansen*, 599 U.S. at 784.

The Platforms' argument is also divorced from HB20's text and structure. For instance, the Platforms argue that some of their actions, like deprioritizing content, would be "practically impossible" to describe. Pet.Br.51. But the only time the word "deprioritiz[e]" appears in HB20 is in a description of the biannual transparency report, which is not before the Court. TBCC §120.053(a)(2)(C). The Section 2 duties at issue here apply only to a decision to *remove* content. That the Platforms rely on, misconstrue, or embellish irrelevant provisions of HB20 reflects the weakness of their actual Section 2 arguments.

CONCLUSION

The Court should affirm the Fifth Circuit's judgment.

Respectfully submitted.

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